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# GEORGIA REPORTS,

CHARLTON-65 GEORGIA.

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ANNOTATED

UNDER THE SUPERVISION OF

THOMAS JOHNSON MICHIE.

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BOOK I,

CONTAINING

T. U. P. CHARLTON, R. M. CHARLTON, DUDLEY, AND  
GEORGIA DECISIONS.

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# REPORTS OF CASES

ARGUED AND DETERMINED  
IN THE

SUPERIOR COURTS  
OF THE EASTERN DISTRICT

OF

THE STATE OF GEORGIA.

---

By THOMAS U. P. CHARLTON, Esq.,  
COUNSELLOR AT LAW.

---

“PRODESSE CIVIBUS.”

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DISTRICT OF NEW YORK, ss.

BE IT REMEMBERED, That on the eleventh day of September, in the forty-ninth year of the Independence of the United States of America, STEPHEN GOULD & SON, of the said district, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the words following, to-wit :

“Reports of Cases argued and determined in the Superior Courts of the Eastern District of the State of Georgia. By Thomas U. P. Charlton, Esq., Counsellor at Law. “Prodesse Civibus.”

In conformity to the act of the Congress of the United States, entitled, “An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned ;” and also to an act, entitled, “An act, supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints.”

JAMES DILL,  
Clerk of the Southern District of New York.

## P R E F A C E .

These cases were intended for publication some years ago, but failing in the required number of subscribers, the plan was abandoned, and would not now have been revived, had not Mr. Gould undertaken to print them at his own risk and responsibility. On these terms, they are placed at his disposal, he having my promise of another volume, so soon as it should be ascertained, that printed Reports of Georgia decisions, are desired by the profession.

Anterior to the time of Judge Jones we had several men on the Bench of high reputed ability and learning; but their decisions are nowhere to be found; at least, they have escaped my research, or any means I possessed to discover them. Judge Jones was not bred to the profession, but he had all the attributes of character essential to the appointment, soundness of judgment, integrity, and firmness. These traits are discernible in his recorded opinions; and they amply atone for any deficiencies, which a garrulous, or ostentatious pedantry may attribute to them. I say recorded opinions, for according to our practice, and system of jurisprudence, few opportunities are afforded for written decisions. A special verdict, or a case stated for the opinion of the court, is seldom agreed to, or made up; it is either a matter of consent, by the attorneys, or assented to on the suggestion of the court. It is, of course, expected, that the verdict will be rendered as *at nisi prius*, under the unprepared, and sudden directions of the judge, who has no other opportunity of correcting his errors or those of the jury, but on a motion for a new trial. It therefore often happens, (no motion having been made,) that a different decision will be had on the recurrence of the same principle, by the same judge, who, in the meantime, has availed himself of the benefits of reflection and research. It is then only, or on a case reserved, or some motion collateral to, and springing out of the main question of litigation, that a judge of this district feels it his duty, to place his decisions upon the minutes. Except, however, on a motion for a new trial, he is not required by law to do so, and if averse to it, in other cases, he delivers his opinion with or without notes, which, at discretion, he records "*in extenso*," or consigns to his common place book. Decisions, therefore, upon questions of the first importance, are left to float upon the memories of the gentlemen of the Bar, whose recollections can be of no authority; and, hence the conflicting adjudications, which are thus represented of the different judges of this district, and I presume of the other

districts. It is not surprising therefore, that such scanty materials should be found for a volume of Reports, or that this effort of mine should be the "*coup d'essai*."

In our equity practice, we have the same difficulties to contend with. The Judge of the Superior Courts, (the highest tribunal of the State,) is also Chancellor, associated with, and aided by Twelve Special Jurors, who decree, under his charge, "according to equity and their opinion of the evidence." As few opportunities then are afforded to the judge to give written opinions in Chancery, as in common law cases. The business on both sides of the court are disposed of in pretty much the same way. The judge, exercising a chancery jurisdiction, has only leisure for investigation, on bills for injunction, ne exeat, petitions or motions, or other proceedings not requiring, according to our anomalous system, the immediate interposition of a jury. These explanations will, I hope, be sufficient for the appearance and contents of this small volume.

It could have been considerably enlarged, by the decisions of my successors, down to the year 1821, (when the Legislature of Georgia did me the honor again to elect me a judge of this district) but these decisions have not been furnished me, and not knowing what may be the fate of this volume, I have not solicited them. Indeed it was always my original purpose to confine the collection to that epoch, when it became the custom of the court to place its decisions upon the minutes, and to my own administration, and times. As regards my own decisions, I could not be influenced by any strong feeling of vanity, for they contain enough of intrinsic evidence to satisfy any one of the profession, that in 1807, (when first appointed,) I must have been a very considerable debtor to legal wisdom and experience. Not much could, or ought, however, to have been expected from a judge then, only a little on the wrong side of twenty-six years. The true and only motive, which induced me to select my own cases, and now to suffer them in this form to meet the public eye, was, and is, to have justice done me, by showing at least industry, and at the same time an anxious wish to conciliate the good opinion and confidence of my fellow citizens; who may now decide themselves, whether I did not endeavour to be honest to all men, and faithful to the law, as far as my poor abilities could comprehend its applicability to the cases before me.

THOMAS U. P. CHARLTON.

Savannah, June 30, 1824.



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# CASES

ARGUED AND DETERMINED IN THE

## Superior Courts of the Eastern District OF THE STATE OF GEORGIA.

JANUARY TERM, 1805.

Minutes of the Sup. Court, p. 21, letter F.

Chatham County, January 1805.

1. **Term of Court—Failure to Hold at Proper Time—Duty of Clerk.**—If the superior courts of any county shall not be held at term time, it is the duty of the clerk to adjourn the court after the second day appointed for holding the same, and if the court be held, he is sworn truly and faithfully to enter and record all the orders, decrees, judgments and other proceedings of the same court.

(1) **Same—Record of Clerk—Effect.**—Hence the record of the clerk is complete evidence of a term or no term under the Judiciary Act.

2. **Appearance Docket—Calling Over—Discretion of the Court.**—The calling over of the appearance docket, not being required by law, is a matter of discretion with the court.

The clerk stated to the court that the minutes recorded by him, on the first and second days of the time appointed by law for holding the Superior Court in the month of April last, or Spring Term in this county, were neither examined or signed by the then presiding Judge Bowen: Whereupon, the court submitted to the gentlemen of the bar the following questions, and requested their opinions, viz.:

First. Is it necessary that the minutes of the proceedings of a court should be signed by the presiding judge, to constitute a term, under the Judiciary Act?

Second. If it be a term, shall the cases brought to said term be considered as ready for trial at this term, notwithstanding the judge omitted to call the docket?

In compliance with the request of the court the preceding day, Mr. Gibbons delivered in his written opinion, viz.:

Answer to the first question:—It is not necessary that the minutes of the proceedings of a court should be signed by the presiding judge, to constitute a term under the Judiciary Act. The first day's sitting of the Judges is called full term, by stat. 32 Hen. 8, ch. 21.

10 \*That the judges shall sign the minutes every day prior to adjournment, is a duty commanded by the law; yet a failure of duty in a judge cannot vacate a term. The law says, that the judge shall sign the minutes before adjournment.

And the same law says, that no cause shall be continued more than one term at

the instance of the same party; yet if Judge Bowen had continued a cause two terms, at the instance of the same party, the cause being continued, and now on the docket, would now be tried, notwithstanding Judge Bowen's irregularities. It is said, that unless the judge had signed the minutes, the authenticity of the book styled "The Minutes" of the Court, may be questioned. The answer to this is, that the clerk is a sworn officer, the law obliges him to keep regular and fair minutes of all the proceedings of the court. This book he produces, as the fair minutes of the court upon oath; it is conclusive. He is the only person who can certify the validity of the book, or extract from it. It may be here remarked, that it is not recollected by the oldest practitioners at the bar, that any former judge in Chatham county signed the minutes before each day's adjournment; and the clerk being asked the question, has so said.

To the second question:—The cases brought to the last term, are to be tried at this term of the court. The judge calling over the appearance docket, is an exceeding good rule, but not commanded by any law. Judgments by default are not so fatal in our courts as formerly. The defendants always have a jury trial, and the court will compel the plaintiff to make out his case. Judgments by default are always under the control of the court.

A great majority of the gentlemen of the bar concurred in the aforesaid opinion, and offered additional reasons in support thereof. Mr. Noel cited 1 Viner's Supplement, 231. Postea being lost, a new one was ordered to be made out from the record above, and the associate notes. Dugrel v. Bridge, Hill. 20 Geo. 2 Strange, 1264. The record of nisi prius was lost, and leave given to make a new one.

11 \*Darby v. Gold, East, G. 22, Kely. 106. And Mr. Attorney General, on the word "term," cited 2 Burn's Law Dictionary, title Term, 376, and 2 Black. Com. 277.

After a full discussion of the aforesaid questions, the court took time to consider.

By the Court: By the act entitled, "an act, to amend an act," entitled "an act to revise and amend the judiciary system of this state, the said Superior Courts shall be held in each county in the respective districts, twice in every year by one or

more of the Judges of the Superior Court, at the several times hereinafter mentioned." Sec. 1st.

And by the 4th section it is further enacted, "That in case of unavoidable accidents, whereby the said Superior Courts in any county shall not be held at the time appointed for holding the same, it shall by the duty of the clerk of such court, to adjourn the same from day to day, not exceeding two days; and if the said court should sit within the said two days, as aforesaid, such clerk shall then adjourn the same to the next term.

By the 34th section it is also enacted, "That the clerks of the several courts in this state, shall copy into a book of record, all the proceedings in all civil cases, in the said courts respectively, which entry of record shall be made within forty days after the determination of any cause; and the said clerks shall be allowed the sum of ten cents for every hundred words of recording such proceedings, to be taxed in the bill of costs. And the said clerks shall also keep regular and fair minutes of all the proceedings, in any of the said courts, which shall be signed by the Judge of the Superior, or Presiding Justices of the Inferior Court, (as the case may be,) prior to adjournment, from day to day.

And by the 35th section it is also enacted, "That the clerks of said Superior and Inferior Courts hereafter to be appointed shall, before they enter upon the duties of their appointments, and after being commissioned by the governor, take the following \*oath before one of the Judges of the Superior Courts, or a Justice of the Inferior Court of the county."

"I do solemnly swear, (or affirm) that I will truly and faithfully enter and record, all the orders, decrees, judgments, and other proceedings of the Superior, (or Inferior) Courts of the county of —, and all other matters and things, which by law ought, by me, to be recorded; and that I will faithfully and impartially discharge and perform all the duties required of me, to the best of my understanding," &c.

From all which, it appears that, if the said Superior Courts in any county shall not be held at the term time, it is the duty of the clerk to adjourn the court after the second day, appointed for holding the same; and if the said court be held, he is sworn truly and faithfully, to enter and record all the orders, decrees, judgments, and other proceedings of the said court.

Hence it results, that the record of the clerk is complete evidence of a term, or no term under the aforesaid statute. But if this were not conclusive, the removal of Judge Bowen, by his excellency the governor, on the address of the legislature, for malconduct, while presiding as judge of said court, must remove all doubts.

As to the second question:—The Judge calling over the appearance docket, (as observed by W. Gibbons) is an exceeding good rule, but not being required by law, is a matter of discretion with the court.

The omission should not work an injury to parties seeking justice, and I am strengthened in this opinion by the 5th section of the aforesaid judiciary act, which enacts, "That where any of the said courts shall fail to meet, the proceedings in such courts shall not thereby be discontinued, but shall stand continued over in the same manner, as if such failure had not been."

Minutes of Superior Court, letter F. p.

13

\*State v. Cuthbert et alias.

Chatham County, January 1805.

**Rescuers—Liability—Conviction of Principals.**—Before rescuers can be tried and punished, the principals arrested under the warrant, on which the rescue is predicated, must first be tried and convicted.

Now at this day, to-wit, of April, 1805, the defendants in court after verdict, but before judgment, move and pray that no judgment be rendered thereon:

1. Because it appears in the indictment, that the warrant was issued in Effingham County, and the rescue in Chatham; without stating, that the prisoners in custody under the said warrant, were sent by the justice to the next jail, which is in Chatham County, there being no jail in Effingham.

2. Because it does not appear that the principals committed any offence, or were arrested for any legal cause.

3. Because the nature of the offence, the refusal or incapacity to give bail, are not stated in the order for commitment.

4. Because it appears in the warrant of commitment, that it was directed to Henry Williams, who was not a constable, or legally authorised officer, and had no right to execute any magisterial, or judicial precept, or authority whatever.

5. Because the principals arrested under the warrant, on which the rescue is predicated, must first be tried and convicted, before the rescuers can be tried or punished in an indictment for a misdemeanor.

6. Hearing argument on the foregoing grounds, the court sustained the motion on the fifth objection; whereupon it is ordered that the defendants be discharged upon payment of costs.

Charlton, for the State.

Harris and Cuyler, for defendants.

Minutes of Superior Court, p. 113, letter F.

14

\*Ex Parte Chauvin.

Chatham County, January 1805.

**Husband and Wife—Indictment against Husband for Cruelty—Presentment.**—Where a husband has been indicted for cruelty to his wife, and a civil action for alimony is also pending against him, a subsequent presentment for the offense will be quashed, since it is unnecessary, and since the publication of the presentment might prejudice the public mind before the trial of the civil action.

The attorney general having been previously notified, Mitchell and Bulloch, attor-



nies for William Chauvin, moved the court to quash that part of the presentments of the grand jury of the present term of the Superior Court, which related to the said William Chauvin, and which is in the following words, viz:—"We feel it a duty to present as a grievance, the violent behaviour of William Chauvin to his wife, and his separation from her, conceiving that the example may have an immoral tendency," upon the following grounds, viz:

1st. That no specific charge of violence or breach of the peace was set forth in the presentment upon which the attorney general could form a bill, against which the defendant could defend himself.

2d. That the names of the witnesses were not set forth in order, that the defendant might know against whom to bring his action, in case the presentment should prove to be malicious.

3d. That it would operate as a sentence against the defendant, without giving him an opportunity of being heard in his defence, when it was probable that upon a trial he might be honourably acquitted.

4th. That a bill of indictment has already been found by the same grand jury against the defendant, for the same ground of charge as that contained in the presentment, and an action is now depending on the common law side of this court, against the said Chauvin, by Mrs. Chauvin, for alimony. That as the grand jury requested their presentments to be published in the Gazette, and this among others, it might tend to influence and prejudice the public mind before the defendant could be heard, on cases depending before the court, and fixing a stigma upon him, without, and previous to a trial, in every part of the world where the papers should go, before the real merits of the case could be known.

15 \*By the Court. A presentment being the notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the state, upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it; and it appearing in the present case, that a bill of indictment has already been found by the same grand jury against the said William Chauvin for the same ground of charge as that contained in the presentment, and that an action is now depending on the common law side of this court against the said William Chauvin for alimony, the presentment, which is the subject of the present motion, it would seem, is unnecessary, and its publication might prejudice the public mind against the defendant before the trial. It is therefore ordered, that that part of the presentment of the grand jury which affects the said William Chauvin be quashed, and their other presentments be published agreeable to their request.

D. B. Mitchell and Noel, for defendant.

Charlton, A. G. for state.

Minutes of Superior Court, p. 107, letter F.

16 \*State v. Marco Monaquas, al. dict. Marco Monaquo, and Jose Sierra, al. dict. Joseph Segar.

Chatham County, January 1805.

1. **Criminal Law\*—Indictment—Issue—Record.**—It is the uniform practice in the courts of this state for the attorney general to state the prisoner's plea in the indictment and to add a similitur in abbreviated terms; but a record of the issue, however abbreviated, appears to be indispensable.
2. **Same—Same—Statute of Jeofails.**—None of the statutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict.
3. **Same—Death Penalty—Issue.**—The death penalty can only be inflicted upon the general issue of not guilty.
4. **Same—Joint Trial—Jurors—Peremptory Challenges—Waiver of Objection.\***—Upon the objection, in arrest of judgment, of the prisoners who were indicted and tried together, that they were thereby deprived of their privilege secured by law to each and every person, charged with felony, of objecting to twenty jurors, without showing any cause whatever, it was held, that if they had wished to challenge peremptorily each twenty jurors, they should have done so at the trial; but having agreed in their challenges, they could challenge but twenty in the whole panel.

At January Term, 1805, Marco Monaquo and Joseph Segar, two Spaniards, were tried for the murder of one Georges Martin. Joseph Segar was charged in the indictment as a principal in the second degree. The attorney general produced in evidence the dying declarations of the deceased, taken before Charles Harris, Esq. Mayor of the city of Savannah, and Sheffall Sheffall, Esq. justice of the peace. This species

\***Criminal Law—Joint Trials—Peremptory Challenges—Number of—Waiver.**—In *Cruce v. State*, 59 Ga. 90, it is said: "In *T. U. P. Charlton*, 16, the objection as to the number of challenges was taken in arrest of judgment. Clearly, it was not good for that purpose, and, therefore, what the court said upon the general subject was mere *obiter*. Besides, the judgment in that case was, in fact, arrested upon another ground. It would be strange if, on putting a man to the bar to plead, with a statutory declaration that he should have twenty peremptory challenges, it would be necessary for him to claim them expressly, on pain of being held to have waived a part of them. A prisoner may repose silently and securely upon every substantial right which any statute of the state gives him."

But JACKSON, J., in his dissenting opinion, citing the principal case, says, at page 95: "All these cases and comments show conclusively that at common law, the practice was to settle the question of whether the prisoners would jointly or severally challenge at the very outset of the case; and if they wished to challenge jointly, then they were tried jointly; if they wished to challenge separately, then they were tried separately. 'When set to the bar to be tried,' is the time fixed in the language of our Georgia judge, who quotes *Post*, 16; *Kel*, 9; 3 *Salk*, 81."



of testimony developed a train of facts and circumstances, which placed the guilt of the prisoners, particularly Marco Monaqu, beyond the possibility of doubt. The declarations of the deceased were taken when "in extremis," and under a strong belief expressed by himself that he could not recover.

Doctor Moses Sheftall deposed, that one of the wounds received by the deceased, generally proved mortal; and that after examining and probing it, he had no hopes of his recovery. At this time, and under these circumstances, the declarations of the deceased were taken by the magistrates, they having previously apprised him of his perilous situation, and the nature of the oath they were about to administer to him.

It appeared from this evidence, that the deceased was one of the crew of a privateer, called *Republique*, which arrived in this port; that he left the said vessel in company with three Spaniards, a Portuguese, and a black man; that they intended to go to Charleston, but before they left Savannah they separated, and the deceased and a Spaniard or Portuguese travelled together on the road leading to Augusta or Charleston, when he and his companion over-

took the three \*other Spaniards, who had been ahead of them, and that after all of them had walked some time together, they laid down to sleep. Whilst the deceased was sleeping, one of the Spaniards struck him on the back with a large knife or dagger; as soon as he awoke was stabbed in the arm, and rising to defend himself, found that the other three Spaniards and the negro were gone; the deceased discovering that his life was in imminent danger, being unarmed, ran,—the Spaniard pursued him, found himself tired, stopped to face the Spaniard, when the said Spaniard made two or three thrusts at him, and gave him two or three wounds, and then told him, that unless he delivered up his money he would kill him.

The deceased gave up his money, amounting to \$15, and a gold ring. After the receipt of the money and ring, the Spaniard made another thrust at him, wounded him, observing, "that he gave that in way of payment;" the last stab or wound was given to the deceased in the bowels. The Spaniard also robbed the deceased of his hat and shoes. The dagger being shown to the deceased, he recognized it as the same weapon with which he had been wounded.

After the deceased had received his last wound, he walked as near the man as his weakness would permit. Saw another Spaniard come up and meet the one who had stabbed him, who asked the said Spaniard if he had killed him, (the deceased) and taken his money? Upon which the other replied, that he had not killed him, (the deceased,) but that he had given him something that would not let him live long. These two Spaniards again pursued the deceased; he ran fast enough to get out of their way, and afterwards saw them go into

the road leading to Charleston. The deceased tried to reach Savannah, but could not; went into a house on the road side, and was brought into the city in a litter or cart.

The deceased had no previous quarrel with these two Spaniards, and could not remember their names. The prisoners being confronted with the deceased, he immediately \*recognised and identified them, Marco Monaqu, as having given him the mortal wound, and Joseph Segar, as having aided and assisted in the manner stated.

This is the substance of the examination of Georges Martin, (taken before the magistrates,) who died a few days afterwards in great agony.

A question arose on the trial whether the declarations of the deceased in the manner they were obtained, should be left to the jury? The court after examining the authorities, decided that the evidence was admissible.

In support of the evidence the attorney general cited Woodcock's case, C. L. p. 397, and declared it to be the most apposite case he could produce.

The prisoner's counsel cited Dingler's case from the same authority; and relied much upon it in their opposition to the evidence; but the court was of opinion, that that case was so analogous in its principle to the case of Woodcock, that it rather operated against, than in favour of the objections of the counsel.

In the course of the discussion of this question, the following authorities were cited. 1 Hale, 585, 2 Strange, 925, 1 Strange, 499. They are contained in the margin of the case reported by Leach, as also the following, 6 State Trials, 195, 202; Bambridge's case, 9 vol. of Harg. State Trials, 661. It was clearly in proof, that the declarations of Georges Martin fell under the operation of the general principle laid down by Lord Chief Baron Eyre: "They were made in extremity," when the party was at the point of death, and when every hope of this world was gone, when "every motive to falsehood was silenced, and the mind was induced, by the most powerful considerations, to speak the truth."

Robert Mullady deposed, that the day or the day after the mortal wound was charged to have been given, the prisoner stopped at his house on the Augusta road; that he saw the same dagger (which was recognised by the deceased) in the possession (to the best of his recollection) 19 of Marco Monaqu; \*that the said Marco Monaqu conducted himself very violently during a short stay he made at the house of the witness, and appeared by his gesticulations to be menacing the life of a Spaniard who accompanied him.

That the said Marco Monaqu drew a dagger and made a cross upon the floor of the witness' house, and it struck the witness, that, as he at the same time addressed himself with great vehemence to the Span-

iard whom he had previously menaced, the cross was made to extort an oath from the said Spaniard, not to disclose some circumstances which had occurred. The witness was induced to entertain this impression, from his knowledge of the forms attached to the oath of a catholic.

No testimony was offered by the prisoners.

The jury returned a verdict of guilty; but recommended Joseph Segar to mercy.

When the prisoners were brought to the Bar, to receive their sentence, the following grounds were urged in arrest of judgment, viz.:

1. Because there are no issues made up between them, the said Marco de las Maurignos, al. dict. Marco Monaquo, and Jose Sierra, al. dict. Joseph Segar, upon which the verdict of the jury can be founded.

2. Because the said prisoners were indicted and tried jointly together by the same jury, and thereby deprived of the privilege secured by law to each and every person charged with a felony, to-wit, of objecting to twenty persons, without showing any cause whatever. Allen and Stevens, counsel for the prisoners, in support of the motion, cited 2 Hale, 217; 2 Lev. 223, 133; 2 Hawk. 470; 2 Hale, 219.

Charlton, attorney general. First ground. Issues have been made up between the state and the prisoners, pursuant to the practice which obtains on the criminal side of this court. The issues joined on arraignment between culprits and the state are oral. Crown Cir. Comp. p. 12. Nothing ever appears on the minutes of this court, save a bare mention of the \*arraignment (which presupposes a viva voce issue) and a designation of the day of trial. This has been the uniform practice of this court.

But, say the counsel for the prisoners, the oral issue should appear on the indictment. Where is that doctrine maintained? Not by the British books; for they express the contrary. "However it may have arisen, the joining of issue, which though now usually entered on the minutes, is no otherwise joined in any part of the proceedings." 4 Tuck. Blk. 339, 340; 2 Hawk. 399.

The record of this court has not a shade of analogy, to the record contained in Justice Blackstone's appendix, (vide appendix to 4 Tuckey, Blk. s. 1. Record of an indictment and conviction at the assizes,) and "the issue is no otherwise joined in any part of the proceedings."

Is not the indictment a part of the proceedings? The issue, therefore, cannot appear on the indictment. In short, the issue cannot be entered on a record (Hawkins must mean a record) of this court, because we have no record similar to that contained in the British books: we cannot therefore conform to their practice.

It results that the issue joined between this state and a prisoner, must necessarily be oral; and that it is not required to enter that issue on the indictment. If the issue

appears at all, it must appear on the whole of the record, and not on a part of the proceedings.

Second ground. The prisoners were legally indicted and tried together.

Principals in the first and second degree, may be indicted jointly. "In all cases where a crime is the joint act of a number of prisoners, or a number are present and assisting, so as to be responsible for the crime, they may be indicted and tried jointly or severally; for though in consideration of law, the crime of one cannot be considered the crime of another; yet, when several join in the commission of a crime, they may be joined on the trial.

"When sundry persons are present and aiding the commission \*of a crime, they may be joined in the trial." 2 Swift, Systems, 283; 1 Hawk. 82, 108; Fost. Cr. L. 347, 349, 350, 351; 1 Hale, 437, 463; 2 Hale, 344, 345; 1 Hale, 615; Plowden, 97, 100, 101, vide particularly 4 book Blk. p. 34, in notes. The indictment expressly charges Jose Sierra, or Joseph Segar, as principal in the second degree. He was present, aiding and abetting. The attorney general here drew the distinction between a principal in law, or in a second degree, and accessory. If Joseph Segar had been charged as accessory, he admitted, he could not have been brought to his trial before the principal had been convicted and attainted.

On this distinction he cited Fost. 367; Hale, 623; 1 Hale, 615, 616; 4 Tuck Blk. 36, 37; 1 Hale 618.

The refusal to allow the prisoners their separate challenges doth not appear upon the record; it is an extrinsic allegation, and therefore the court ought not to notice it.

Nothing can be stated on motions in arrest of judgment dehors the record. "Arrests of judgment arise from intrinsic causes appearing upon the face of the record." Tuck. Blk. 3d vol. 393, and all the authorities on the doctrine.

But admitting this objection to have some weight, still it is made too late. The privilege of separate challenges must be claimed before the jurors are sworn; afterwards the party is deprived of that inestimable right. Vide the Address of the Clerk of Arraignment, Crown Cir. Comp. 13.

The attorney general concluded with the following quotation from Sir Matthew Hale, which he requested might be permitted to have some influence in the determination of the court. "In favour of life, grave strictness has at all times been allowed and required in points of indictments: and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escaping by the over easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offences escape, by these unseemly niceties; to the \*reproach of the law, to the shame of the gov-



ernment, to the encouragement of villany, and to the dishonour of God."

This being a case of the first impression in this district, the judge said, he was not prepared to give an immediate decision; and would solicit the opinions of the judges of the Western and Middle Circuits. The prisoners were remanded.

May Term, 1805.

At this term the prisoners were again set to the bar, when the honourable George Jones, judge of the Superior Courts of the Eastern Districts of this state, delivered the following opinion:

JUDGE JONES.—In considering the objections of the prisoners in arrest of judgment, at the last term, the second objection was overruled, for that if they had wished the liberty of challenging peremptorily each twenty jurors, they should have claimed that liberty when set to the bar to be tried; but having agreed in their challenges, they could challenge but twenty in the whole, and one jury was therefore rightly sworn and charged with them. *Post*. 16; *Kelyng*, 9; 3 *Salk*. 81.

The first objection I considered as an argument of some weight, and my reflections have since confirmed that opinion. I can find no decision in the authorities on that subject; but this may proceed from the system and regularity of the courts whence we seek for precedents: for in those, it is made the duty of the clerk to record the prisoner's plea, and on the general issue, culprit to reply. By this replication, the king and the prisoner are therefore at issue. 2 *Hale*, 219; 4 *Blk. Com.* 339. None of the statutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict. 2 *Hale*, 193. And, says the same authority, in favour of life, great strictness have been, in all  
23 times, required in points of \*indictments; and the truth is, that it is grown to be a blemish and inconvenience in the law and the administration thereof. More offenders escaping by the over easy ear given to exceptions in indictments, than by their own innocence.

It appears to have been the uniform practice in the courts of this state, for the attorney general to state the prisoner's plea in the indictment, and to add a similiter in abbreviated terms. And from the authorities cited, it would seem, that in indictments, a strict adherence to forms is required.

But a record of the issue, however abbreviated, appears to be indispensable: for the law allows many pleas by which a prisoner may escape death, but only one plea in consequence whereof it can be inflicted, viz. on the general issue of not guilty. After an impartial examination and decision of the facts, by the unanimous decision of a jury, I may have been disposed to view this objection in its strongest light, in favorem vite; but the opinion is the result of my best judgment.

The motion in arrest of judgment, is there-

fore sustained; and it is ordered that the prisoners be discharged, upon payment of costs.

Upon the motion of the usual proclamation, the attorney general stated to the court, the prisoners were also charged with a robbery on the highway: whereupon they were remanded.

Allen and Stevens, for the motion.  
Charlton, Att'y Gen. against it.

Minutes of Superior Court, letter F. p. 120.

24 \**State v. Marco De Las Maurignos, and Jose Sierra, al. dict. Joseph Segar.*

Chatham County, May 1805.

**Habeas Corpus—Confinement for Two Terms without**

**Trial—Effect.**—Upon the objection of the prisoners that they were confined two terms, and were ready for trial at each term and at the second, by their counsel, petitioned to be brought to trial, it was held, that, under the habeas corpus act, 31 *Carolus* 2, chap. 2, sec. 7, which is adopted by the constitution and laws of this state, the prisoners were entitled to their discharge.

The prisoners having been brought up yesterday, and it appearing that they were detained under an order of the court at the last term, upon the suggestion of the attorney general, that they were charged with highway robbery; and it also appearing, that an indictment had been preferred at the term of January preceding, for the aforesaid robbery, against the prisoners; and that they at the last term, to wit, on Saturday, the 4th day of May, in said town, did, by their counsel, move the court for a trial on said indictment; but it then appearing that the attorney general had entered a nolle prosequi on the said indictment, it was ordered, that the prisoners take nothing by their motion. Mr. Stevens, counsel for the prisoners, moved for their discharge, upon the following grounds, viz.: First. Because they have been tried, and at the last term moved to be tried, and are, therefore, now entitled, under the habeas corpus act, to their discharge. Secondly. Because that, for the charge of robbery, under which they are now confined, they were indicted at the term in January last; and that it does appear that the attorney general did, at the said term, enter on the said indictment, a nolle prosequi, which operates as a bar to further prosecution. Thirdly. Because that there is no evidence to support the charge of robbery, for that the declarations of a deceased person, is not evidence in robbery. After hearing the arguments of the counsel for the prisoners, and the attorney general on the motion, the prisoners were remanded.

25 \*The prisoners being again this day brought up, farther argument was heard on the motion for their discharge. The attorney general moved that he be directed by the court to issue new process against the prisoners, for that the motion in arrest of judgment being sustained on the conviction for murder, and a nolle



prosequi being entered on the indictment for robbery, did not discharge the prisoners from a farther prosecution for the said crimes, as that could only be effected by a verdict of acquittal. 1 Salk. 21; 2 Salk. 456; 6 Mod. Rep. 261, 262; Hardress, 126, 153; 4 Tuck. Black. 375; Cites 4 Rep. 45.

By the Court. In considering the arguments of the counsel for the discharge of the prisoners, and of the attorney general against it, I do not think it necessary to examine whether the "nolle prosequi" be an acquittal of the crime, or whether the declarations of a deceased person, are or are not admissible as evidence on an indictment for robbery on the highway. The prisoners, it is stated, have been confined two terms, were ready for their trial at each term, and at the second term did by their counsel petition to be brought to their trial. The habeas corpus act, 31 Carolus 2, chap. 2, sec. 7, which is adopted by our constitution and our laws, enacted, That if any person committed for felony, upon his or their prayer or petition in open court to be brought to his trial, shall not be indicted and tried the second term after commitment, or upon his or their trial shall be acquitted, he or they shall be discharged from imprisonment. Upon this ground, therefore, the prisoners are entitled to their discharge: and it is ordered, that they be discharged upon payment of costs.

Stevens, for the prisoners.

Minutes of Superior Court, letter F. p. 110.

## 26 \*State v. Elias Roberts.

Chatham County, May 1805.

### Record—Failure to Show Issue Joined—Effect.\*—

Where the record fails to show that an issue was made up between the state and the defendant, a motion in arrest of judgment will be sustained.

The jury having returned a verdict of guilty, the counsel for the defendant moved in arrest of judgment, upon the following grounds, viz.

1. Because the indictment charges the defendant with a misdemeanor in receiving stolen goods, under the statute of Ann, the principal felon having been convicted at the time of preferring such indictment.

2. Because there is no record of, nor in fact was there, any issue made up between the state and the defendant.

3. Because the said indictment is repugnant and inconsistent, and therefore void.

Mr. Attorney General.—The indictment charges the defendant with a misdemeanor, under the statute of Ann.

It is first necessary to cite the authorities in support of the indictment.

Receiving of stolen goods, knowing them to have been stolen, is a high misdemeanor, an affront to public justice. This offence, which is only a misdemeanor at common law, by the statute 3 & 4 W. & M. c. 9, and

5 Ann, c. 31, makes the offenders accessory to the theft and felony. But because the accessory cannot in general be tried, unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which it is enacted by statute 1 Ann, c. 9, and 5 Ann, c. 31, that such offender may be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not before taken, so as to be prosecuted and convicted: 4 vol. Tuck. Blk. 132; so that now the prosecutor has two methods in his choice; either to punish the receiver \*for the misdemeanor immediately before the thief is taken, or to wait until the felon is convicted, and then punish them as accessories to the felony. Foster, 373.

The doctrine is, however, more explicitly developed in the stat. of Ann, referred to c. 31.

After making it a felony to buy or receive stolen goods, it declares: "That if any principal felon cannot be taken, so as to be prosecuted and convicted, it shall and may be lawful to prosecute and punish every person buying and receiving any stolen goods by such principal felon, knowing the same to be stolen, as for a misdemeanor, although the principal felon be not before convicted of the said felony."

At the first blush there appears a little repugnancy between Blackstone, Foster, and the plain language of the statute of Ann.

Those authorities say, that the receiver may be punished, or indicted for a misdemeanor, "immediately before the thief is taken," meaning the principal felon. But justices Blackstone and Foster explain the statute of Ann, and their construction is confined by uniform decisions since Wilkie's case, Leach, C. L. p. 98; 2 Hawk. c. 29. The statute of Ann, connected with the authorities cited, are of themselves sufficient to maintain the legal correctness of the indictment, and prosecution against the defendant. But there is another statute which definitely settles the point. The statute of 22 Geo. 3, c. 58, enacts, "That in all cases whatsoever, where any goods and chattels (except lead, iron, copper, brass, bell metal, and solder), shall have been feloniously taken and stolen, every person who shall buy or receive any such goods and chattels, knowing the same to have been so taken and stolen, shall be guilty of, and may be prosecuted for, a misdemeanor, although the principal felon be not before convicted of the felony, and whether such felon be amenable to justice or not. And if the felony amounts to grand larceny, or some greater offence, and the principal felon shall have not been convicted, such offender shall be exempted from being punished as an accessory,

28 if the principal \*shall have been afterwards convicted." Leach, C. L. 325, Haslam's case, which recites the statute.

Under this statute, one William Haslam

\*See State v. Monaquas and Segar, T. U. P. Charlton 16.

was tried, and Richard Rogers, the principal felon, was produced as a witness. The question was, whether the principal could, in this case, be legally admitted as a witness against the accessory? and it was decided, that a principal felon may be admitted as a witness against the accessory under this statute.

If the principal can be a competent witness against the accessory, is the conviction of that principal a previous requisite to maintain the indictment against the accessory for a misdemeanor? The statutes do not require it. The authorities explanatory of those statutes, decidedly do not. But admitting the necessity of a previous conviction of the principal felon, or that he could not be taken, that is, proof to that effect. Yet, in the present case, the court cannot take judicial cognizance of the conviction of the principal felon, he being a negro, and not amenable to this jurisdiction, and over that court, (the justices' court) before which he has been tried and convicted, this court has no control as to criminal charges exhibited against that class of people. I was, therefore, of necessity, compelled to prosecute the defendant for a misdemeanor.

Second ground. No issue joined. I would still contend, that there is no issue in criminal cases. *Rex v. Oneby*, 2 Strange 775; *Rex v. Roya*, 4 Burr. 2084, 5; *King v. Doalin*, 5 Im. Rep. 511.

The reasoning applied to the case of the Spaniards, if deemed convincing, must operate very conclusively in opposition to this ground. For if the issue, joined between a culprit on his life and death, is, in its nature, oral, and is so admitted by the authorities, can a more dignified system of pleading (viz. issues on records) be extended to defendants indicted for misdemeanors? On motions in arrest of judgment, nothing can be alleged which doth not appear on the face of the record. Is there any matter on the record which supports this ground of arrest?

29 \*Justice Blackstone is explicit: "arrests of judgments arise from intrinsic causes appearing upon the face of the record." Hence, there cannot be a re-investigation of a fact upon a motion in arrest of judgment.

If the prisoner or a defendant has been denied any important right (which does not appear upon the record) secured to him by common, statutory, or constitutional law, he may be redressed through the medium of a new trial. And if the grounds stated in the present case, can, in any shape, avail the defendant, he ought to have taken advantage of them in a reinvestigation of facts on a new trial. Vide the authorities on the doctrine of new trials, passim, particularly 2 Dallas, 55, 56, and Bright, executor, v. Eynon, 1 Burr. 390. It may be contended, that the stat. 22 Geo. 3, having been enacted since our independency, is not in operation. But it must be recollected, that this statute is cumulative of that of Ann; and if cumulative, the principle of

exposition is clear and obvious, viz. "a second act enacting an offense felony, that was so enacted before, with some alterations, is cumulative;" Hale, P. C. p. 705, that is, it is to be considered as the same statute to which the alterations have been made. If, therefore, the statute of Ann is in force in this state, the statute of George is also in force.

Third ground. Because the indictment is repugnant and inconsistent.

The repugnancy is, that the indictment concludes "with a damage done to the defendant, Elias Roberts;" when it should have concluded, "to the great damage of the said William H. Spencer."\*

The indictment, however, contains the substantial and technical counts, and is copied from one of the best books of practice.

In the formality of the conclusion a trivial error has been committed, but that error cannot effect a discharge of the defendant, according to the English authorities.

By JONES, Judge.

30

**\*State v. Elias Roberts.**

Chatham County, May 1805.

**Indictment—Receiving Stolen Goods—No Issue Joined.**

The defendant was found guilty at the last term, and recommended to mercy.

Motion in arrest of judgment upon the following grounds: viz.

1. Because the indictment charges the defendant with a misdemeanor in receiving stolen goods, &c. &c. under the statute of Ann, the principal felon having been convicted at the time of preferring such indictment.

2. Because there is no record of, nor in fact was there, any issue made up between the state and the defendant.

3. Because the said indictment is repugnant, inconsistent, nonsensical, and therefore void.

It is considered by the court, that the motion in arrest of judgment be sustained, upon the second objection: and it is ordered, that the defendant be discharged, upon payment of costs.

Motion in arrest of judgment sustained. Charlton, A. G. for state.

Davis and Berrien, for prisoner.

Minutes of Superior Court, letter F. p. 124, 177.

Chambers, 21st August, 1805.

Present, his Honor, JUDGE JONES.

31

**\*Ex Parte Walter Roe.**

Chatham County, August 1805.

**Certiorari.**—Certiorari will lie from the superior court to the mayor of the city of Savannah to remove the proceedings had in such court.

On the petition and affidavit of Walter Roe, for a certiorari to remove the proceedings of the city council of Savannah, on

\*The person from whom the goods were stolen.



an information and fine on said Walter Roe, for a breach of the quarantine law; it is ordered, that the proceedings of said council and their officers in the premises, be suspended until argument is had on the said application before me, on Friday next at 12 o'clock; that the recorder have notice to attend, and that the said Walter Roe give, forthwith, security for the payment of said fine of fifty dollars to the city of Savannah, in case the said application for a certiorari be refused.

Chambers, 22d of August, 1805.

Present, his Honour Judge Jones.

Walter Roe, being brought up under a habeas corpus this day issued; and it appearing by the return of Charles Cope, marshal of the city of Savannah, that he is detained in his custody under an order of John Y. Noel, mayor of the said city, of this date, in the words following:

"The city marshal brought before the mayor Walter Roe whom he had arrested under a writ in nature of an execution against the property and person of the said Walter Roe, for a fine inflicted under the quarantine law of this state; the marshal at the same time laid before the mayor a certified copy of an order made by his honour Judge Jones directing, that the proceedings of the city council be suspended until Friday next; whereupon it is ordered that the city marshal take

32 \*bond with security from the said Walter Roe for his appearance personally before the city council on Monday next; the mayor entertaining doubts as to the power of the Judge to make any order for suspending the proceedings of the corporation, considers it his duty to make this order to the marshal, that the corporation may have an opportunity of deciding whether they consider their proceedings subject to be suspended by a Judge of the Superior court.

"John Y. Noel, Mayor."

August 22, 1805.

And whereas it appears by an affidavit of Richard M. Stites, Esq. in the words following, viz.: "Georgia,—Richard M. Stites, being duly sworn, maketh oath, that he served Charles Cope, Marshal of the city of Savannah, on Wednesday the 21st of August inst. with a certified copy of Judge Jones' order, on the application of Walter Roe, for a certiorari to remove the proceedings of the city council on a fine against the said Roe of fifty dollars, for a breach of the quarantine laws, and at the same time gave him a bond of the said Roe's, with Edward L. Davis as his security, in the penal sum of one hundred dollars, conditioned to pay to the city council of Savannah fifty dollars, and to abide the order of his honour the Judge of the Superior Court, in case the certiorari was refused, and also tendered him two dollars thirty-seven and a half cents, his fees and the costs on the city warrant; and on the same day served Thomas Whitefield, the Recorder of the city, with a certified copy of said order, and the grounds on

which this deponent would rely in the motion for a certiorari, and in all things complied with the said order. That the said Charles Cope received the said certified copy of the judge's order suspending all proceedings, until the arguments should be had on Friday the 23d instant, on the motion for a certiorari, and also received the bond of said Walter Roe and Edward L. Davis, but refused at that time to take his fees on the costs of said warrant, and that on this day about 9 A. M. he actually took into 33 his custody the body \*of the said Walter Roe, on the aforesaid warrant, notwithstanding this deponent cautioned him against such a proceeding.

"Sworn before me this 22d day of August, 1805.

"Richard M. Stites."

George Jones.—That a certified copy of the order of the 21st instant had been served on the said Charles Cope, City Marshal, aforesaid, and a bond with security given by the said Walter Roe to the said City Marshal, and that the said City Marshal did notwithstanding afterwards, to-wit, on this 22d day of August instant, actually take into his custody the body of the said Walter Roe, on a warrant issued by J. M. Wilson, Clerk of the said city, bearing date the 19th day of the present month, August, being two days anterior to the order and subsequent proceedings thereon, and now holds him under the aforesaid order of John Y. Noel, Mayor as aforesaid. Whereupon, it is considered that the said Walter Roe is illegally detained by the said City Marshal, and is therefore discharged from his said custody; and that the said Walter Roe do appear at 12 o'clock to-morrow, the 23d instant, at the Court House, before me, and in all respects comply with the conditions of his said bond given to the City Marshal in terms of the order of the 21st instant otherwise incur the penalty of such his failure; and it is further ordered, that the recorder be served with a copy of this order.

Chambers, Savannah, 23d August, 1805.

Present, his Honour, JUDGE JONES.

### Walter Roe v. Mayor and Aldermen of Savannah.

Chatham County, August 1805.

The plaintiff this day appeared, in compliance with the orders of the 21st and 22d instant. Mr. Stites, his counsel, moved to be heard on the application for a cer- 34 tiorari. Mr. \*Whitfield, the recorder, objected; for that by the 54th section of the Judiciary Act, passed 16th February, 1799, he is entitled to twenty days' notice; and on consent of said counsel, the argument of this motion is postponed until Monday, the 2d of September next; that the said Walter Roe give security for the payment of the said sum of fifty dollars and costs to the corporation of Savannah, or to abide the decision of this court in the premises; and that his former bond given



in compliance with the order of 21st instant, be cancelled, and the same filed with the clerk of this court; and that all proceedings of the corporation of Savannah and their officers be suspended until the said second day of September next.

Chambers, 2d September, 1805.

Present, his Honour, JUDGE JONES.

**Walter Roe v. The Mayor and Aldermen of the City of Savannah.**

Chatham County, September 1805.

**Application for a Certiorari.**

Mr. Leake and Mr. Stites being heard on behalf of the plaintiff, and Mr. Whitfield, the recorder of the city of Savannah, on behalf of the corporation, and the question being one of importance, the judge took time to advise.

Cur. ad. vult.

John Y. Noel, Esq. Mayor.

Sir,

Please to take notice, that I shall, on Monday, the 2d September next, move the Hon. George Jones, Esq., Judge of Superior Courts for the eastern district, for a rule to show cause why an attachment should not issue against you for a contempt in directing the city marshal, by your order, to take a bond and security from

one Walter Roe, for his appearance  
35 \*personally before the city council; by which order, the said Walter Roe was again arrested, after the proceedings of the city council against the said Walter Roe had been stayed or suspended, for a fine inflicted under the quarantine law of this state, by the said judge of the Superior Court.

(Signed.) Thomas U. P. Charlton, A. G. Charles Cope, Esq. City Marshal.

Sir,

Please to take notice, that I shall, on Monday, the 2d of September, move the Honourable George Jones, Esq. judge of the Superior Courts of the eastern district of this state, for a rule to show cause why an attachment should not issue against you for a contempt in arresting one Walter Roe, by order of John Y. Noel, Esq. mayor of the city of Savannah, after the proceedings of the city council, against the said Walter Roe, for a fine inflicted on him under the quarantine laws of this state, had been stayed or suspended by the said judge of the Superior Courts.

Thomas U. P. Charlton, Att'y Gen.

Copies of these notices having been duly served on John Y. Noel, Esq. mayor of the city of Savannah, and Charles Cope, Esq. marshal of said city, Mr. Attorney General now moved the court for a rule to show cause why attachment should not issue against the said John Y. Noel and Charles Cope, Esqrs. for the contempts aforesaid. Thereupon, and by consent of the recorder, is ordered, that the said John Y. Noel, Esq. mayor of the city of Savannah, and

Charles Cope, Esq. marshal of the said city, do show cause, on the first day of the next term; and that they be respectively served with a copy of this order.

Chambers, 3d September, 1805.

36 \***Walter Roe v. The Mayor and Aldermen of the City of Savannah.**

Chatham County, September 1805.

JONES, Judge:—

The objections and arguments that have been urged against granting a certiorari, are,

1. That the judge of the Superior Court has no power to make an order to suspend the proceedings of the corporation; or in other words that the Superior Court has no jurisdiction over the city of Savannah.

2. That the law is conditional.

3. That the court has not the power to decide whether the law be constitutional or not.

4. That the facts upon which the fine was imposed, cannot be examined under a certiorari, or any other process to review or control the proceedings of the corporation.

As to the first,—In considering it, it would only be necessary to resort to the constitution of the state to demonstrate the right of this court. But the question is not a new one, it has often been decided in England, and in the United States, and in our own courts the precedents are numerous. I shall cite but a few of them, and first, the case of *Rex v. Conle*, 2 Burr. 834, on a rule to show cause why a supersedeas should not issue to a certiorari, directed to the mayor and corporation justices of Berwick to remove an indictment for an arrest; "and also on the adverse party's showing cause at the same time, against other cross rules, for attachment against the justices to whom the said certiorari was directed, for refusing to receive or return the said certiorari," and for committing the defendant to prison on his refusal to plead to their court of sessions and jail delivery, after he had offered his certiorari to them, and tendered sufficient and proper security thereupon. "It was insisted by the counsel for

the corporation justices, and consequently urged for the supersedeas,\* and against the attachments, that the court has no jurisdiction over Berwick, when the proceedings are not according to the laws of England, but according to a quite different law. Burwick, (535) they say, was formerly a part of Scotland, and was ours only by right of conquest, and remains unincorporated with England, and is governed by its own former laws. It is in the very same situation that Ireland was immediately after its being conquered. Vide 8 vol. of State Trials, p. 346. Pryme's argument in lord Maguire's case. A conquered country retains its own laws till others are given by the conquerors. No certiorari, therefore, lies to Berwick. The proper method would be to issue a commission to judge

according to their own laws. Vide 4 Inst. 286. Lord Mansfield, in delivering the opinion of the court, went into a full examination of the charters of the corporation of Berwick, and then said, "There is no doubt as to the power of this court, where the place is under the subjection of the crown of England, the only question is, as to the propriety, 856. There is no one authority to the contrary, and in reason it would be most absurd; because it would really be putting the place out of the protection of the law; and there must be, in many important cases, a little failure of trial, and consequently of justice, 806." Suppose the office of mayor should be usurped, the usurpation is a crime, and cannot be tried before the man himself, who is accused, or any jurisdiction in the town; much less could a question, Whether a corporation was dissolved, be tried before themselves. Such question could not be tried originally before commissioners, sent thither by the king. They could only be judged in this court; to try franchises of this kind in any other shape, would not only be contrary to the common law, but to the act abolishing the star chamber, 16 & 17 Car. 1, c. 10, and all the statutes there recited, 860, 861. Therefore we are all of the opinion, that these indictments may be tried in this court by a jury of the county of Northumberland." 861.

To the third objection, admitting that the court have authority, yet there is not sufficient ground. We are all of us  
38 \*of opinion, that the rule to show cause "why writs of supersedeas to these writs of certiorari should not issue," ought to be discharged. 863.

Secondly, In the case of *Rex v. Mosely et al.*, 2 Burr 1040, 1041, 1042, counsel showed cause against the issuing of certiorari to remove several orders made by a justice of the peace in Kent, upon the conventicle act, 22 Can. 2, c. 1, by which orders he had convicted a Methodist preacher and others in the respective penalties, following: The penalty had been levied upon Osborne, the master of the house. They had all appealed, within the week, to the sessions, and the justice had returned to the session the monies levied, and certified the evidence with the record of the conviction, agreeable to the directions of the 6th section; and the defendants had pleaded, and been tried by a jury at the quarter sessions, and there had been both verdict and judgment given against them. The counsel for the prosecution urged, that after all this had passed a writ of error might lie, but not a certiorari, which will only lie when there is no other remedy. And there is a clause in the 6th section, which is express: that no other court whatsoever shall intermeddle with any cause or causes of appeal upon this act; but they shall be finally determined in the quarter sessions only; which negative words must include all the courts of judicature in the kingdom, and this court in particular, as being most likely to meddle with matters of this kind. Therefore,

to what purpose shall a certiorari issue, when the court can neither intermeddle with the fact or form. The penalties are, by the second section, to be distributed into three parts, one third to the king, one third to the poor, and one third to the informer; and these penalties have been so distributed, and this court cannot order restitution.

The counsel had affidavits of the facts which they alleged. The court were unanimously of opinion, that a certiorari ought to issue. A certiorari does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds. The jurisdiction of this court is not \*taken away, unless there be express words to take it away; this is a point settled. Therefore a certiorari ought to issue, and after a return shall be made to it, you will be at liberty, and it will be open to you to move to supersede it, if there should appear reason for the court's so doing. Rule made absolute for a certiorari. These cases from the English authorities I deem sufficient for my purpose. The decisions in the courts of our sister states, if not authority, at least may be considered in argument. I shall take the liberty to cite a case from a work of great merit, in South Carolina, viz.

*Geter v. The Commissioners for Tobacco Inspection at Campelton warehouse*, upon an application for a mandamus to restore him to his office as inspector of tobacco; he having been, as alleged, improperly displaced by the commissioners. On the return of the rule for the commissioners to show cause why a mandamus should not issue to them, to restore the applicant to his office, Goodwin appeared on their behalf, and took an exception to the jurisdiction of the court. He alleged, that these commissioners having been appointed to an office unknown to the common law, created by an act of assembly for the purpose of inspecting tobacco; that they were not amendable to the ordinary tribunals of justice: that they were nominated by the legislature, and responsible to that body for their acts and proceedings, who alone was capable of removing or punishing them for misbehaviour.

Ramsay, in reply, was stopped by Bay, justice, who observed, "he would never sit in the court of sessions and suffer its authority, over any of the inferior officers of any department in the state, to be called in question; that although the office of a commissioner for the inspection of tobacco was an office unknown at common law, yet it was a well known maxim, that whenever an act of parliament creates a new office, unknown before, the moment an officer is appointed to fill the place, that instant he becomes subject to the control of the supreme tribunals of justice; and if he  
40 \*misbehaves he is liable to punishment for such misbehaviour; or if he abuses or exceeds his authority, the court of sessions can correct that abuse, and com-



pel the newly created officer to do justice; That it was the province of the legislative branch of the government to make laws and create offices; but it was the province of the judiciary alone to control them when made, and keep the officers within the bounds of duty when once appointed."

This case was, by consent, ordered to be farther agreed before the judges of Columbia, and a mandamus was ordered to issue.

An now for the precedents in our own courts: The first in order is the case of Hicks quietam v. Cuddy et al. p. 216, 220. Argued on the 24th April, 1794, before judge Walton and judge Stith, on a conviction for dealing with negroes without a license, and a fine imposed under a provincial statute revived and continued by the legislature after the revolution; the statute authorized a fine of ten pounds.

"But," said the court, "we say that the magistrate or magistrates might convict and impose a fine not exceeding five pounds, and that after proceedings should be according to former usage; and the admission of this operation precludes indictment. In saying this we only declare the law of the land."

Secondly. The case of Welcher v. Mayor and Aldermen, the 17th April, 1798, before judge Mitchel, on a rule to show cause why writs of certiorari should not issue to remove certain proceedings said to be had before the Mayor and Aldermen against the defendant and others. After hearing Mr. Recorder against it, and Mr. Welcher for the rule, the court are of opinion, that writs may issue in order to remove said proceedings.

Thirdly. J. P. Sluyter, v. Thomas R. Box, 26th June, 1800, before the same judge. Order on motion to show cause, and all proceedings in the mean time stayed; and on the 21st of July, a certiorari was granted.

Fourthly. The Mayor and Aldermen v. Thomas Hogg; \*fined for opposing a city constable, 14th August, 1800. Order to show cause why certiorari should not issue, and in the mean time all proceedings stayed. On the hearing, the recorder did not contend for the right of jurisdiction in the corporation; but if they had not jurisdiction the certiorari could not be granted, for it was a writ only intended to correct errors in inferior courts having jurisdiction in a cause, cited 3 Blk. 112; Jac. Law Dict. title certiorari. Mr. Welcher contended it was the proper remedy; cited 1 Bl. Rep. 231, and several cases settled under our practice. Certiorari granted.

Fifthly. Stephen Files v. Peter Shick. Before judge M'Allister. Chambers, 24th December, 1801.

Judgment in the court of mayor and aldermen on the appeal.

An application by Mr. Lawson, for the defendant for a rule to show cause why a certiorari should not issue, granted and ordered, that all proceedings in the mean time be stayed; and,

Sixthly. John Lillibridge v. Mayor and

Aldermen of Savannah. Before judge Bowen. Chambers, December 9th, 1803. Certiorari.

Rule .to be served on the recorder to show cause, why writ of certiorari should not issue to remove proceedings on information against plaintiff for retailing spirituous liquors on the 29th December; after hearing, ordered that the rule be absolute. Hence, it appears, upon principles of common law, there is no doubt of the power of the court over the inferior officers in the government, and the precedents in the proceedings of the courts of this state, the propriety of which have never been questioned, must be conclusive. In the 4th case cited, the question of jurisdiction and the propriety of the writ of certiorari was argued and decided, and in the 5th case a certiorari was granted after the appeal trial, which the statute declares shall be final. But to conclude, the first section of the 3d article of the constitution removes every possible doubt; in defining the powers of the superior

42 \*courts, it declares, "they shall have power to correct errors in inferior judicatories by writs of certiorari, and by the 7th section of said article, the judges of the superior courts, or any one of them, shall have power to issue writs of mandamus, prohibition, fieri facias, and all other writs which may be necessary for carrying their powers fully into effect." As the recorder did yesterday abandon his first ground, I should perhaps have passed it over, or but slightly noticed it, but for the formidable shape which it first assumed, which induced me to take this extensive view of the case. The 4th point has been determined in the examination of the first; and as to the second and third points, they will be noticed in considering the grounds of the application for a certiorari, viz. 1st. That the constitution of the United States and of the state of Georgia, secure to every one the trial by jury. 2d. That no act of the legislature of Georgia can impugn the constitution. 3d. That even should the act of assembly of 1803 be deemed constitutional, yet the conduct of the corporation has been illegal and not conformable to the act of 1793. To constitute a crime or offense, the actor must possess the powers of a free agent.

I shall pass over the first and second grounds as unnecessary in determining upon the application for a writ of certiorari, and proceed to the third ground; in support of this, it is urged by the counsel for the applicant that the corporation have exceeded their bounds, even under the act of 1793; that the act of 1805 is merely an amendment of the act of 1793, (giving to the corporation unusual and unconstitutional power). That under the act of 1793, before a quarantine can be laid, the place from whence the vessel comes must be infected with a contagious disorder; that neither the plague, or other malignant distemper is said to prevail at Jamaica, from which the applicant came; and that the said corpora-



tion have, by their resolution of the 6th May last and other proceedings, acted improperly and illegally.

Upon mature deliberation, I am of opinion that the certiorari ought to issue.

43 \*Rule made absolute for a certiorari.

It is therefore ordered that the said Walter Roe forthwith give security to prosecute the said writ of certiorari before this court at the next term, and to abide the order of the court in the premises; and that the former bonds given by him in pursuance of the orders of the chambers be, and the same are, hereby cancelled and annulled.

Stites and Leake, in support of the Rule.

Mr. Recorder, Whitfield, against it.

January Term, 1806.

**The State v. John Y. Noel, Mayor of the City of Savannah, and Charles Cope, Marshal of the Said City.**

Chatham County, January 1806.

**Superior Courts\*—Refusal of Lower Court to Obey—Contempt.**—Where the mayor of a city acts in disregard of an order of the Superior Court he is guilty of contempt.

Agreeably to a previous order, Mr. Noel now proceeded, in behalf of himself and the city marshal, to show cause why an attachment for contempt should not be granted against them.

NOEL, Mayor.

Had I been required, by the order of this court, to answer the charge of a contempt committed as a private citizen, the delicacy of my situation, whether justly chargeable or not, must have deeply impressed my mind. But when called on to answer for an act done in the honourable and highly respectable station in which I now appear, I am awed, not by an anxiety respecting my situation as an individual, but by the consideration that, on the one hand, one of the powers of the judicial department, and on the other, the dignity of office, the rights of those who are represented by the office, and of those associated with me, are deemed

\***Superior Courts—Refusal of Lower Court to Obey—Contempt—Attachments.**—The superior courts of this state have general supervisory powers over all inferior tribunals. Code, § 246. When, therefore, a person has been tried and convicted in the county court, and has petitioned the judge of the superior court for a writ of *certiorari*, and the petition is sanctioned and the writ issued, and the judge of the county court refuses to answer as required by the writ, the judge of the superior court, in term time, has power to attach the county court judge for contempt. Code, §§ 206, 4711; Rapalje, Contempts, § 26; 3 Am. & Eng. Enc. L., titl Contempt, 780; *Ex parte Carnochan*, T. U. P. Charlton 315; *State v. Noel*, T. U. P. Charlton 62; *Pittman v. Hagins*, 91 Ga. 107, 16 S. E. Rep. 659.

The principal case is cited in *Low v. Comm'rs, R. M. Charlton* 315.

to be, in some measure, involved in this discussion.

44 \*With the utmost dismay and compunction should I have arisen to address this court, on the present interesting occasion, if I could, for a moment, have entertained a reflection, that, in the act for which this rule was granted, I had been actuated by impetuosity of temper, by disrespect for the judicial branch of government, or for the person who exercises its functions, or by any motive which either my own conscience, or the judgment of my worthy colleagues had disapproved. Supported by their united sanctions in all these respects, I am enabled, with confidence, to explain the reason of my conduct, and cheerfully to submit them to the impartial decision of this honourable court.

In the case of Walter Roe, from which this proceeding emanated, the first judicial order was in the following words:—

Chambers, Savannah, 21st Aug. 1805.

On the affidavit and petition of Walter Roe for a certiorari to remove the proceedings of the city council of Savannah, on an information and fine on said Walter Roe, for a breach of the quarantine law, it is ordered that the proceedings of the said court and their officers in the premises, be suspended until argument is had on the said application, before me, on Friday next, at 12 o'clock; that the recorder have notice to attend, and that the said Walter Roe, give forthwith security for the payment of said fine of fifty dollars, to the city of Savannah, in case the said application for a certiorari be refused.

On the twenty-second, Walter Roe was brought before me by the city marshal, in pursuance of the process in his hands, when the following order was made:

"The city marshal brought before the mayor, Walter Roe, whom he had arrested under a writ in nature of an execution against the property and person of the said Walter Roe, for a fine inflicted under the quarantine law of this state. The marshal,

at the same time, laid before the  
45 mayor a certified \*copy of the order made by his honour, Judge Jones, directing that the proceedings of the city council be suspended until Friday next. Whereupon it is ordered, that the city marshal take a bond with security from the said Walter Roe, for his appearance personally before the city council, on Monday next. The mayor entertaining doubts as to the power of the judge to make an order for suspending the proceedings of the corporation, considers it his duty to make this order to the marshal, that the corporation may have an opportunity of deciding, whether they consider their proceedings subject to be suspended by a judge of the Superior Court or not."

The ground upon which I made the order cannot be mistaken. It is clearly and explicitly stated, viz. that I doubted the power of a judge of the Superior Court, by the order of the 22d instant, to inhibit or

suspend the proceedings of the corporation and its officers, for enforcing the sentence of the said Walter Roe.

The reasons by which our opinions were formed, that this court has not jurisdiction, and that the order was illegal, and not operative upon the corporation, must necessarily constitute the basis of my justification.

It is my purpose to express the sentiments by which my conduct has been governed, with great respect and deference hoping for the patient and unbiased attention of this honorable court, to the expression of these sentiments, and to the arguments which will be adduced in support of them.

The arrangements of this discussion will be,

1. That the judicial order was irregular, and irregularly acted.

2. That the judge had not jurisdiction to make this order.

3. That the judge of the Superior Court has not jurisdiction to issue the writ applied for, and to which this order was preparatory.

1. It appears to me that the order was irregular, and that if regular and legal in itself, yet it was so irregularly acted as to defeat the purpose for which it was intended.

46 \*The order was irregularly made, not being founded on any evidence, being made ex parte, and without notice.

It does not appear, nor is it contended, that a transcript of the proceedings or conviction was produced when the application was made. It is stated that the applicant's petition was accompanied by his own affidavit; but no other evidence is set forth as forming the basis of that order.

Courts of law will not, even for a moment, stop the progress of final process issued for the purpose of effectuating their own judgments, but upon good cause of exception; much less will they interfere with process issuing from inferior jurisdictions, over whom they have control, unless special reasons be assigned and substantiated in the first instance. If then the corporation is considered as an inferior judicial tribunal, and if its summary convictions are subject to be controlled and reviewed; yet upon principles of law, this court will not inhibit or stay the proceedings by which those convictions are enforced, unless some exception shall be made apparent.

The order was irregularly acted on, because it was not served on the presiding magistrate of the corporation. The order, if legal in itself, could not have its effect by any other means than service upon the mayor; upon him alone, as head of that body, could it act imperatively. The city marshal is a ministerial officer of the corporation, and is subject to their mandate alone. The marshal is an officer appointed by the corporation, for the execution of certain functions and duties defined by their ordinances; being the mere agent and servant of the corporation, he can act only by their authority and through them, and

therefore is answerable to them only; unless in the exercise of the office he should do an act illegal in itself, in which case he would be made answerable to the person injured in a civil action. Or in the instance which occurred, (in the case of Walter Roe,) having arrested the body of the defendant, and holding him in custody, he was bound to obey the writ of habeas corpus, as any \*other person holding the body of the prisoner in confinement, would be bound. But as an officer of this city, the marshal is not subject to the mandate or process of any other body or power except the corporation.

The recorder is also an officer created by the corporation for the execution of particular duties. He possesses no powers either of a judicial or executive nature, being merely the advocate and counsellor of that body. His province is, to advise when consulted by the mayor or corporation, but he possesses no authority to adjudicate or order in the recess or vacation of council.

The mayor is the head or source of efficient power, and is therefore the only person upon whom that order (if legal) could operate imperatively.

If the order for a stay of proceedings upon this conviction was not immediately imperative upon the marshal, it necessarily results that the rule to show cause why an attachment should not issue against him, must be discharged.

It remains to be considered whether the mayor is chargeable with a contempt, under this order, for a stay of proceedings.

The universal and indispensable basis of an attachment for contempt, in the disobedience of a judicial order is, that the person charged was personally served with a copy of the order, which he was bound to obey, and that the original was produced and shown to him. The ordinary practice of our courts, as to proceedings by attachment for contempt, manifests the correctness of this position. But in order to apply it more immediately to the case now before this court, I shall cite the corporation cases, in which the practical rule which I have stated, was recognized and held indispensable. The King v. Smith, 3 Term Rep. 351, upon a rule to show cause why an attachment should not issue for not obeying the rule of the court, which required the defendant to give inspection of some corporation books, Mr. Bearcroft showed cause, by objecting that the affidavit did not state that the defendant had been served with a copy of the rule personally, \*and the original rule at the same time shown to him, and the court being of opinion that this was absolutely necessary, were about to discharge the rule; but it being suggested that the defendant had been regularly served with the rule, the court gave the prosecutor an opportunity of making an additional affidavit as to the fact.

In the case of the King v. Edgveau et al. ibid, 352, a mandamus had issued to certain officers of a corporation, requiring



them to proceed to the election of a mayor, in pursuance of a particular statute. For disobeying the mandamus, a rule to show why an attachment should not issue, was obtained. Upon showing cause, the objection was the same as in the preceding case. Lord Kenyon, C. J., delivering the opinion of the court said, "Although in general, personal notice is necessary before a party is brought into contempt, yet in this case, the act of parliament seems to have dispensed with it. That statute which was made to prevent the dissolution of corporations which neglect to choose the mayor of the charter day, enables the court to grant a mandamus to compel them to proceed to an election, and it directs that public notice be given. The public notice directed by the act is sufficient *prima facie* to call upon the members of the corporation. Rule absolute."

By this adjudication, founded upon the exception made by the statute, the general rule is acknowledged, and the inference is, that without special provision of the statute, personal service would have been deemed indispensable.

It may be objected, that knowledge of the original order is admitted by my order made on the arrest of Walter Roe. This knowledge was indirect, and therefore ineffectual. The command to desist could only be addressed to the presiding magistrate. From him alone could obedience to the command be expected; and not having been communicated to him, he could not obey it. 'Tis the service alone which constitutes inhibition, as I shall show by some authorities to be cited in support of the second position.

The second point of justification  
49 which I have stated and \*shall attempt to illustrate is, that the judge had not jurisdiction to make this order.

I deem it unnecessary and improper to occupy the time of the court, by an historical detail of the rise and progress of civil corporations; suffice it to remark, that in all the populous and commercial cities of Great Britain, they have existed and have been found essentially useful for their internal government during ages past.

That similar institutions were organized in the cities and towns of America, under the provincial governments, established by the crown, and that since the revolution they have been adopted by legislative acts, throughout the United States, upon the same principles, with such modifications only as were requisite to reconcile them to the genius of our governments and the principles of our constitution.

On casting our eyes over the pages of our common law, as handed down to us by Littleton and Coke, and illustrated by Wood, Blackstone, and Modeson, we find that civil corporations, with their incidental powers for the immediate government of cities are permanent features of that illustrious system. Lord Hobart, in a case reported by himself, Hobart, p. 211, says, he holds the power to make by-laws given in corporation patents, as needless, that power being in-

cluded by law in the incorporating act. The legislature of this state have thought it expedient, at a very early period of our present government, to originate a corporate institution for the police of this city, upon principles similar to those recognized by the common law; acting under powers thus derived from the legislature, the presiding magistrate of the corporation appears before this court, in obedience to the rule which has been served upon him; and, before entering into a particular investigation of the point stated, he takes the liberty of asking, from what source arises the importance and duration of corporations?

If, from their great utility, founded in the experience of monarchical and republican governments, he deems it not inapplicable to the present discussion, to state  
50 very briefly, in \*what their utility consists; it is in their being enabled, by the combined powers delegated to them, to enact and enforce ordinances, for protecting the property, lives and health of their fellow citizens, upon emergencies, and in cases against which neither the ordinary course of legislative, executive, nor judicial procedure can provide or effectuate remedies. In populous cities, and more especially those attached to seaports, the sources of danger both internal and external, are various and frequent. It is, therefore, essential to the utility of corporations, that they act in their various functions without control, so long as they continue within the pale of the constitution and within the limits of their jurisdiction, as defined and prescribed by law.

It is not denied that this court, as a court of superior judicial power, has a controlling authority over the corporation to a certain extent, and for the purpose of restraining them when they attempt to exceed their jurisdiction; but, I shall maintain this point, and show the invalidity of the judicial order by the statement of a single proposition, which is undeniable, and, to every lawyer, self evident, viz.: That a Superior Court cannot stay the proceeding of an Inferior Judicatory in any other manner than by some appropriate judicial process, which has inherently, and by operation of law, the incidental effect of superseding or staying proceedings.

This stay of proceedings in the inferior tribunal, is not an act or order of the court, which may or may not be exercised at discretion.

It is a coincident effect of a writ legally issued by a Superior Court, for the purpose of removing and reviewing the proceedings of an Inferior Court, in some particular case.

If then, the corporation is to be considered as an Inferior Judicial Tribunal or a Court of Record, (which I shall disprove in discussing the third point) yet, as a judicial tribunal, it would not legally be subject to a stay of proceedings by a mere order of a Superior Court.

To illustrate the position and apply it more closely to the relation which is con-



tended for as subsisting between this  
 51 \*honourable court and the corporation,  
 viz: That of Superior and Inferior  
 Courts, I will cite a few authorities. The  
 writ of certiorari operates as a virtual su-  
 persedeas, from the service of the writ upon  
 the judge or justice to whom it is directed,  
 and not before. The general rule on this  
 subject, is clearly laid down in 2 Viner, 361.  
 "If certiorari goes to remove a record, the  
 judge below is not in contempt for proceed-  
 ing on the record till service of the writ;  
 but all proceedings upon it after the cer-  
 tiorari tested, are void." Ibid.

Upon motion for attachment, for proceed-  
 ing by distress under an order of justices,  
 for levying of money for repairing a bridge,  
 after the order was removed by certiorari,  
 per Holt, C. J., to bring one in contempt,  
 the distress must be after the certiorari pre-  
 sented below; and if the warrant were de-  
 livered before that time, the way had been,  
 upon producing the certiorari to get a su-  
 persedeas of it and deliver it to the officer,  
 or else he cannot be in contempt. This case  
 not only supports the doctrine for which I  
 am now contending, but also confirms the  
 ground upon which I have defended the  
 marshal. It shows that he was bound to  
 proceed in execution of the process, until  
 ordered to desist by the mayor. That for  
 his not desisting, the mayor would have  
 been answerable, after service of certiorari.  
 2 Com. Dig. 196. "If a certiorari be de-  
 livered to a justice, to whom it is directed,  
 it shall be a supersedeas, and every proceed-  
 ing afterward is a contempt. When a cer-  
 tiorari is granted, the justices ought to  
 award a supersedeas to the sheriff ex offi-  
 cio. 1 Bacon Abridg. 574. After the cer-  
 tiorari delivered, if the inferior court  
 proceeds, where by law it ought not, it is  
 a contempt, for which the court will grant  
 an attachment."

The certiorari is a prerogative writ, the  
 granting of which is matter of discretion.  
 3 Blk. Com. 132. "Writs of certiorari,  
 prohibition, mandamus, and other preroga-  
 tive writs, do not issue as of mere course,  
 without some probable cause why the extra-  
 ordinary power of the crown is called in to  
 the party's assistance." Until a ne-  
 52 cessity is ascertained to exist, \*for  
 the interposition of this high-toned  
 remedy, it is never granted. To this  
 principle is adapted the certiorari for re-  
 moving causes in certain cases from the  
 inferior to the Superior Courts, by the ju-  
 dicial system of this state. "Upon excep-  
 tions made by either party, to any proceed-  
 ing in any cause, in any inferior court,  
 affecting the real merit of such cause, he  
 may apply to a judge of the Superior Court,  
 and if such judge shall deem the said ex-  
 ceptions to be sufficient, he shall forthwith  
 issue a writ of certiorari, &c. And the said  
 Superior Court shall determine thereon, and  
 order the proceedings to be dismissed, or  
 return the same to the said inferior court,  
 with order to proceed in the same cause."

Notwithstanding the generality of the  
 expression in an inferior court, I shall not

undertake, nor do I deem it necessary, to  
 express any opinion whether the rule thus  
 laid down is intended to govern all cases of  
 certiorari. The rule is precisely assimilated  
 to those general principles, which govern  
 in cases of certiorari.

The conclusions from those authorities  
 which I have cited in support of my second  
 position, appear to be, that the allowance  
 of the writ is the only criterion and the  
 only means by which it can be adjudged in  
 a Superior Court, that the proceedings of  
 an inferior court shall be stayed or super-  
 seded, and that until the presiding magis-  
 trate shall be served with this writ, it  
 cannot operate as a supersedeas, so as to  
 charge him with a contempt.

My third ground of justification, for not  
 having immediately ordered a stay of pro-  
 ceedings is, that I considered the Superior  
 Court as not having jurisdiction to grant  
 the writ, to which the order of the judge  
 was preparatory. Being aware that this  
 point has in some measure been decided by  
 the allowance of a certiorari, I am, not-  
 withstanding, constrained to ask the liberal  
 attention of the court, for the purpose of  
 farther evincing the reasons and impres-  
 sions by which I have been guided, and by  
 which I presume this honourable body who  
 accompany me, have been governed in ap-  
 proving my conduct.

These remarks will be made with the  
 53 highest respect and deference \*for the  
 court, and with due submission to  
 the adjudication which has taken place.

The conviction of Walter Roe, whence  
 this procedure originated, was founded on  
 an act of the legislature, passed 10th De-  
 cember, 1803, by which the corporation is  
 empowered to impose a fine not exceeding  
 fifty dollars, upon any person arriving in  
 the port of Savannah, who shall violate the  
 quarantine law of December, 17th, 1793.

As I have already stated in a preceding  
 part of this defence, it is not denied that the  
 Superior Court has a controlling power over  
 the corporation, but the exercise of this  
 power, we say, is confined to those cases in  
 which there is a want or transgression of  
 jurisdiction apparent on the proceeding.  
 And we contend, that where there is juris-  
 diction manifested upon the face of the  
 proceedings, no other objection against  
 them can give appellate jurisdiction to the  
 Superior Court.

Upon referring back to the order of this  
 court, dated August 21st, we shall find  
 that it is stated to have been made on the  
 petition and affidavit of Walter Roe, pray-  
 ing for a certiorari, to remove the pro-  
 ceedings of the city council, on an  
 information and fine for a breach of the  
 quarantine law. This statement on which  
 the order is founded, does in itself display  
 our title to jurisdiction. It shows on the  
 face of it, that this summary conviction  
 was made under the express sanction of the  
 legislative act, which I have cited. It is  
 not deficient in any one particular for this  
 purpose, except the sum or amount of the  
 fine; this, I presume, is stated in the peti-

tion or affidavit, copies of which were never served upon me.

Strictly speaking, a certiorari is not the process by which proceedings of a corporation are to be controlled in a Superior Court. The writ of prohibition is the proper process for that purpose. 1 Bacon, 559. "A certiorari is an original writ issuing out of chancery or the King's Bench, to the judges or officers of inferior courts, commanding

54 them to return the records of a cause depending before them, to the \*end the party may have more sure and speedy justice." Certiorari lies to a court of record where a writ of error will not lie, that is in cases where a court of record, of inferior jurisdiction, proceeds in a summary way, and not according to the course of common law. The doctrine relied on, to prove that Superior Courts have power to review convictions by the corporation, is sufficiently stated in 1 Salkeld, 263. Gronvelt v. Burrell, where it is held by Holt, C. J. "that wherever a new jurisdiction is erected by act of parliament, and the court or judge that exercises this jurisdiction, acts as court or judge of record, according to the course of common law, a writ of error lies on their judgments; but where they act in a summary method, or in a new course different from the common law, there a writ of error lies not, but a certiorari." This doctrine remains unimpeached, but has no sort of applicability to corporations. This corporation is instituted upon common law principles, and its power, as briefly defined by the act, are those incident to them by the common law. It is therefore neither a new jurisdiction created by statute for a special purpose, nor is it a court of record. It has the power of enforcing its ordinances by fine, but not by imprisonment. But it is neither essential nor even material in the present investigation, to ascertain whether in point of form, or as to the mode of process, a certiorari may or may not be used, instead of a prohibition; it has been used in some instances. The effect must necessarily be the same, the appellate jurisdiction, being confined to this single question, Whether the corporation has exceeded the limits of its jurisdiction or not? The process for removing into this court and suspending proceedings of this body, in which I have the honour to preside, is not *ex gratia*, but a matter of sound legal discretion, upon an examination of those proceedings. This is the only legal rule of procedure, whether the mode of removal be by certiorari or prohibition. And, if upon an examination of those proceedings, it appears obviously that the corporation had jurisdiction, the inference is, that the

55 Superior Court \*has not jurisdiction.

Vain and futile indeed would be the power delegated to them for enforcing obedience to local ordinances, and laws enacted for the immediate preservation of lives and health, if their sentences were subject to be reviewed as to the testimony and facts upon which such sentences may have been founded. Under such circumstances, the

corporate institution would become a mere thing of nothing, a rope of sand. Before I proceed to cite authorities in support of this proposition, as to the controlling power of the Superior Court, it will be proper to anticipate an argument which will be drawn from precedents of certiorari heretofore issued from this court, to remove proceedings of the corporation in this city. It is certainly true that in general, adjudications in courts of law, operate as authorities to settle a rule or principle of law, and must govern the decision of all subsequent cases, to which they apply. But it is an axiom, as certain and invariable, that precedents will not give or create jurisdiction, in repugnance to principles of law. The instances which occurred in this court, so far as I have obtained information of them, have been very few; and of those few instances none have been carried to a final decision, except the case of Hicks qui tam v. Cuddy. That was a conviction under the slave acts, for dealing with negroes; the sentence was reversed, because, by it, a fine of ten pounds had been imposed, and by an act subsequent to the revolution, the jurisdiction of magistrates was limited to five pounds. Here the justices manifestly exceeded the boundary fixed by law, and the judgment was reversed, for sufficient cause apparent on the record. In South Carolina, the case of Zeylstra v. The Corporation of Charleston, arose upon a motion for a prohibition. It appeared that the court of Wardens had given judgment against Zeylstra for one hundred pounds, though the jurisdiction of that court was expressly limited to twenty pounds. Here the limitation of jurisdiction had been exceeded, and for this cause a prohibition was granted.

56 \*To prove that a certiorari does not lie to review the merits, but merely to ascertain whether the subordinate limited jurisdiction has exceeded its jurisdiction, I shall cite, in the first place, the case of the King v. Morely, 2 Burr. 1040, which was a conviction of a Methodist preacher, upon the conventicle act, 22 Charles 2, c. 1. The objection was, that "it was alleged that the defendants were subjects of this realm, which is an essential requisite. The court were unanimously of opinion that a certiorari ought to issue. A certiorari does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds. The jurisdiction of this court is not taken away, unless there be express words to take it away; this is a point settled. Therefore a certiorari ought to issue, and after a return shall be made to it, you will be at liberty, and it will be open to you, to move to supersede it, if there should appear reason for the court's so doing."

Rule made absolute for a certiorari.

In all cases of special limited jurisdiction, so much must be set forth on the record as will show the jurisdiction. Jurisdiction cannot be presumed, where the authority is limited or special. In the case last cited,



there was a deficiency of jurisdiction apparent on the record.

The King v. Whitbread, Douglas Rep. 530. This case came before the court, on a rule to show cause why a certiorari should not issue, to remove a conviction by the commissioners of excise. Two objections were made; 1st. That the power of granting a certiorari was expressly taken away by the statute which authorized this conviction. 2d. That a certiorari will not be granted to review the facts. Lord Mansfield said, "We are all of opinion that in this case a certiorari does not lie; but if it did, it must be granted upon cause shown, and as the affidavits in support of the present application do not proceed upon any alleged want of jurisdiction, but contain objections to the conviction on the merits,

the court would not grant the certiorari, if they had power to do \*it, for those objections are more properly the subject matter of appeal, and the defendant has not chosen to resort to that remedy."

To obviate the force of this adjudication, it may be answered, that in the case cited there was another mode of redress by appeal, which does not exist under our judicial system. To such an argument the correct reply is obvious. An inconvenience arising from defects in a judicial system can only be removed by the legislature, and it is not competent to any court of law to extend its jurisdiction, for reasons drawn merely by inconvenienti.

I shall cite another case which recognises and confirms the doctrine laid down in the King v. Whitbread.

The King v. Abbot, Doug. 534. This was a conviction by two justices upon a statute of 11 Geo. 1, for harbouring tea and spirits. On a rule to show cause why a certiorari should not issue, Mr. Wallace showed cause, and contended, 1st, that as the affidavit on which the rule was obtained went only to the merits, denying the truth of the charge the court, if they had the power of granting a certiorari, would not do it, an enquiry into the merits not being competent to the court. Lord Mansfield,—"The second objection is, that if there were a power in the court to grant it, in their discretion, they ought not to do it upon the present occasion, because the question is upon the merits, and not to the jurisdiction. The motion has been made, not on an objection to the jurisdiction, but to the merits, and in Rex v. Whitbread, the court thought that would have been sufficient reason for not granting a certiorari if it had not been otherwise competent. We all adhere to that opinion." Rule discharged.

By the authorities, it appears to me, that the impression under which I acted, in the first instance, with regard to the controlling power of the superior courts, is positively sanctioned. That the only ground for the exercise of that controlling is want or transgression of jurisdiction, indicated upon the face of the proceedings. To prove the justice of my impression, and of

the sentiments entertained by \*my colleagues, on this question, it is only necessary, in a few words, to test the case of Roe, by these adjudications. The conviction passed for inflicting a fine of fifty dollars, under the express authority and duty prescribed by a legislative act. The questions, what facts were adduced in evidence against the delinquent, and what were the legal inferences by our body from those facts, are beyond the reach of any controlling or appellate tribunal; whether Mr. Roe, or the vessel in which he had arrived, came from a port infected with a contagious disease or not; whether the port of Jamaica was actually infected with a contagious disease, or whether only suspected to be infected, were facts exclusively to be decided by this body, to whom alone the legislature had committed the power of adjudicating upon them in cases when we might elect to adopt the summary mode of procedure, pointed out by the act.

If questions of this nature, under laws calculated and intended for immediate coercive protection, are to be arrested by an appellate tribunal, in their progress and upon their merits, where is the benefit of a corporation, or of any summary tribunal? Perhaps no instance could have intervened by which the justice and propriety of the doctrine which I have undertaken to prove, and of the right we contend for, could have been so strongly exemplified, as this case of a conviction under the quarantine laws. The legislature had ascertained from experience, that the deliberate mode of prosecution, provided by the original act of 1793, was not adequate in its coercion to the important mischief. They therefore by the act on which this conviction was founded, authorised the corporation to impose a fine in a summary way, for violations committed within this port, or any of the inlets north of Ossabaw. If it had appeared either by the proceedings, or affidavit of the offender, that the offence was committed beyond those local limits, the want of jurisdiction in the corporation would have afforded ground for prohibition.

I cannot take leave of the present discussion without making \*a remark and producing an authority to evince the futility of one objection against Roe's conviction, made by the attorney, who applied for this certiorari; "that the law is unconstitutional, because the person accused is entitled to a trial by jury." I do not bring this objection into view for the purpose of investigating the constitutionality of that act, or the power of a judicial tribunal, to decide whether it be constitutional or not. It is my purpose to prove, that, upon this occasion, or upon an application for a certiorari, or any other summary appellate proceeding,—no such question can be decided. That, on the contrary, the validity of any law or ordinance by which an accused person may be convicted by the corporation, can only be tested by a regular legal remedy, according to the usual course of procedure in an

action at law. It is a well settled principle, that the validity of a by-law cannot be questioned upon the return of a process, or in any summary way. If so, it follows a fortiori, that the legal or constitutional validity of a legislative act, by which a special authority is delegated to a corporation, cannot be decided on in any summary way. 2 Burr. p. 775, *Ballard v. Bennett*, on showing cause against a motion for a procedendo to the mayor and aldermen of the city of Worcester.

Lord Mansfield. "This is an action upon a by-law, and comes removed from a corporation in the country, upon the return of a habeas corpus; and the whole question at present, is, whether the court can enter into the consideration of the validity of the by-law upon the return? There is a settled course and form of proceedings in cases of this nature, of which there are many thousand instances; and yet, though there be such numbers of instances of this kind, there is not a single one where the court has ever determined the validity of a by-law on the return, excepting in London. The validity of this by-law is not to be disputed upon the return, but in the ordinary course of proceeding in the like cases, viz: by the plaintiff's declaring here, and the defendant's demurring to it, if he thinks proper. It never has been done in this summary way upon the return, nor  
60 ever attempted or \*thought before, and therefore we ought not to do it now. The proper course is settled: it must be by declaring here; and the defendant may demur if he has any objection to the by-law." Mr. J. Dennison was of the same opinion, and said, "this was an attempt to get at the opinion of the court extra-judicially." Mr. Justice Paster said, "let the plaintiff declare here." Mr. J. Wilmot said, "he had searched very diligently, and could find no instance (except in London) where the court had entered into a question upon the validity of a by-law, on the return; therefore he was clear that the court were not authorized so to do."

It may be asked, Wherein consists the great certainty of a legal decision upon any question of this nature by formality of procedure, than under the return of a summary process? It consists of that gradation of courts which forms one of the most precious and invaluable features of British jurisprudence. A principle which effectually secures the rights of persons and of property against illegal or erroneous adjudications. There, if the validity of a by-law is denied, instead of being decided summarily by a single judge, however brilliant his talents and profound his legal knowledge, it is made the subject of an action at law, either by declaration or plea; and an issue of law is formed upon it, by filing a general demurrer. Upon the judgment given, a writ of error lies to the next superior tribunal, and thence it may be carried to the house of lords. In this state, under our judicial system, we have no court of errors, but we

have an appellate jurisdiction in the last resort, our special jury. By adopting British principles in subordination to our own law, the courts are bound to refer all matter respecting the merits, as well in point of law, as fact, to a jury. There is, in our proceedings, a petition, process, and answer. But no pleading beyond these can go upon the record; and these, says the act, must be submitted to a jury for their verdict.

I have thus stated to the court in as perspicuous a manner as I was able, the reason why I considered the judicial order as irregular, and why, upon the proceedings  
61 ings had under it, the \*presiding magistrate of this city is not chargeable with a contempt. I have, also, endeavored to explain and elucidate, by authorities, the ground of the impression hitherto entertained, and still remaining upon the minds of the corporation that this honourable court hath not jurisdiction to review or suspend their proceedings in the case of Walter Roe.

The arguments and authorities thus adduced are the result of my best judgment and investigation, upon the questions to which they relate. And although it must be admitted, that, after the researches and progressive attainments of more than twenty-five years in the science of jurisprudence, many errors may remain hidden under the veil of professional confidence and incorrect experience; at the same time it is hoped and expected, that the arguments which have been used will be developed with candor and liberality, and that their denunciation as erroneous, will be the effect of impartial and dispassionate judgment. Happily we live under governments of laws and not of men; a government in which difference of opinions does not constitute a crime, provided opinions are not expressed or entertained with motives or intentions hostile to the constitution and laws, or to legitimate authority. Of such motives or intentions, I believe it unnecessary for me to declare a disavowal, either for myself or my brethren in office. Our attachment to the government is manifested by our general deportment, and more especially by our continual services, in the corporate office.

Conscious that the magnitude of the questions, to be decided by a single judge, will be duly weighed, we leave the matter with the court, in full confidence that the constitution and law of the land will be the only rule of decision, and will ultimately prevail.

By JONES, Judge.

This is a motion for an attachment against John Y. Noel, mayor, for a contempt in directing the city marshal, by an order of the said John Y. Noel, to take a bond and security from one Walter Roe, for his appearance personally before  
62 \*the city council; by which warrant the said Walter Roe was again arrested, after the proceedings of the city



council against the said Walter Roe, for a fine inflicted on him under the quarantine law of this state, by the said judge of the Superior Courts; and also, for an attachment against Charles Cope, city marshal, for a rule to show cause why an attachment should not issue against him for a contempt in arresting one Walter Roe, by order of John Y. Noel, Esq. mayor of the city of Savannah, after the proceedings of the city council, against the said Walter Roe, for a fine inflicted on him under the quarantine law of this state had been stayed or suspended by the said judge of the Superior Courts. The fact appeared from the records, and were confessed by the defendants, but it was contended that the order of the Superior Court was irregular, it should have been served on the mayor, not on the recorder; that the Superior Court had not jurisdiction of the case; that a Superior Court cannot stay proceedings of an inferior court, but by some judicial writ; and that the corporation is not a court of record.

These point have all been considered and decided by the court in the case of Walter Roe against the Mayor and Aldermen of Savannah on the application for a certiorari, therefore the only question to be now considered is, whether the order of the mayor and the proceedings of the marshal thereon be a contempt in either or both of them. In enumerating the contempts that are punishable by attachment, Blackstone in the 4th vol. of his Commentaries, p. 285, recites, "These committed by any other person under the degree of a peer, and even by peers themselves, when enormous and accompanied with violence, such as forcible rescues and the like; or when they import a disobedience to the king's great prerogative, writs of prohibition, habeas corpus, and the rest; some of these contempts may arise in the face of the court, as by rude or contemptuous behaviour, by obstinacy, perverseness, or prevarication, by breach of the peace or any wilful disturbance whatsoever; others in the absence of the party; as by disobeying or treating with dis-

63 respect the king's writ, or the \*rules or process of the court, by perverting such writ or process to the purposes of private malice, extortion, or injustice, by speaking or writing contemptuously of the court; or judges, acting in their judicial capacity, by printing false accounts, or untrue ones, without proper permission, of causes then depending in judgment, and by anything, in short, that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost among the people." And in 2 Hawkins' Pleas of the Crown, 426, Sect. 28, "There is no doubt," says he, "but that justices of the peace, or commissioners of the sewers may be punished for proceeding in a matter before them, after a certiorari delivered to them, or the judge of a spiritual or civil law court, for proceeding in a cause, after notice of a rule to show cause why a

prohibition should not issue." Sect. 29. "Also justices of the peace may be punished in the manner above mentioned, for acting in a contemptuous manner against the determination of the courts of king's bench." Sect. 33. "For disobeying other writs wherein the king's prerogative or the liberty of the subject are nearly concerned." And after reciting cases in which attachments will lie against peers, he says; "However it is certain that all other persons are liable to an attachment for contempt, all the particular instances whereof, it would be useless to enumerate."

The most remarkable instances of contempts seem reducible to the following heads, 1st. Contempt for the king's writs. 2d. Contempts in the face of the court. 3d. Contemptuous words or writings concerning the court. 4th. Contempt of the rules or awards of the courts. 5th. Abuses of the process of the court. 6th. Forgeries of writs, and other deceptions of the like kind tending to impose on the court."

As to the objection, that the mayor had not personal service of the order; it appears that a copy of the rule or order was regularly served on the recorder, who appeared before the court in obedience to the same rule or order, and this is all the notice necessary in conformity with the practice

64 \*of the courts for many years past.

But the rule or order in the case of Roe was also served on the marshal, who held the execution issued by the clerk of the city council against the said Walter Roe, and it appears by the order of the mayor that the rule or order of the judge of the Superior Court was delivered to the said mayor by the said marshal. The order of the said John Y. Noel, mayor, directing the marshal to take a bond with security from the said Walter Roe, in contravention of the order of the judge of the Superior Court, laid before the said mayor by the said marshal, is a disobedience of the order of the said judge; and that part of the said order which expresses doubts as to the power of the judge to make an order for suspending the proceedings of the corporation, and referring it to the corporation to decide whether their proceedings should be subject to be suspended by a judge of the Superior Court or not, is treating with disrespect the said rule or order of the judge of the Superior Courts. This is the second instance in which the proceedings of the Superior Courts have been arrested and suspended by the said John Y. Noel, mayor, and in the first case to the great interruption of public justice. And if the mayor of the city of Savannah were permitted to question the validity of the proceedings and powers of the Superior Court, and disobey its rules or orders, every inferior officer in the government would have an equal claim to do so; and the Superior Court would cease to deserve that name. Upon the whole, I am, after mature consideration, of opinion, that the said order of the said John Y. Noel amounts to a contempt, and the said Charles Cope, marshal of the city of Savannah,

having, on the 21st of August last past, received a bond with security from Walter Roe, in obedience to the rule or order of the judge of the Superior Courts for his appearance before the said judge on the 23d of the same month, and having on the day following the date of the said rule or order, that is to say, on the 22d of the same month, arrested and detained in his custody the body of the said Walter Roe, in disobedience of the rule or order of the said judge, notwithstanding \*he had the bond with security from the said Walter Roe for his appearance as aforesaid, is also guilty of a contempt. It is therefore ordered by the court, that the rule be made absolute.

And the parties being present, the sentence imposed upon the said parties by the court, for their contempts in disobeying the order of this court, is as follows: That the said John Y. Noel do pay a fine of fifty dollars, and that the said Charles Cope do also pay a fine of ten dollars, and that the said John Y. Noel and Charles Cope do stand committed until the said fine be paid.

Charlton, Att'y Gen. in support of the rule for the attachment.  
Noel, against it.

Minutes of Superior Court, letter F. p. 155.

66 \*Joseph Davis v. Thomas Scott.

Chatham County, January 1806.

**Insolvent Debtors—Liability of Property to Satisfy Judgment.**—Although the defendant had taken the benefit of the act for the relief of insolvent debtors, yet a judgment may be obtained against him, and property required by the defendant be made subject to such judgment.

Mr. Stites, on the part and behalf of the defendant, objected to this case going to the jury, stating, that the defendant had been admitted to take the benefit of the act for the relief of insolvent debtors, and was, therefore, discharged from this debt, and that therefore no judgment ought to be rendered against him.

Mr. Cuyler, for the plaintiff, contended, that although the defendant had taken the benefit of the act for the relief of insolvent debtors, yet a judgment may be obtained against him, and property required by the defendant be made subject to such judgment, notwithstanding the person of the defendant could not be taken in execution; and the court, being of opinion with the plaintiff's counsel,

It is considered and ordered, that he do proceed in the cause.

Verdict for plaintiff.

Cuyler, for plaintiff.

Stites, for defendant.

Minutes of Superior Court, letter F. p. 158.

67 \*The State v. John Stewart.

Chatham County, January 1806.

**Perjury—Records of Inferior Court—Admissibility as Evidence.**

It being stated by the attorney general

that an affidavit and a replevin bond thereupon of the said John Stewart, in the case of Joseph Welcher, administrator of the estate and effects of Elizabeth Shick, deceased, which affidavit and replevin are filed among the records of the inferior court, and are essential evidence on a bill of indictment to be preferred against the said John Stewart for perjury. Whereupon it is ordered, that the clerk of the inferior court do deposit with the attorney general the said documents, to be used as evidence aforesaid.

Minutes of Superior Court, letter F. p. 224.

68 \*Leighton Wilson v. Owen Hughes.

Chatham County, January 1806.

**Caveat—Appeal to the Superior Court, from the Court of Ordinary.**

A paper writing, dated the 2d January, 1805, purporting to be the last will and testament of Adam Mackay, deceased, signed and sealed, and having the names of three witnesses thereto subscribed, was proved in the usual form, on the 5th March, 1805, before the Court of Ordinary, by two of the subscribing witnesses. It appears that a caveat was filed on the 9th day of February preceding, against the establishment of said paper writing, by J. Cuyler, Esq. attorney for Leighton Wilson, who produced another paper writing, dated the 4th April, 1802, also purporting to be the will of the deceased, and alleging, that the paper dated the 2d of January, 1805, was fraudulent. It also appears by the certificate of the clerk of the court of ordinary, that James Mackay, nephew of the late Adam Mackay, appealed from the decision of the court of ordinary. The parties being heard, and one of the subscribing witnesses to the paper writing of the 2d January, 1805, being farther examined in open court, at the instance of the caveator, and due consideration being had thereon, it is considered and ordered, that the said paper writing of 2d January, 1805, be established as the will of the said Adam Mackay, agreeably to the decision of the court of ordinary thereon.

Cuyler, for Applicant.

Mitchel, Bulloch, and Stites, for Respondent.

Minutes of Superior Court, letter F. p. 224.

69 \*Henrietta Horskins, and Peter H. Morel v. John Morel, Applicant for Letters of Administration of the Estate and Effects of Henrietta B. Jones, Deceased.

Chatham County, January 1806.

**Decedents—Who Entitled to Administration on Estate.**

—The caveatrix and the caveator, the appellant, claim in equal degree of affinity to the deceased, but the caveatrix claims a preferable right of greater interest, being residuary legatee of one quarter of the estate, real and personal. HELD, the



order made in this case by the court of ordinary, granting administration, with the will annexed, to the caveatrix is confirmed.

JONES, Judge.

It appears that the court of ordinary did, on hearing the parties in this case, order, that letters of administration (with the will annexed) of the estate and effects of Henrietta B. Jones, deceased, be granted to Mrs. Henrietta Horskins, upon her giving bond with Doct. John Irvine and Edward Harden, in the sum of ten thousand dollars. From whose decision Peter Henry Morel entered an appeal. On the part of the applicant it is alleged: First. That he is nearest of kin to the said Henrietta B. Jones. Second. That he is principal surviving heir of the said Henrietta B. Jones; and Third. That Zachariah Horskins, late husband of the said Henrietta Horskins, and administrator of the estate of Henrietta B. Jones, committed (in his life time) waste on the estate of the said Henrietta B. Jones. It would be, therefore, improper to grant administration to his widow, who, in all probability, will be administratrix of her husband, the said Zachariah Horskins; and on the part of Henrietta Horskins it is contended, that, admitting she stands in equal affinity with Peter Henry Morel to the deceased, she has a preferable right to the administration, because of her greater interest arising under the will. That she is residuary legatee under the will, of one fourth of the estate, real and personal; that Mr. Morel has no original interest, and that, in regard to his secondary interest, in virtue of his right to a distributive share of the lapsed legacies, Mrs. Horskins standing in the same degree of affinity, her interest

70 must be increased in an equal ratio \*with his, on this ground, and probably in greater from the circumstance of her being residuary legatee. The waste, alleged to have been committed by Zachariah Horskins, in his life time, is denied; and it is stated he made a will, and appointed an executor other than the said Henrietta Horskins. It is also contended, that administration follows the interest, and that Mrs. Horskins is entitled to preference, in consequence of her possessing the greater interest. For that our own statute directs, that the rules, relating to distribution, shall have equal application in granting administration, and refers cases not specially provided for, to the course of decisions to common law. Dig. 217. That by the law of England, if two be in equal degree of affinity, the ordinary may grant to which he pleases. 2 Tuck. Blk. 604. But this is to be understood as between applicants, whose claim rests wholly upon their affinity. For it is laid down, that administration must be granted where the estate ought legally to go. 4 Coke 51, cited in 3 Mod. 63; Tollers' Law of Errors, 85-87.—And farther, the reason why administration is granted to the next of kin, is, the presumption that the deceased intended to prefer him, and this presumption is destroyed

where there is a residuary legatee. 11 Viner, Abridged, 92, 182, et note Wood, Inst. 349.

If the executor refuse or die intestate, administration is to be granted to the residuary legatee, in exclusion of the next of kin, Price v. Parks, 1 Sid. 280; Thomas v. Butler, 1 Vantrie, 219, cited in 3 Bacon, 55 et vid. Godolph, 230.

The caveatrix and caveator, in this case appellant, claim an equal degree of affinity to Henrietta B. Jones, deceased, but Henrietta Horskins claims a preferable right, of her greater interest, for that, under the will she is residuary legatee of one quarter of the estate real and personal. The precedents cited and arguments used by her counsel demonstrate this right. Wherefore the order made in this case, by the court of ordinary is confirmed.

Harris, for Applicant.

Davis and Berrien, for Respondents.

Minutes of Superior Court, letter F. p. 225.

71 \*Joseph Clay v. James Jackson, Applicant for Letters of Administration on the Estate of Doctor James B. Young and Wilson and Young, Deceased.

Chatham County, January 1806.

Administration—Who Entitled to.—The person entitled to the estate is entitled to administration also.

JONES, Judge.

This is an appeal by the caveator, Joseph Clay, from the decision of the court of ordinary, made on the 5th day of November last.

Facts stated:—

Doctor Young, divorced an estate from his father William Young; to which estate he made additions in his life time. In 1791, Doctor Young intermarried with Elizabeth Clay. In 1800, Doctor Young died intestate, leaving a widow and child. In October, 1801, the child died, under age, intestate and without issue. Mrs. Young, the widow, administered, and, in 1804 died, having first made a will, and appointed the Reverend Mr. Clay her executor. General Jackson claims administration in right of his wife, who is the sister of Doctor Young. The Reverend Mr. Clay claims it as the executor and brother of Mrs. Young the widow of Doctor Young. It is contended on the part of General Jackson, that it is not at present of great importance to consider who is entitled to the estate which Doctor Young left; if it was necessary, it might be contended, that no plenary interest vested in Mrs. Young, or their child at the time of the death of Doctor Young, but in law, may be considered as never vesting until an actual distribution. Be that, however, as it may, there is, there must be, a property of Doctor Young unadmin-  
72 istered, \*there are debts to collect, and to pay, which requires an administration, de bonis non. That General

Jackson, in right of his wife, who is next of kin to Doctor Young, is entitled to the administration, 1st. By your own statute, passed 23d December, 1789, Dig. 217. And 2d. By the common law. In this view of the subject, two principles, they contended, may be laid down, 1. That the executor of an administration cannot be in that the representative of the first intestate; to establish this point, see 2 Bacon, Abr. 385, 386; 11 Viner, Ab. 67, 107. 2. That administrator de bonis non is to be granted to the next of kin, to the first testator, or intestate, vide 2 Bacon, 386; 3 Dyer, 372; 2 Shower, 399; 1 Vernor, 200. And on the part of Mr. Clay it is said, 1st, That the first subject of inquiry is, in whom did the estate of Doctor Young vest, on his death, having died intestate. 2. It is contended, that the whole estate, real and personal, vested in his widow and son. 3. That the law settles this point beyond dispute. The words of the act of the 23d December, 1789, are clear and explicit. Dig. 217. That under this law Mrs. Young became entitled to one moiety of Doctor Young's estate, and her son to the other moiety. That the interest thus vested was an absolute and indefeasible interest, both as to the real and personal property. It was no life estate, or estate which ceased on the death of Mrs. Young. It was fee as to the land, and an absolute unqualified interest in the personal property, which descended to her representatives, or the legatees under her will. 2. That the child having died shortly after the father, also intestate, and without issue, the next question is, who inherits the child's share? That this point is equally clear under the law. The law gives it to the parent, who was Mrs. Young. Dig. 217.

That by the death of the child the whole estate vested in Mrs. Young, and was subject to her disposal, to give to whom and as she pleased. That Mrs. Young made a will, as she had a right, and her disposition of the property is binding in all courts of justice. Under these circumstances it is

enquired, who is entitled to the unadministered estate of Doctor \*Young?

73 The person entitled to the property? or the next of kin? And it is contended, that these points are indisputable, both from reason and upon the authority. 1. That administration shall be granted to the person entitled to the estate. 2. That administration shall not be granted to a person not entitled to the estate, though the nearest of kin, or possessing most of the blood of the deceased. The person entitled to the estate shall have the administration. The estate of Doctor Young having vested in Mrs. Young, the property on her death passed to her representatives. The same rules to be observed in granting administration as respects the distribution. The law of itself decides the point. Administration follows the right of distribution. General Jackson is not entitled to a distributive share, either of Doctor Young's estate or of the widow, Mrs. Young. Mrs.

Young succeeded to the estate of Doctor Young, and her representatives (not Doctor Young's) succeed to the estate. This is also the clear law of England, to which our law adheres very strictly. The persons entitled to the estate shall have the administration, because most interested in taking care of the property. 2 Eq. Ga. Abr. 423; Pl. 5, 425; Pl. 15.

A. makes C. executor and residuary legatee; B. also makes C. executor without the surplus. C. dies intestate. A.'s personal estate shall go to the administrator of C. but B.'s shall go to B.'s next of kin, who shall have the administration. 11 Viner, 88 pl. 25, 3. If a son dies intestate, the father is entitled to the whole of the personal estate, and to administration, and if the father dies before administration is granted, administration shall be granted to his representative, for the estate was an interest vested; for the court regards the property in granting administration. 11 Vin. 88, pl. 25; 1 Calls. Rep. 1; Cutchin v. Wilkinson. This case was decided in the court of appeals in Virginia in 1797, and is an exact resemblance of the case before the court.

And here administration followed the property, and was granted to the representative of the person last entitled, and

74 \*not the next of kin of the first intestate. Where a child dies intestate, administration shall be granted to such persons as legally represent the child. A father died intestate leaving a son, who died intestate; administration shall be granted to the next of kin to the son, and not to the next of kin to the father. 3 Modern, 58. For by the stat. 22 and 23 Charles, a right is vested in the child. Swinb. 224. 2d. Administration shall not be granted to the next of kin, if not entitled to the estate. Where there is a residuary legatee, administration may be granted to him, in exclusion of the next of kin, if the executor refuses or dies intestate. 2 Bl. 509. The statute of distributions passed 23d December, 1789, "that when any person, holding real and personal estate, shall depart this life intestate, the said estate real and personal shall be considered as altogether of the same nature and upon the same footing. So that in case of there being a widow or children, or child, they shall draw equal shares thereof. If the father or mother be alive, and a child dies intestate, and without issue, such father, (or mother, in case the father be dead, and not otherwise,) shall come in on the same footing as a brother or sister would do. Dig. 217, Sec. 1; and by the second section of the same statute, it is also declared, "That the same rules shall obtain in regard to the granting letters of administration, or intestate estates as before mentioned, for the distribution thereof; and should any case arise, which is not expressly provided for by this act, respecting intestate estates, the same shall be referred to, and determined by the common law of this land, as it hath stood from the first



settlement of this state, except only, that real and personal estate shall always be considered in respect to such distribution as being precisely upon the same footing." The statute is clear and explicit; and in addition to it, the precedents cited, and the arguments urged by appellant's counsel, are conclusive. They prove, that the person entitled to the estate, is entitled to administration also; and consequently, that the applicant has no title.

75 \*Therefore, it is considered and ordered, That letters of administration, *de bonis non*, of the estate and effects of the said James Box Young, deceased, be granted to the Rev. Joseph Clay, on his giving such security as shall be approved by the Court of Ordinary.

Judgment reversed.

Woodruff, for Appellant.

Mitchell, Bulloch and Harris, for Respondents.

Minutes of Superior Court, letter F. p. 232, 259.

Chambers, 12th April, 1806.

76 \*Ex Parte Henry Putnam.

Chatham County, April 1806.

Before JONES, Judge.

**Justices of Peace—Jurisdiction.**—A justice of the peace has no jurisdiction to try a case respecting title to lands. Hence a writ of prohibition will lie to such court in action of forcible entry and detainer.

Exceptions taken by Henry Putnam to the proceedings had before William Smith, a justice of the inferior court of Chatham county, and John Pooler, a justice of the peace of said county, on a claim made by Eliza H. Scofield against the said Henry Putnam, for a forcible entry on the 4th of March last, on lot No. 37, Washington Ward, city of Savannah.

1. Because there is no such power, authority, usage, or custom, known to the good people of this country, or its government, as that the said Eliza H. Scofield, is pursuing.

2. That the said justice of the inferior court, and justice of the peace, are assuming in this regard a power, not known to the common or statute laws of this state, and contrary to the constitution of the state of Georgia.

3. That the 1st section of the 3d article of the constitution declares; "The Superior Courts shall have exclusive and final jurisdiction in all cases respecting titles to land, which shall be tried in the county where the land lies." And that no tribunal or court whatever have a right of trying or deciding the titles to lands directly, or indirectly, save and except the Superior Court of the county where the lands are situated; for which cause the proceedings of the said justices are extra-judicial, illegal, and unconstitutional. For these, and many other causes of exception apparent on the face of their proceedings, the said Henry Putnam begs leave to except to

the proceedings of the said justices, and prays that a writ of prohibition may issue.

Stites, attorney for Putnam.

77 \*On reading the foregoing grounds of exception taken by Henry Putnam's counsel, as well as his affidavits of the facts, in a prosecution commenced by Mrs. Eliza H. Scofield against him for a forcible entry, on lot No. 37, Washington Ward, Savannah, before justices Smith and Pooler, and on said Putnam's application for a prohibition: It is ordered, that the said justices, and the party prosecuting before them, do show cause on Saturday next, the 19th instant, at the court house, why a writ of prohibition be not granted the said Henry Putnam, and that a copy of this order, be served on said justices, and party prosecuting; and that in the meantime all farther proceedings by, or before them, be stayed.

Chambers, 19th April, 1806.

On a rule to show cause, why a writ of prohibition be not granted to the said Henry Putnam, to stay the proceedings of the said justices against him for a forcible entry and detainer, prosecuted by Eliza H. Scofield; and the parties being heard, a belief was suggested, that a decision had been formerly made by judge Walton, upon the statutes against forcible entries, and in order to give time to search the records for that case, the decision on this motion is for the present postponed.

Ulterius Consilium.

April Term, 1806.

78 \*Ex Parte Henry Putnam.

Chatham County, April 1806.

The decision of this case having been postponed at the hearing, on the 19th instant, at chambers, on a suggestion that a decision on the statutes against forcible entries had been formerly made; but it being certified that search had been, and no decision thereon found, the court now said that although title to land could not be given in evidence to prevent restitution, yet it is a general rule, that an indictment cannot warrant a restitution, unless it find that the party was seized at the time. It must appear, what estate the party expelled had in the premises, otherwise it will be uncertain, whether any one of the statutes, relative to forcible entries extend to the estate, from which the expulsion was. The 5 Richard 2, chap. 7, the 15 Richard 2, chap. 2, and the 8 Henry 6, chap. 9, extend only to freehold estates, and the 21 Jac. 1, c. 15, extends only to estates holden by tenants for years tenants by copy of court roll, and tenants by elegit, statute Merchant, and statute Staple. 3 Bacon, 256, 257, cites *Rex v. Wanlope*, Say. Rep. 142. And by the constitution of this state, the jurisdiction of a justice of the peace is limited to civil cases, and not exceeding 3 dollars, 5 Sect. of Art. 3. And also by the 61st

Sect. of the "Act entitled an act to amend an act, entitled an act, to revise and amend the Judiciary System of this State," passed the 16th February, 1799, it is declared, "That no justice of the peace, shall sustain, or try any satisfaction in damages, for any trespass on the person or property of the plaintiff."

Thence it results, that justices of the peace can have no jurisdiction under the said recited statutes: and it is therefore ordered that a prohibition do issue.

Stites, for the rule.

Harris, against it.

Minutes of Superior Court, letter F. p. 221.

79 **\*Smith Executor, v. Neufville.**

Chatham County, April 1806.

Equity Practice—Discovery—Order of Publication.

It appearing to the court, that the object of this bill, is to obtain a discovery of certain matters, relating to a suit at law, therein this defendant is plaintiff, and that the defendant is not to be found within the state, so that the process cannot be served upon him, to compel an answer to the equitable matter aforesaid.

It is ordered, that unless the said defendant appear, and answer on, or before the first day of the next term, that the bill be taken pro confesso; and that in the mean time the proceedings at law between the parties be stayed: and it is also farther ordered, that a copy of this rule be served on the attorney for the defendant, in his suit at law, and be also published in one of the gazettes weekly until the 21st day of April next.

Lawson, for Complainant.

Stites, for Defendant.

Minutes of Superior Court, letter F. p. 276.

Chambers, 23d May, 1806.

Before JONES, Judge.

80 **\*Ex Parte George, a Free Man of Colour.**

Chatham County, May 1806.

**Negroes—Right to Appeal to Executive.**—A negro, whether he be a free man or a slave is equally entitled to the benefit of an appeal to the executive.

Upon the petition of Benjamin Burroughs and Oliver Sturges, on the part and behalf of George, a free man of colour, stating, that the said George is now in confinement, in the common jail of the county of Chatham, under sentence founded upon a conviction for inveigling, or attempting to inveigle a negro; which said conviction was had before Balthazar Shaffer, Ulric Tobler, and John Pooler, Esqrs. justices of the peace of the said county, and a jury by them, selected; and farther stating, that the said conviction and sentence are illegal and void;

and therefore praying, that a certiorari may be granted to remove the said proceedings of the said justices and jury; and the facts in the said petition stated having been supported by the said Benjamin Burroughs and Oliver Sturges, thereto attached; It is ordered, that the justices and their officers, have notice to attend before me, at the court house, on Thursday the 29th instant, to show cause, if any they have, why a certiorari should not be granted; and that a copy of this rule be served upon each and every of the said justices, and the constable, or constables by them empowered to execute the said sentence, and that notice of the ground on which this application is founded, be served upon each and every of the said justices, at least five days before the return of this rule: And it is likewise ordered, that the farther execution of the said sentence, and all other proceedings of the said justices and constables, be stayed until the determination of the aforesaid application, upon the return of this rule: and that the jailor of this  
81 county, do now \*retain in his custody and safe keeping the said negro, George, until further ordered.

May 29, 1806.

On the return of the rule granted, upon the application of Burroughs and Sturges, in behalf of a free negro, George, dated 22d May instant, it appearing that the grounds of exceptions had not been served on the justices in conformity with that order; the argument therefore in this case is postponed until Tuesday next at 10 o'clock; And it is further ordered, that the moving counsel in this rule furnish the attorney general with a copy of the said grounds, as he appears in behalf of the magistrates.

Chambers, Tuesday, June 3, 1806.

Agreeably to the order of the 29th of May, Mr. Charlton, Attorney general, was served with the following grounds of exceptions to the proceedings of the justices of the peace, upon which a certiorari, as directed by the constitution, is prayed for:

1. Because, the jury who tried the case, or some part thereof, were not freeholders. (a)

2. Because, the justices did not suspend the execution of the sentence, and lay a statement thereof before the governor after security tendered, but proceeded to execute the same.

3. Because, the sentence is not warranted by the 12th sect. of the act entitled "An act for ordering and governing slaves, &c." passed 10th May, 1770, or by another section of the same, or of any other act in force in the state of Georgia. (b)

82 \*4. Because, justices of the peace have no jurisdiction in the trial of criminal cases. (c)

(a) Act of General Assembly, passed 10th of May, 1770.

(b) Ibid.

(c) Constitution of Georgia, Sect. 1, Art. 3, Marb. and Crawford, Dig. 27.



Stites, attorney for prisoner.

Charlton, Attorney General, in behalf of the Magistrates.

It being a general impression, that the principal act of 1770, is not only the basis of the right, but the only legal authority by which our negroes are held in slavery, it is deemed proper, in the first place, to examine, how that impression is well or ill founded. If it is established as the result of that investigation, that the act of 1770 creates the only legal tenure by which the negro is held in bondage, then that act becomes a very delicate and sacred thing, and consequently too much caution cannot be used either in the discussion of its principles, or in the adoption of any measure or construction, which may tend to weaken those principles, or impede their operation. But if, on the other hand, the result of the investigation should demonstrate, that our system of slavery is guaranteed by compacts independent of the act of 1770; and that the right by which we hold the negroes in slavery would not be impaired, even if that act were repealed, then it is presumed, the court will feel less difficulty in giving a decision, which would directly, or in its consequences, shake a principle of that act.

There is no act, antecedent to the act of 1770, which either recognizes the system of slavery, or that declares the terms upon which a property may be had in the person and services of the slave. Before the passing of that act, however, the condition of the slave, as well as the rights of the master, were precisely the same as are designated and established by that act.

The act of 1770 was therefore passed out of abundant caution; for without that authority, the acquiescence of the people, in the measures adopted to procure  
83 slaves for the colony, \*the unconditional terms of the sale and purchase destroyed, are the principles of the common law applicable to those subjects; for, instead of things, persons were made the objects of property.

The laws of the mother country are enforced in the colony so far as they are applicable to a new state of things.

In England, things, and not persons, are the objects of property. 2 Blk. Com. 16; 1 Blk. Com. 423.

But the relations of the infant colony of Georgia, required an important innovation in this principle of the common law, and persons, as well as things, were the objects of property before the act of 1770.

The people of Georgia imported and purchased slaves upon the same terms that other colonies imported and purchased them; and in no other colony can a law be found, declaring the slavery of the negro to be of the absolute kind; because it was understood, that common consent, and the forms and manner of the purchase, as well as the necessity which introduced the system, rendered the slavery of the negro absolute and unconditional.

It is that kind of slavery which obtained in ancient Greece and Rome, and now among the Turks, and established upon the same principles. It would appear from these general observations, that the slavery of the negro was of the absolute kind antecedent to the act of 1770; and that, therefore, that act is only declaratory of what was before the law of the land.

The only difficulty which could have presented itself if that law had not been passed, would be, whether the offspring followed the condition of the mother or the father. On this point the civil and the common law are at variance; by the common law the issue follows the condition of the father; by the civil law, the condition of the mother. The act of 1770 adopts the civil law principle, which was the only principle in the abstract condition of the slave that remains to be legislated on, and in this particular only, is the act of 1770, as it respects our right to negro property, of any importance. 2 Blk. Com. 390; Litt. 187, 188, 11 St. Trials, 343.

84 \*There is no law (as I have been able to discover) of the state of Virginia, either in the provincial code, or her code since the revolution, which establishes a tenure by which negro property is held; yet the condition of the slave in that state is, and ever has been, unconditional and absolute, resulting from the manner of acquiring, as well as that kind of general understanding, which carries with it the force and authority of the most solemn written compacts.

We find the system of slavery as thus established, supported and recognised by a decision in England.

It was an action of Ind. Assmt. for a negro sold; and it was said by Holt, C. J., that a negro by entering England becomes free; but that a sale in Virginia, if properly laid, will support the action. 2 Salk. 666.

The common law itself is supported by that universal consent, by which the system of slavery could have been supported, and can now be supported without the interpolation of the act of 1770.

But there is a higher authority by which an absolute property in the slave is held.

It is declared, by the 2d section, 1st article of the constitution of the United States, "That representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to serve for a term of years, and excluding Indians not taxed three-fifths of all other persons." Here then is a recognition by this sacred instrument of the system of unconditional slavery; for as it has the distinction between the free man and the indented servant, the three-fifths of the other persons alluded to must consequently be those persons who are held in bondage, or a state of servitude different from that of the indented servant; which in

our country can be no other species of servitude than that which is attached to the unconditioned slavery of the negro.

In including the slaves in the rule 85 for the apportionment \*of direct taxes, they have considered them as inanimate matter, as things; and, therefore, as things, they may be acquired and transferred by deed, or without a deed, upon those general principles which govern all other kinds of property; thus, then it results, that common consent, and the mode of purchase, (which had no analogy to the relation of servant in the common law of England,) which considered the negro as a thing, gave the master an absolute property antecedent to the act of 1770, had never been enacted, or if it was now to be repealed, our absolute property in the slave would not be impaired, but exist in the same manner as is expressed in that act.

These positions and deductions may perhaps have little weight in the mind of the court; they however influence my mind, and enable me to investigate the principles of the act of 1770, with indifference and composure. 1st. The jury, or a part thereof, not freeholders. Vide Marb. and Crawford, Dig. 429; Sect. 8, Act of 1770.

This qualification of a juror is repealed, either by the negative words of the judicial act of 1770, or by evident implication. 5 Com. Dig. 248.

The judicial act of 1799 requires the same qualification in a juror, as the qualification of a vote for members of the legislature. Marb. and Crawford, Dig. 303.

That qualification is designated by the constitution of this state, which requires that the voters or electors of the members of the General Assembly should have attained the age of 21 years, paid taxes, and resided six months within the county. Marb. and Crawford, Dig. 29.

The act of 1799 is therefore negatively expressed, and upon that ground, is a repeal quo ad hoc of the act of 1770.

So if a subsequent act enacts a thing inconsistent with the former, it is a repeal of the former. 1 Blk. Com. 89; R. 11 Co. 63 a; 5 Com. Dig. 249.

It is highly inconsistent that a more dignified mode of trial, such as that the jurors on the trial of a negro should be freeholders, which necessarily carries 86 with it the probability, \*that there

would be more virtue and respectability among that class of citizens than could be found in any other class; when on the trial of a free citizen it is only necessary that his jury should consist of persons in every situation of life, who have just passed the bounds of infancy, had a precarious residence of six months, and paid thirty-one and a quarter cents for his poll tax!

The qualifications of the judicial act of 1799, founded as it has been shown upon the 1st sect. of the 4th art. of the constitution, must be considered, therefore, upon this ground of inconsistency, as attaching themselves to all jurors, whether sitting

upon the trial of the free man, or the slave.

In opposition to this maxim, another may be cited, to wit: "a statute which treats of persons or things of an inferior rank, cannot, by any general words, be extended to those of a superior." 1 Blk. Com. 87. And, therefore, as the act of 1770, speaks of slaves, it cannot be interfered with by the act of 1799, which treats of free citizens. The converse of the proposition is, however, true and legal, viz.: That a statute which treats of superiors, will include inferiors.

There is another maxim, if a statute concerns all persons generally, though it be but a special and particular thing, as a statute which concerns appeals, or assizes, or other particular action, is considered as a general law. 4 Co. 76 b.

The act of 1799, as a general law, must control the act of 1770, though the act of 1799 speaks of a particular thing, the trial by jury; but that particular thing concerns all persons, and therefore concerns the persons mentioned in the act of 1770.

2. Because the justices did not suspend the sentence upon security tendered.

The law certainly requires the justices to suspend the execution of the sentence, if good and sufficient security is tendered; the law also makes the justices judges of the sufficiency of that security.

Upon the ground of insufficiency it might have been rejected, for aught that appears upon the record. Non constat, that 87 \*sufficient security were tendered, and if it does not appear, it ought to be presumed that that kind of security was not tendered, for every thing is to be presumed in favour of the magistrate acting under the obligation of his oath.

The security might have been refused on another ground, viz.: That the person, or persons offering himself or themselves as security, refused to make it appear to the satisfaction of the justices, that they were amply sufficient for the sum required. Marb. and Crawford, Dig. 257. (a)

The exceptions offered to and overruled by the inferior jurisdiction, constitute the basis of the certiorari, and unless the ground appears among those exceptions, no judicial cognizance can be taken of it.

3. The sentence is not warranted by the 12th section of the act of 1770. (b)

(a) This power is delegated in the 5th section of the "Act more effectually to punish persons guilty of stealing horses, asses, or mules." It is not, however, confined to persons charged with that species of felony; for it declares, that in "all cases where bail is admitted the person or persons becoming security, shall, if required, make it appear to the satisfaction of the court, that he, or she, or they, are amply sufficient for the sum for which such bail is taken."

(b) Sect. 12. And be it further enacted, that the several crimes and offenses hereinafter particularly enumerated, are hereby declared to be felony, that is to say, if any slave, free negro, Indian, mulatto, of mustizoe, (Indians in amity with this government excepted) shall be guilty of homicide of any sort



This is decidedly the most formidable ground the counsel have taken, and is therefore open to a more particular examination.

88 \*It is contended, that as the punishment, in the conclusion of the section is affixed to slaves, (though in the previous parts free negroes are mentioned) it cannot by any construction apply to free negroes.

If the act is considered as involving all the principles of exposition, applicable to penal statutes, this ground of exception assumes a very serious aspect.

But this act is not to be expounded as a penal statute, it is to be construed most largely and beneficially for the purpose of carrying it more effectually into execution. It is so declared in the 45th section, Marb. and Crawf. Dig. 439.

If a liberal construction is to be given it, then we are to look for the intention of the legislature, without regard to the strict and literal expressions of the act.

Common usages, or practice, is a sound principle in the exposition of statutes, where the words of the statute create a doubt. *Rex v. Hogg*, 1 T. R. 728.

It has been the common usage and practice, to consider this section of the act of 1770, as equally applicable to free negroes, as to slaves.

Every statute ought to be expounded, not according to the letter, but according to the intent. 5 Com. Dig. 250.

It obviously was the intention of the legislature, to place the free negroes upon the same footing with the slaves, as to

89 \*the punishment inflicted by the 12th section of the act of 1770, for deluding and enticing slaves to run away. The free negro is so inseparably associated with the

upon any white person, except by misadventure, or in defence of his, or her own, or other person under whose care and government such slave shall be, or shall raise or attempt to raise any insurrection, or commit or attempt to commit a rape on any white person whatsoever, every such offender or offenders, his and their aiders and abettors, shall, upon conviction thereof, suffer death; or if any slave, free negro, Indian, mulatto, or mustizoe, (except as before excepted) shall, wilfully and maliciously, kill any slave or other person as aforesaid, or shall break open, burn, destroy any dwelling house, or other building whatsoever, or set fire to any rice, corn or other grain, tar kiln, barrel or barrels of pitch, tar, turpentine, rosin, or any other goods or commodities whatsoever, or shall steal any goods or chattels whatsoever, or delude and entice any slave or slaves to run away, whereby the owner of such slave or slaves shall, or would have lost and been deprived of such slave or slaves, any such slave or slaves, and his and their accomplices, aiders, and abettors, shall, upon conviction as aforesaid, suffer death, or such punishment as the said justices and jury shall, in their discretion, think fit. Provided, that such slave or slaves, shall have actually prepared provisions, arms ammunition, horse, or horses, or any flat, canoe, or other vessel, or done any other overt act whereby such their intentions shall be manifested. Marb. and Crawf. Dig. 430.

slave in that section, that, except a liberal construction of it is adopted, it is impossible to collect the intention of the legislature to be any other than that which has been stated.

If this ground is supported by a parity of reasoning, the free negro is exempted, and cannot be tried for an offence under the act of 1770; for the title of the act is confined to the "ordering and governing of slaves;" and, therefore, if one part is to be construed strictly, every other part must receive a similar exposition.

Influenced by the impression that many things must be supplied in the act of 1770, I have not taken advantage of the omission in the 8th section, which, if taken literally, is exclusively applicable to the case of the slave. Marb. and Crawf. Dig. 429.

Though that section is silent as to the free negro, yet it was certainly the intention of the legislature to give the same advantage of an application to the executive through the medium of his guardian, as is expressly given to the owner or trustee of the slave.

If the intention of the legislature is rejected as the leading principle of exposition, we shall never have done with the absurdities and omissions of this act.

The 21st section establishes the fee for an unfounded and malicious prosecution, known to be so by the magistrates at the time the punishment is inflicted and carried into effect. Marb. and Crawf. Dig. 432. This absurdity is rectified by transposition and exposition, according to the intent.

The context of the act authorizes the infliction of the punishment.

The act is to be construed, not upon the basis of that or this principle, but by all its parts. 1 Blk. Com. 59.

A free negro is not a member of a privileged order. He cannot surely commit crimes with impunity; but if this

90 \*ground of exception is maintained, he escapes all the penal consequences of the law, for as he cannot be tried as a free citizen, there is therefore no jurisdiction to which he is amenable.

Suppose a free negro strikes a citizen and wounds him grievously, can he be tried for that offence? No, says that gentleman moving for the certiorari, because the 23d section of the act makes no mention of a free negro. Marb. and Crawf. Dig. 433.

Suppose a free negro administers poison, is he punishable with death? No, the 13th section of the act speaks only of slaves, administering poison to any person or persons, whether free or bond. Ibid., 430.

No violence can be committed upon the principles of the law, by adopting the intention of the framers, of the act of 1770, as the leading rule of exposition. If any other rule is resorted to, the act is a carte blanche, as it affects free people of colour.

Policy demands it of us, that no other privileges than those which flow from an imperfect state of freedom should be extended to persons of colour, or free negroes, than

those enjoyed by slaves. The same kind of evidence, the same form of trial, should be established for one and the other. For, as soon as distinctions are attempted to be made in these respects, the free negro or man of colour, will begin to feel a dignity of character, and to affect rights highly incompatible with that distance at which he ought to be kept.

Humanity demands it of us, that all the omissions of the act of 1770 should be supplied, so as to bring the free negro within its operation, agreeably to the evident intention of the legislature; for, otherwise, as the law, upon a liberal construction, exempts him from all the punishments inflicted therein, the free negro becomes a perfect outlaw, whom one may knock on the head, or destroy as his caprice may dictate.

The free negro is not mentioned in  
91 the 12th section of the \*4th article of the constitution,(a) or in the act carrying into effect that section. Marb. and Crawford, Dig. 433, yet will it be contended that if a citizen wantonly kills or maims a free negro, or person of colour, that he is not subject to the punishment of the constitution and the law?

If reason and intention are not permitted to be our guides in the investigation of this subject, we get into a labyrinth, from whence we can never be extricated, unless a liberal construction is allowed us, as it seems to be expressly allowed by the law itself.

4. The justices have no jurisdiction in criminal cases.

It is scarcely necessary for me, I presume, to answer this ground. The inapplicability of it at the present discussion must be very obvious to the court; but not to be wanting in respect to gentlemen in passing over any of his objections, I shall barely and laconically observe, that the constitution of this state, upon which the exception is founded, was not made to establish the rights and liberties of slaves or free negroes; they are left at the disposal of the ordinary sovereignty. One farther remark may be added, as free negroes, persons of colour, and slaves, can derive no benefit from the constitution, so neither can they be included by any general principles within the pale of its provisions.

The object and ends of fundamental laws are, the organization of government, and the protection of the general rights of mankind. The slave is divested of all those rights, for which government is erected; how can you place him then, within the pale of the constitution? His life, and those rights, which are incidental to his

(a) Any person who shall maliciously dismember, or deprive a slave of life, shall suffer such punishment as would be inflicted in case the like offence had been committed on a free white person, and on the like proof, except in case of insurrection by such slave, and unless such death should happen by accident, in giving such slave moderate correction—Constitution of Georgia, Marb. and Crawford, Digest, p. 30.

condition, are subjects for the consideration of the legislature, whose business it is to form a distinct code for those purposes.

92 \*In these respects the legislature is omnipotent; (not being controlled by the constitution) may create a new jurisdiction, and delegate any powers its discretion may dictate.

PER CURIAM. The present is a rule to show cause, why a writ of certiorari should not issue to remove the proceedings had before the magistrates, and a jury, under an act entitled "An act for ordering and governing slaves in this province, and for establishing a jurisdiction for the trial of offences committed by such slaves, and other persons therein mentioned, and to prevent the inveigling and carrying away slaves from their owners, masters, or employers."

The grounds upon which this application is made, are as follows, viz.

1. Because the jury who tried the case, or some part thereof, were not freeholders.

2. Because the justices did not suspend the execution of the sentence, and lay a statement of the case before the government, after security tendered, but proceeded to execute the same.

3. Because the sentence is not warranted by the 12th section of the act, entitled an act for ordering and governing slaves, passed 10th May, 1770, or by any other section of the same, or of any other act in force in the state of Georgia.

4. Because the justices of the peace have not jurisdiction in the trial of criminal cases.

Stites and Berrien being heard in support of the rule, and Mr. Attorney General against it, after the most mature consideration, I am of opinion that a certiorari ought to issue.

Stites and Berrien, in support of the rule.  
Charlton, A. G., against it.

Minutes of Superior Court. letter E. p. 346.

93 \*On the return of the certiorari the court delivered the following opinion:

January Term, 1807.

After argument and mature deliberation, the court is of opinion, that the first ground of objection is sufficiently obviated by the testimony procured at the hearing, but the 2d and 3d grounds are considered as tenable. The negro George, whether he be a free man or a slave, is equally entitled to the benefit of an appeal to the executive, the refusal of which is the basis of the 2d ground. And if it appeared to the court as to the third ground, that the act under which the prisoner was convicted is deficient in not describing the punishment to be inflicted for the crimes specified in the 12th section, when committed by a free man of colour, it is unnecessary to decide upon the last ground.

Therefore it is ordered, that the said conviction and sentence be reversed, and set aside, and that the said negro George, be discharged from his confinement.



Minutes of Superior Court, letter F. p. 278.

94 \*Edward White, Esq. Escheator of Chatham County, v. Richard Wayne, Sen. Esq.

Chatham County, January 1807.

1. **Administration on Estate of Decedent Who Dies without Heirs—Subsequent Passage of Escheat Law—Effect.**—In 1796 Edward Ellington died intestate, leaving no heirs lineal or collateral entitled to his estate. Administration was granted on the estate to Richard Wayne, who by virtue thereof obtained possession of the personal estate of the deceased. In 1801 the escheat laws of the state of Georgia were passed. Upon a suit brought by the escheator in the right of the state, for the estate of the deceased, it was held that he was entitled to recover, since an administrator is merely an officer of the ordinary from whom his title to possession is derived and therefore if no relation can be found he is the trustee of the state.

2. **Escheat Laws—Retrospective Effect.**—The law regulating escheats, does not refer to crimes, pains, and penalties, and is therefore not within the meaning of the prohibition against *ex post facto* laws.

The bill in this case states, that the Rev. Edward Ellington, late of the city of Savannah, was in his life time, and at the time of his death, possessed of \$10,000; that he died in 1796, intestate, leaving no heirs lineal or collateral entitled to his estate; that in consequence of his thus dying intestate and without heirs, his estates became vested in the estate, by virtue of the escheat act of 1801. Laws of the state of Georgia, and a right accrued to the escheator to sue for the same in behalf of the state; that on the death of the said Edward Ellington, Richard Wayne, sen. obtained letters of administration on his estate, and by virtue thereof got possession of the goods and chattels and personal estate of the said Ellington, of the value aforesaid, or other great value; that the said Richard Wayne, sen. having thus possessed himself of the personal estate of the said Edward Ellington, refuses to account with the escheator for the same, and thereby defrauds the estate. The bill then prays for a discovery of the estate the said Edward Ellington died possessed of, and what part has come into his hands since Ellington's decease, &c. and for an account with the escheator in behalf of the state, touching the said estate.

To this bill the defendant, Richard Wayne, filed a special demurrer, and for cause assigned, that he became possessed of the personal estate of Edward Ellington, by lawful administration regularly obtained in 1796, which was previous to the escheat act, and of that possession obtained as aforesaid, he cannot now be divested by the retrospective operation of the escheat act.

95 \*Charlton, Attorney General,

Upon these pleadings, it is to be considered.

\*The principal case is cited in *Cook v. Walker*, 15 Ga. 467.

1. Whether the escheat law of 1801 can operate retrospectively, so as to bring this case within its operation, and,

2. What is the effect and nature of an administration upon principles of the common law of England and the statutory law of Georgia?

1. As a decision upon this case will involve principles of great magnitude to the interests of the state, and will in all probability establish a precedent, which will have the effect of governing and controlling all cases of a similar nature, which may hereafter occur; it is therefore proper that it receive from me as deliberate and as comprehensive an investigation as it is in my power to afford it.

Under this head, I shall examine the operation of the escheat system, as it obtains under the municipal code of England, and as it is altered, modified, and adopted by the statute law of Georgia.

Escheat is a creature of the feudal system, and resulted as a necessary consequence of the civil and military policy of that system. The personal and warlike merits and achievements of the feudatory procured him a donation of land from the chief, which was limited to him and his lineal descendants, on a failure of which the land resulted back to the lord, or chief, and was said to escheat; so it escheated if the blood of the tenant was stained by the commission of treason and felony. 2 Blk. Com. 72.

As it is not necessary however to trace the history of escheat to an age so distant, I will come at once to the law of escheat, as it is at present recognized in the British authorities.

The law of escheats is founded, says Mr. Justice Blackstone, upon this simple principle, that the blood of the last person seized in fee simple, is by some means or other utterly extinct and gone; and since none can inherit his estate, but such as are of his blood and consanguinity, it follows

as a regular consequence, that when 96 such blood is extinct, the inheritance itself must fail. Tuck. Blk. vol. 2. 345, 246; Co. Lit. 13 a.

Escheats are frequently divided into those proper defectum sanguinis, and those propter delictum tenentis; the one sort if the tenant dies without heirs, the other if his blood be attainted. Or, as the doctrine of escheats is very fully expressed in Fleta, dominus capitalis feodi loco hæredis habetur, quoties per defectum, vel delictum extinguitur sanguis tenentis.

When the tenant dies without any relations on the part of his ancestors; when he dies without any relations on the part of those ancestors, from whom his estate descended; when he dies without any relations of the whole blood; in all these cases the land shall escheat.

A monster, resembling the brute creation, cannot be heir to land, albeit it be brought forth in marriage. Bastards are incapable of being heirs; consequently if there be no other claimant, than such monsters or bastards, the land shall escheat.

If a man leaves no other relations than aliens, his land shall escheat to the lord. Com. Dig. tit. Escheat, vol. 3, p. 606, 607; Reeve v. Attorney General, 2 Atkins, 223; 2 Tuck. Blk. 248.

Thus it appears, that by the laws of England, the principle of escheat will apply, when first, the blood of the person last seized is extinct from the want of heirs agreeably to the rules and canons of descent; second, if his blood is attained, and third, if the claimant is a monster, bastard, or an alien.

The constitution of the United States, art. 3, inhibits a forfeiture, or corruption of blood by conviction, or attainder; escheats propter delictum tenentis are consequently abolished in this state, and every other state of the federal republic.

This is one grand principle of difference between the English and the American systems of escheat.

Further differences between the British escheat law, and the escheat law of Georgia, are now also to be considered.

The escheat law of the 5th December, 1801, Acts of 1801, p. 64, 65, section 2, enacts, "that where it shall appear,

97 \*that any person has died without will and without heirs, leaving property behind, that then and in that case, it shall be the duty of the escheator of the county, in which such person shall have died, to make inquiry of all the estate both real and personal, of which the deceased died seized and possessed: that a true statement shall be notified to the judge of the Superior Court, two months previous to the sitting of the court, who shall cause a jury to be sworn to make true inquest of all such supposed escheated property; that heirs shall have 12 months after such inquest and verdict therein, to appear and make their claim; and if no heir exhibits his claim within that time, the property real and personal of the deceased is escheated, is directed to be sold, and after necessary deductions the proceeds of such sale are to be paid into the treasury of the state: that if any person shall establish his claim, within 21 years of escheated real property, and within 5 years to escheated personal property, on an issue made up and tried, and certified by the judge to the government, he shall receive a draft on the treasury, for the amount paid therein, and by section 3, that the pretensions of any person claiming as an heir shall be heard without delay, and the property real and personal to be committed to him, to hold until the right shall be determined, or found for the state, or the claimant, the claimant giving security to prosecute without delay, and to render to the state the yearly value of such property, if the right be found for the state."

This mode of proceeding upon escheat, is variant from that of England; but the principles of the systems are still more variant.

Escheat in England fixes itself on real estate, here it embraces in its operation

real and personal property. But ever since the colonization of this state, real and personal property have been placed upon the same footing, as to almost every purpose.

Our ancestors brought over with them, all the laws of the mother country, which were applicable to our relations, \*among them was the common law principle of escheat, a principle coeval with the existence of Georgia.

Without any particular recognition of escheat, by statute, or edict, it is a law incidental to government, and tacitly introduces itself into the social systems and compacts of all civilized nations.

Upon principles of natural law, first occupancy gives a title to all derelict property. The institution of government, and the establishment of political rights, have superseded the doctrine of first occupancy, as subversive of the order and ends of society; and to prevent the feuds and contentions which would arise up between individuals for the first possession, all derelict property is given to the moral persons, or the sovereignty, for the use, benefit, and purposes of the public. Hence the principle of escheat.

A man dying without will, and without heirs, throws his property back into the common mass; it then becoming common property, and it is to be enjoyed by the community. Vattel. 105, 248, 249.

This is the law of nations, the law of England, and the law of America.

It cannot be denied, that the law of escheat was applicable to Georgia, when a colony, and that it was a component part of that system brought over by our ancestors. Marb. and Crawf. Dig. 400. If it was law then, it is law now; and if lands could only be escheated in England, land and personal property being placed upon the same footing in Georgia, personal property could have been escheated in Georgia, previous to the escheat act of 1801, which is therefore not introductory of a new law, but is cumulative of and declaratory of the common law principle which before obtained.

Statutes are either declaratory of the common law, or remedial of some defects therein. Declaratory, where the custom of the kingdom is almost fallen into disuse, or become disputable, in which case the parliament has thought proper in perpetuum rei testimonium, and for avoiding all

99 doubts and difficulties, to declare what the common law is, and \*ever has been. Thus the statute of 23 Ed. 3, chap. 2, doth not make any new species of treason; but only for the benefit of the subject, declares and enumerates, these several kinds of offence, which before were treason at common law. Tuck. Blk. vol. 1, part 1, p. 85; 2 H. P. Cr. 189.

If an offence were felony at common law, but a special act of parliament, ousts the offender of some benefit, (that the common law allowed him,) when certain circumstances are in fact, though the body of the indictment must express these circum-



stances, according as they are prescribed in the statute, yet the indictment must not conclude, contrary to the form of the statute. 2 Hale, P. C. 190, 191; Crown Cir. Comp. 108; 1 Hawkins, 151.

Legislating upon the subject of escheat does not therefore presuppose the previous non-existence of the principle, it has only the effect of declaring what the "common law is, and ever has been," in England for the benefit of the subject, in this republic, for the benefit of a more exalted personage, a citizen. The act of 1801 is declaratory of the common law.

Thus I have generally described the law of escheats upon the doctrine of the English system, and as they are innovated upon, and modified by the statute of 1801.

It would appear from this investigation, 1st, that escheat, in the first instance, was a result of feudal policy; 2d, that in the progress of civilization, and the refinements of civil government, it became an incidental law; and that consequently it was a law coeval with the existence of society and government in this state; 3d, that though escheat is solely applicable to real estate in England, it is applicable to both real and personal estate in Georgia, because real and personal estate have always been placed upon the same footing, from the first settlement of the state to the present moment; 4th, that consequently the act of 1801 is not introductory of a new law, but declaratory of the common law, which had almost fallen into disuse.

100 \*But to return to the question, Has the act of 1801 a retrospective operation?

This question is at once answered; if the act of 1801 is considered as declaratory of the common law, for the act will then have of course a retrospective operation.

If the demurrer, in using the term "retrospective" means an *ex post facto* law, the question may be satisfactorily answered in that shape; for the terms "*ex post facto*," when applied to a law, have a technical import, and in legal phraseology, refer to crimes, pains, and penalties.

It is declared by the constitution of the United States, "That no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

"Where is the necessity, (says the case in Dallas,) or use of the latter words, if a law impairing the obligation of contracts, be comprehended within the terms of *ex post facto* law."

"I believe," says Judge Chase, "that but one instance (2 L. Raym. 1352,) can be found, in which a British judge called a statute, that affected contracts made before the statute, an *ex post facto* law; but the judges of England always considered penal statutes, that created crimes, or increased the punishment of them, as *ex post facto* laws.

"If the term *ex post facto* law, is to be construed, to include, and to prohibit the enacting any law after a fact, it will greatly restrict the power of the state and

federal legislatures; and the consequences of such a construction may not be foreseen."

Here there is a distinction settled between a law of the legislature cumulative of, and declaratory of the common law which necessarily operates retrospectively, and a law affixing a punishment to an action antecedently committed and considered as innocent.

"Every *post facto* law, must necessarily be retrospective, but every retrospective law, is not an *ex post facto* law."

The celebrated Yazoo act of 1795, and the rescinding act of 1796, affords a convincing illustration of this distinction.

101 \*I would contend that, the act of 1796 had a retrospective operation; for as the act of 1795 was bottomed upon fraud, bribery, and corruption, there was no contract, the fraud vitiated everything, Fermer's case, 3 Co. 77, and as no contract can be perfected through the instrumentality of fraud, the rescinding act of 1796 could not, and did not impair the obligation of a contract. It could not be considered an *ex post facto* law, because it had no reference to crimes, pains, and penalties. It is, therefore, to be considered a retrospective law, or it is a chimerical nondescript.

"*Ex post facto* laws, and laws impairing the obligations of contracts, are not only within the prohibition of the constitution, but if such prohibition was not contained in the federal compact, the principles of the revolution itself prepared a vortex for all those parts, and principles of the common law of England, which refuse to be blended, with our republican institution.

"A retrospective act in the acceptance given it by the authorities, may, like all other salutary measures, be perverted by bad men, to bad purposes; but all retrospective acts are not necessarily iniquitous. Statutes of oblivion, and of pardon, the taking possession of private property for important, and indispensable public purposes, &c., must all operate retrospectively; and yet it will not be contended, that such statutes are either unjust or illegal."

All statutes declaratory of the common law, are necessarily retrospective statutes. The principle of escheat, being coeval with the existence of government in this state, the act of 1801 is consequently declaratory of that principle with some modifications, and has consequently a retrospective effect.

But the question I set out with, is determined by the express words of the act of 1801. By the 4th section of that act it is enacted, "That any possession, grant, conveyance, or any other cause or title, shall not preclude, or hinder the state from making inquest, or sale, after the manner herein before described, of all such property both real and personal,

102 \*as has been heretofore escheated (save that which may have been es-

cheated prior to the 4th of July, 1776,) by the death of the person last seized or possessed, without will and without heirs, any law or usage to the contrary notwithstanding; and farther, wherever any property real or personal of any person, dying without will and without heirs, shall be found in the hands of an administrator or executor, the escheator shall on behalf of the state, sue for, and recover the same in law, or in equity; and of real estate, the same when recovered shall be sold by notice and advertisement, as herein before directed; and if personal property, the amount of the same when recovered shall be paid into the public treasury of this state.

Now this act is neither *ex post facto*, or does it impair the obligation of contract; it is consequently not within the prohibition of the constitution, it is therefore a retrospective act, which has the public benefit in view, and operates legally on antecedent facts, whether considered as an act declaratory of the common law, or as a new law made for the benefit and advantage of the community.

Surely the act of 1801 was made to fit this very case.

The law, and cases referred to in this decision of the argument, may be found in 1 Blk. Com. 46; 3 Dallas, 396; Const. of the U. S. Act 1, Sect. 10; 3 Dallas, 397, 399, 393, 391; Acts of the state of Georgia, 68, 69.

If escheat cannot fix itself upon this property, the state is without a remedy. For if the estate in the hands of the defendant, is the estate of a person dying without will and without heirs, there is no other mode of vesting it in the state, but through the medium of escheat.

It cannot be vested, if it can be vested at all, by forfeiture or confiscation.

Escheat is not a right arising *jure belli*, it results from a mere municipal regulation. It exists not because the person purchasing is an enemy, but because he dies without will and without heirs, and because he is an alien, &c.

It is not a right extended over the 103 subjects of a particular \*power, with which by chance we may be at war, but over the subjects of foreign nations at all times whatsoever, and to all other persons, whether citizens or aliens dying without will or without heirs.

The right by which the common law is technically denominated a forfeiture; forfeiture of lands and goods for offences (founded on the offence of the alien in presuming to purchase, or, on attainder in high treason) says Blackstone, and called by the civilians *bona confiscata*, because they belonged to the *Fiscus*, or imperial treasury, or as our common lawyers call them, *bona foris acta*.

Indeed lord Coke seems in one place to consider forfeiture and confiscation as synonymous terms; and Blackstone, also in a few passages, appears to have used the term confiscation, to signify a forfeiture into the treasury; but preserving the dis-

inction which this learned commentator has taken between the two terms, as above stated, the one being a civil law, the other being a common law term, and expressly discovering, that we had treated of the right now in question, in a chapter, under the head of "title by forfeiture," it is not fair to conclude that the technical and appropriate term descriptive of this offence is forfeiture and not confiscation.

Besides this ordinary right of forfeiture, there is an extraordinary one, according to belligerent nations, by right of war, of confiscating the property of their enemies. This right does not wait on the contingent event of a purchase by descent to an alien, or on the event of a person dying without will and without heirs; it affects the property there actually holden by the enemy, nor is it carried into effect by the ordinary course of the municipal laws; the property is seized and confiscated by an extraordinary act of the government of the belligerent nation. It is seized not because it belongs to an alien, or to a person dying without will and without heirs, but because it belongs to an enemy.

To this right it is, that the term confiscation is technically and properly applied.

Here then are two senses in which 104 \*the term confiscation may be employed. The one restricted to a mere seizure by a belligerent nation, in right of war, the other an extensive sense, covering not only the right which has just been mentioned, but also comprehending a mode of acquiring property by the state, under a permanent municipal regulation. Thus is confiscation and forfeiture contradistinguished from the title by escheat, one is a right springing out of a state of war, the other is the consequences of the commission of offences. Escheat, as has been before particularly defined, has no view to a state of war, or the commission of offences.

(The Attorney General here acknowledged his obligation for this division of his argument to the report of a decision in the High Court of Appeals in Virginia, Robert Reed, Colin Reed, Hugh Ballantine and Frances, his wife, v. Margaret Reed. It was reported in the newspapers of the day, and it is not known whether it has found a place in any of the Virginia volumes of reports. In support of its doctrines are cited 4 Blk. 382; 1 Blk. 372; 2 Blk. 274; 3 Inst. 227; 2 Blk. 408; 2 Blk. 267.)

The right now in question is strictly a right accruing by escheat.

Upon what pretext can Mr. Wayne be permitted to retain the estates of Edward Ellington? He says, in his demurrer, he ought not to make the discovery prayed for, because the act of 1801 is retrospective. I hope I have given to that point its full consideration, and I do not see how that principle can avail the defendant upon any doctrine of the common law of England, the statute law of Georgia, or the constitution of the United States.

The defendant assumes another ground in his demurrer; he alleges a regular ob-



tainment of letters of administration on the estate and effects of Edward Ellington.

The capacity of an administrator carries with it no magic. It is not the talisman which dissolves by the touch legal and vested rights of individuals or the public. If the court should determine that the act of 1801 has a retrospective operation,

105 \*it appears to me, that the subordinate point of administration will be reduced to a shadow. *Accessarius sequitur principalem*.

2. This brings me to a consideration of my second point. What is the effect and nature of an administration in England, and in Georgia?

It was formerly held as sound law in England, that is, before the statute of 13 Ed. 1, c. 19, that the ordinary had the absolute disposal of intestate effects, to be distributed to pious uses. 2 Bac. Ab. 398; 2 Blk. 494; Law of Executors, 183.

Administrators are now put upon the same footing with regard to suits and to accounting as executors appointed by will. 2 Blk. Com. 496.

An administrator is but a trustee, Eq. Ab., and as a trustee is he not bound to account to his *cestuy que trust*?

Who is the *cestuy que trust* in the present case? The heirs of Ellington? He left no heirs. The devisees of Ellington? He died intestate. The administrator is, therefore, the trustee of the estate, or he is trustee of no person, moral or physical.

Surely the administrator does not claim the ancient powers of the ordinary! Does he consider the property of Ellington as placed at his disposal, to be distributed to pious uses?

The property of Ellington is derelict, and if the state of Georgia cannot possess herself of it, then all the inquiry resulting from the principle of first occupancy is revived among us, and force and chance usurp the jurisdiction and authority of settled government, and certain laws.

The reporter regrets that he cannot here insert at length the arguments of the learned counsel, Noel and Berrien, in support of the demurrer. He has not been furnished with briefs which would enable him to do justice to those arguments, and is therefore compelled to state, from some loose notes before him, the general grounds upon which their arguments rested.

106 \*The learned counsel contended, that the escheat system did not obtain in Georgia antecedent to the act of 1801, and therefore that act could not operate prospectively; and that it was an *ex post facto*, as it applied to this case.

Mr. Wayne had obtained a vested right, by virtue of his administration, which could not be defeated by the *ex post facto*, or retrospective operation of the statute; and it was said by Mr. Noel, that, in this state, the powers of escheat and forfeiture for the failure of inheritable blood remained dormant, until the passing of the act of 1801, which could not operate retrospec-

tively, so as to subvert rights vested previously.

The counsel cited a decision of Tait, judge of the western circuit, in which the act of 1801 had been declared *ex post facto*, as it related to supposed escheated cases antecedent to the act. This case was in point.

Per JONES, Judge.

The first question proposed, is, whether the law for regulating escheats be an *ex post facto* law within the meaning of the constitution of the United States, and the constitution of this state?

The words *ex post facto*, when applied to a law, have a technical meaning, and, in legal phraseology, apply to crimes, pains, and penalties. Blackstone's description of the terms is clear and accurate. "There is," says he "a still more unreasonable method than this, which is called making of laws *ex post facto*; when, after an action, indifferent in itself, is committed, the legislature then, for the first time, declared it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt, by a subsequent law; he had, therefore, no cause to abstain from it, and all punishment for not abstaining, must, of consequence, be cruel and unjust." 1 Blk. Com. 46.

In the constitution of Massachusetts, 107 sets, Delaware, Maryland, \*and North Carolina, the terms *ex post facto* are understood in the same sense.

The 24th article of the declaration of rights, in the constitution of Massachusetts:—"Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."

The constitution of Delaware, article 11, of the declaration of rights:—"That retrospective laws punishing offences committed before the existence of such laws, are oppressive and unjust, and ought not to be made."

The constitution of Maryland, article 15, of the declaration of rights:—"That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore, no *ex post facto* law ought to be passed."

The constitution of North Carolina, article 24, of the declaration of rights:—"That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* laws ought to be passed." Again, the words of the constitution of the United States are, "That no state shall pass any bill of attainder, *ex post facto* law, or

law impairing the obligation of contracts. Art. 1, sec. 10." Where is the use and necessity of the latter words if a law, impairing the obligation of contracts, be comprehended within the terms *ex post facto* law?

The framers of the constitution, says Judge Patterson, understood and used the words *ex post facto*, in their known and appropriate signification, as referring to crimes, pains, and penalties. The arrangement of the distinct members of this section, necessarily points to this meaning.

The words of the constitution of this state are, "Freedom of the press, and trial by jury, as heretofore used in this 108 \*state shall remain inviolate, and no *ex post facto* law shall be passed."

From the connexion of the latter words with the preceding parts of this section, it appears that they were intended to refer only to crimes, pains, and penalties. The law regulating escheats, does not refer to crimes, pains, and penalties, and is therefore not within the meaning of the prohibition.

The defendant's counsel urged, that the act is creative of a new right by way of forfeiture, and therefore cannot retrospect in its operations, so far as to interfere with rights vested. But the defendant's application to the property for letters of administration, proves, that he did not consider himself entitled to the possession, much less to the property in dispute by mere occupancy. His taking our letters, therefore, tends to show, that he collected the property as a trustee, for those lawfully entitled; and that he was not otherwise interested, than in such commission as the law gives him; otherwise he would have rested on his title of occupancy, without applying to the legal department for an authority to take possession.

All property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. Hence, the right of society to regulate that property.

It is a well settled principle, that an administrator is merely an officer of the ordinary, from whom his title to possession is entirely derived, and his duty is prescribed by act of the legislature, in whom the deceased has reposed no trust at all. He is, therefore, if no relation be found, the trustee of the state.

The demurrer is therefore overruled; and it is ordered, that the defendant do make full answer to the bill of complaint, 30 days before the meeting of the next Superior Court.

Charlton, A. G., for Complainants.

Davis, Berrien, and Noel, for Defendant.

Minutes of Superior Court, letter F. p. 281.

109 \*William Wilson v. Patrick Ray.

Chatham County, January 1807.

Attachments—Return of Sheriff—Record—Amendment.

—At the trial of an attachment it was suggested to the court that they could not proceed to give judgment, because the late sheriff had neglected to make return. Counsel for the plaintiff offered a return of the sheriff, that "he had posted a copy at the court house." and moved that the return be admitted, and filed *nunc pro tunc*. HELD, under the circumstances of this case the lower court was wrong in refusing to admit such return, and the amendment of the record to that extent.

Proceedings removed into the Superior Court by certiorari.

It appears, from the proceedings in this case, that an attachment was issued on the 3d of February, 1802, and by a return of the sheriff, that he did attach some dry goods, and a negro boy, and served J. M. Mounox (a garnisher) with a copy on the same day. The sheriff farther returned, that he had caused the property to bring 540 dollars and 96 cents; by order of the justices of the inferior court, which cash he had waiting the order of that court. And it also appears, from the statement of counsel, that, in the term of July, 1804, in the inferior court, when the said case came on to be heard, Messrs. Davis and Berrien, of counsel for other attaching creditors, suggested to the court, that they could not proceed to give judgment, because the late sheriff, Thomas Norton, had neglected to make a return; that a copy of the attachment had been posted at the court house, in conformity with the attachment law of the state; and the court below being of this opinion, the attachment was accordingly about to be dismissed, when Mr. Stites, for the plaintiff, offered an affidavit of Thomas Robertson, certifying, "that he had seen a copy posted at the court house;" but the court being of opinion, that no evidence de hors the record could be received, Mr. Stites then offered a farther return of the late sheriff, that "he had posted a copy at the court house," and moved the said return be admitted, and filed *nunc pro tunc*. But the court said it could not be received, as Mr. Norton was not then in office, and the attachment was dismissed.

110 \*Per JONES, Judge.

Upon the first view of this case, I was inclined to believe, that the inferior court could not authorise the amendment; but the statute of jeofails, 21 Jac. 1. c. 13, and the subsequent statutes extend to all courts of record. I am, therefore, after mature consideration, of opinion, that, under all the circumstances of the case, the additional return of the late sheriff Norton, ought to be received, and that the plaintiff should be permitted to proceed.

Proceedings removed.

Stites, in support of the certiorari.

Davis and Berrien, against it.

Minutes of Superior Court, letter F. p. 283.

Chambers, 2d July, 1806.

111 \*Joseph Davis et al. v. David Matthews.

Chatham County, January 1807.

Certiorari.—Rule to show cause why certiorari



should not issue to remove this case from the mayor's court. Rule discharged.

This was a rule to show cause why a writ of certiorari should not issue, to remove this case and its proceedings from the mayor's court.

The rule being granted, the defendant's counsel now offered an affidavit of William Blogg, clerk of the mayor's court, that, before judgment had been obtained in the above actions, the defendant had filed, in the office of deponent, an affidavit, stating that he was not a resident of the city of Savannah, but which affidavit could not now be found.

The plaintiff's stated, and it was not denied, that the defendant's affidavit was not, nor the exceptions now upon which the present motion depends, bearing date the 28th June, manifestly could not have been before the court below. He therefore contended, that, if a certiorari should issue in this case, there would not be any matter apparent upon the record, on which this case could reverse the decision below; for, that the returns made upon the writs by the sheriff of the mayor's court, were, that he had left copies at the defendant's most notorious place of abode, and if the defendant is injured he can have redress by resorting to the sheriff for a false return. 20 Viner, 334.

He also contended, that an inferior court is not bound to notice the want of jurisdiction, unless it be pleaded, and if they refuse it, an affidavit may be made of the refusal. Lutw. 294; 5 Bacon, 652, as a good ground for prohibition.

112 \*PER CURIAM. It is ordered, that the rule granted, "that the plaintiffs respectively should show cause, why certiorari should not issue to remove the proceedings of the court of Mayor and Aldermen, in such respective case," be discharged.

Rule discharged.

Cuyler, for the rule.

Charlton and Miller, against it.

Minutes of Superior Court, letter F. p. 311.

January Term, 1807.

113 \*Thomas Gibbons, Esq. v. John Gibbons, Esq. Tax Collector.

Chatham County, January 1807.

**Purchaser of Land under City Ordinance—What Estate Created—Case at Bar.**—Thomas Gibbons bought lots from the city of Savannah under an ordinance fixing the terms as follows:—That it shall be at the option of the purchaser to pay the valuation and increase money down, or to retain the valuation in his hands, or the hands of his heirs and assigns forever, on a ground rent of five per cent. But that it shall be in the power of the purchaser, his heirs and assigns, to pay in the valuation money, with the rent then due, and extinguish the ground rent. Upon the question as to what estate this

created in the purchaser, whether a lease or a conditional conveyance in fee, which latter would render him liable for the taxes, the question was left to the jury, which decided that the purchaser was liable for the taxes.

This was an action of trespass on the case, brought by the plaintiff, Thos. Gibbons, against the defendant, John Gibbons, and the declaration states, "That John Gibbons, Tax Collector for the county of Chatham, hath, in quality of tax collector, claimed of the plaintiff, under the tax laws of this state, the sum of thirty-six dollars for taxes on two lots, Nos. 8 and 9, in Franklin Ward, within the city of Savannah." The plaintiff then avers, "that he hath not the fee simple in the said lots, but only a leasehold, and that the fee simple is in the corporation of the city of Savannah, for and in behalf of the whole body of citizens in the said city; that in and by the laws of this state and custom immemorial the city were not at any time liable to pay the state any tribute or tax prior to the leasing of the said property; and that the plaintiff by becoming a lessee hath not varied the principles or changed the right of exemption." The declaration then concludes, "that the defendant is not ignorant of the premises levied on said lots to the amount of \$36, and great injury done to the plaintiff, &c."

The second section of the ordinance of the corporation of Savannah, passed the 28th September, 1790, ordains, 1. That the city lots, shall be sold in arithmetical progression, at public auction; 2. That they shall be set up at a valuation contained in a schedule; 3. That the sum bid upon that valuation shall be considered as increase money, 114 and paid down \*in cash, and that the highest bidder of increase money shall be considered the purchaser.

4. That it shall be at the option of the purchaser to pay the valuation and increase money down, or to retain the valuation in his hands, or the hands of his heirs and assigns for ever, on a ground rent of 5 per cent. But that it shall be in the power of the purchaser, his heirs or assigns, to pay in the valuation money, with the rent then due, and extinguish, the ground rent.

Thomas Gibbons, the plaintiff below, purchased upon these conditions the city lots, Nos. 8 and 9, and he now resists the payment of the state tax upon these lots, upon the ground of his being only the lessee of the corporation.

He contended, that the deed of conveyance from him to the corporation created only a leasehold estate, so long as he thought proper to pay a ground rent of 5 per cent. quarterly, upon the valuation money, according to the terms of his deed, which recited the conditions of the ordinance of 1790; and that until the ground rent was extinguished by the payment of the valuation money, the fee simple vested in the corporation of Savannah; which by custom and the law could not be liable to the payment of the public taxes.

Mr. Attorney General Charlton.

The plaintiff below states in his declaration, that John Gibbons, then tax collector of Chatham county, claimed \$36 for taxes on lots Nos. 8 and 9, situate in Franklin Ward, in the city of Savannah; that he hath only a leasehold estate in the said lots; that the fee simple is in the city of Savannah; that by the laws of this state and custom immemorial the city was not liable at any time, to pay the state any tribute; that he as a lessee had not varied the principle of exemption; and that the defendant below hath levied on the premises to satisfy the aforesaid assessment.

From this form of pleading the following points present themselves for investigation:

1. What is the species of tenure created by the titles of \*the corporation to the grantees of city lots, sold pursuant to the ordinance of the 28th September, 1790?

2. Do the conditional conveyances of the corporation exempt the grantees from the payment of the state taxes?

The purchaser of city lots has it at his option to obtain an absolute fee simple title by paying down the valuation and increase money, or, to keep the estate in himself, his "heirs and assigns forever," by paying 5 per cent. quarterly, upon the valuation.

The second section of the before recited ordinance, also declares, that on the failure of the payment of ground rent, fifteen days after it becomes due, the lots shall revert to the corporation.

Thomas Gibbons, a purchaser of city lots, sold pursuant to the directions of this ordinance, alleges, that he is nothing more than a lessee of the corporation, and therefore not subject to the payment of the taxes.

We, on the other hand, contend, that the conveyance and assurance to Mr. Gibbons, created in him a freehold of inheritance to be defeated upon the non-performance of a condition subsequent.

If Mr. Gibbons is simply a lessee of the corporation, it must appear so, on the face of his deed. That deed conveys an estate to him, his heirs and assigns forever, upon the condition of paying a quarterly ground rent.

The technical expressions of the deed cannot create a lease.

A lease is a conveyance of lands and tenements for life, for years, or at will; but always for a less term than the lessor hath in the premises; its operative words are demise, grant and to farm let. Co. Litt. 45; 2 Blk. Com. 317.

The deed from the corporation does not and cannot contain these operative words, nor is a less term conveyed than the lessor had in the premises. It conveys the whole interest dependent upon a contingency. The conveyance from the corporation cannot be denominated a lease.

The titles from the corporation do not create an estate for life. Litt. 56; 2 Tuck. Blk. 120.

\*An estate for life is by express or general language; the first, where a

lease is made to a man of lands and tenements for his own life, or the lives of others; the second, where the deed leaves the nature of the estate indefinite.

The titles of the corporation to the grantees of city lots preclude the idea of this species of estate; because they neither expressly convey the estate for life, nor are the terms so generic as to create that estate.

The titles of the corporation do not create an estate for years.

That estate is created by a contract between the lessor and the lessee for the possession of lands, to expire at a determinate period. Com. Dig. vol. 4, p. 45; 2 Blk. Com. 141.

The titles of the corporation convey an interest, which may last forever.

We have thus pursued the idea of a lease in all those branches which can in any manner apply to the present discussion; and sufficiently shown that the contracts between the corporation and the purchasers of its lots, cannot create a lease.

We will in the next place endeavour to evince, by adopting a similar train of definition, that the estate created by the city titles is a freehold estate of inheritance, which may be defeated upon the non-performance of a condition subsequent.

The highest estate the law recognises is the estate in fee simple.

A tenant in fee simple is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever. 2 Blk. Com. 104; 1 Inst. 1.

The word "fee," is derived from the nature of the feudal system. It imports, that the land is held of some superior, to whom certain services are due, and in whom the ultimate property resides.

In England, to the present day, there is a system of dependency and vassalage, which preserves the spirit of the feudal law, though the literal inconveniences and oppressive \*principles of that law are done away with by 12 Car. 2, c. 24.

The tenant in fee simple in England, and his heirs, have the uncontrolled disposal and enjoyment of the use of the land, but that land is still held of some superior.

The British subject has only the usufruct, not the absolute property in the soil.

Only one man in England, and he is the king, hath an absolute allodial property in the soil. *Predium domini regis est directum dominium, cujus millus est author nisi deus.* Co. Litt. 1.

The Revolution hath destroyed the ideas attached by the English law to an estate in fee simple. We adopt the term fee simple, as indicative of the highest species of tenure which can be created, and in creating that estate, we also adopt the forms, the principles, the technical expressions of the English law. But the term fee, as it imports a subjection to some superior in a feudal acception, is unknown to the constitution and laws of the American people.

The citizen seized of an estate called a fee simple, holds his lands of no superior.

The connexion between him and the gov-



ernment is a connexion founded upon the doctrines of the social compact, the leading principles of which are, mutual protection, and the preservation of certain political rights and forms of government. The tenure by which estates may be held can neither diminish or enlarge the sphere of that protection, or those civil rights. The government of England has its basis on the feudal system, the very genius of which is a chain of dependency from the lowest up to the highest species of estates. The term fee, that is, an acknowledgment that I hold my estate of some superior, in whom the ultimate property resides; but the use of this estate is vested in myself, my heirs and assigns forever, is the English fee simple estate.

A man seized of lands and tenements to himself, his heirs and assigns for ever, in the state of Georgia, (and every other state in the union,) is seized thereof absolutely in his own demesne, and the allodial estate or property remains in himself and his descendants.

This is called the allodial tenure in contradistinction to the fee, and this is the estate which we improperly call in this country a fee simple.

The word "heirs," however, in this country, and in England, creates the estate in fee simple. It is a term incompatible with any other kind of estate. The titles of the corporation contain this operative word—they convey to the purchaser, his "heirs and assigns for ever."

Upon the demise of the ancestor the heirs take possession of the lots, by the legal operation of the deed. Is not this an estate in fee simple?—is it not a freehold of inheritance? But there is a condition in the deed which possesses the magical power of giving the purchaser's estate the aspect of a freehold of inheritance, when he and his heirs will it so to be; yet, when the state calls upon him, or his heirs, to pay a small tax towards the support of the government, this freehold of inheritance suddenly changes its front, and presents a leasehold—a simple chattel interest, which has been exempted from taxation time immemorial! (this immemorial time, however, takes its date from the year 1732).

Is there any thing in the condition of the city conveyance incompatible with an estate of freehold of inheritance? We say, that the condition of the conveyance does not militate against such an estate.

A base fee, or qualified fee, that is, an estate having a qualification subjoined thereto, is determined whenever that qualification is at an end. 2 Blk. Com. 108.

A fee of this description, however, is a freehold of inheritance. As a grant to a man and his heirs, tenants of the manor of Dale, the estate ceases when the heirs of the grantee are not tenants of the manor of Dale. 2 Blk. Com. 108.

This is called a fee, because by possibility the estate may endure for ever! So the estate created by the corporation titles may endure for ever. It is therefore a fee.

So a grant to A. his heirs and assigns for ever, of these city \*lots, he or they paying a quarterly ground rent of 5 per cent. The estate ceases, when the re-entry is made by the corporation for a non-compliance with the qualification subjoined to the grant. In the mean time A. and his heirs have a freehold estate of inheritance.

So the conditional fee at common law determined when the donee died without heirs, which was the qualification of that kind of estate, or, if the estate did not descend to a particular class of heirs. 2 Blk. Com. 109.

The entailed estates created by the statute of Westminster are freeholds of inheritance, the duration of which depend upon a condition.

An estate in fee simple or otherwise may be granted upon a condition; and this condition may be precedent or subsequent.

If a man grant an estate in fee simple, reserving to himself and heirs a certain rent, and that if such rent is not paid at the times limited it shall be lawful for himself and heirs to enter and avoid the estate; in this case the grantee and his heirs have an estate (in fee simple), which is defeasible if the condition is not strictly performed. 2 Blk. Com. 158.

The term "successors" in a grant to, or from a corporation, is equivalent to the term "heirs," to or from individuals. 2 Blk. Com. 108.

The purchasers of city lots possess titles in fee simple, upon the condition of their paying a certain rent, and if not paid at limited times, it is lawful for the corporation to re-enter and avoid the estate.

If the high British authority referred to, contains the law of this country, the principle has been established, that the purchasers of city lots, are seized of a freehold of inheritance, which may be defeated upon the non-performance of a condition subsequent.

The condition contained in the title of the corporation is a condition subsequent, and it is a condition in deed, because it requires an act to be done by the corporation before the reversion is consummated. 2 Blk. Com. 154.

\*It is said by the authorities, that so long as the condition remains unbroken, the grantee may have an estate of freehold, if the estate upon which the condition is annexed be of a freehold nature.

We have shown that the title of the corporation conveys a freehold, because its technical and operative words are appropriate to a freehold of inheritance.

The reservation of a rent is not repugnant to the nature of a freehold of inheritance.

In the proprietary governments, when these states were colonies, a quitrent was reserved, upon the non-payment of which, by the tenants, the estate was forfeited; but the tenant during the continuance of his estate, which was a freehold, paid his taxes for the support of the then sovereign power.

2. Are the purchasers of city lots subject to the payment of the state taxes?

The solution of this question will depend upon the admission of the nature of the estate we have supposed the city grantees to be in possession of.

The plaintiff below does not attempt to deny, that if he is not a lessee, the estate he derives from the corporation is subject to the state taxes.

If the estate held by the plaintiff is a simple lease, he is certainly exempted from the state assessment, not by custom immemorial, but because the state tax laws do not impose it.

There is no principle of law, common or statutory, which exempts corporate bodies from the public taxation.

The silence of the legislature is the only ground of exemption.

But if it still remains equivocal (notwithstanding the principles we have advanced), whether the estate of the purchaser of city lots is a freehold of inheritance or not, still we must view these lots as lands granted to the plaintiff, and therefore subject to the state taxation. *Marb. and Crawford, Dig. 516, and the tax acts passim.*

These lots are granted to the purchasers and upon a condition \*which may last for ever; and yet it is said that a lease of lands for ever doth not subject the lessee or grantee to the state taxation!

The corporation must be bound by the technical expressions of the grant.

If the corporation had wished to exempt their grantees from the state taxation, that might have been effected by a demise of 500 years, the estate to be defeated upon the non-payment of the 5 per cent. quarterly ground rent, and a fee simple title to be given upon payment of the valuation money.

As the title is to be taken, it is a grant which may last in perpetuity, and as a grantee of such conditional perpetuity, he is unquestionably subject to the state taxes.

The title of corporation is therefore not a lease.

Because, it does not convey a less term than the lessor hath in the premises.

Because, it is not an estate for life, expressly created, nor is that estate created by the indefinite language of the deed: and,

Because, it is not for a determinate period.

The title of the corporation conveys a freehold of inheritance.

Because, it conveys the lots to the "heirs" and "assigns" of the purchasers, "for ever;" and it is a freehold of inheritance upon a condition subsequent.

As a freehold of inheritance the lots are by the admission of the plaintiff below subject to the payment of the tax; or if that admission is denied, the form of the corporation grant subjects the lots to taxation.

Judge Jones having an interest in the

question, as a purchaser of city lots, or in some other capacity,

Skrine, Judge of the Middle District, was requested to preside on the trial of this particular case.

The Judge, in his charge to the special jury repeated the law as it had been cited by Mr. Attorney General, and then left it to the jury, according to the judicial system, to determine \*whether Mr.

Thomas Gibbons was the lessee of the corporation, or whether the deed did not create a freehold estate of inheritance. If the latter estate was created, the lots were certainly subject to the state taxation.

The Judge then observed, that it was the province of the jury to decide upon facts *ad questionem facto respondent juratores*. In this case there was no fact, the question involved only a principle of law, which from the nature of things should receive its exposition from the bench; but as neither the practice of our courts, nor the judicial system of the state, admitted of any form, by which the case could be referred to the exclusive judgment of the court, he was necessarily compelled to submit the whole of the law to the jury.

Verdict for the Tax Collector.

Gibbons, for Appellant.

Charlton, A. G., for Tax Collector, the Respondent.

Minutes of Superior Court, letter F. p. 364.

Chambers, May 11th. 1807.

## 123 \*The State v. Edward White.

Chatham County, May 1807.

1. **Courts of Record—Contempt—Commitment for.**—All courts of record may commit for contempt.

2. **Same—Officers—Power of Court over.**—All courts of record have a discretionary power over their own officers and are to see that no abuses are to be committed by them which may bring disgrace on the courts themselves. And all officers of courts of record are punishable for disobeying the commands of such courts, or otherwise misdemeanor themselves in their offices.

3. **Contempts—Return—Validity.**—In proceedings for contempts, if the return shows a good cause of commitment, it will be valid though it may want form.

4. **Same—Of Inferior Court—Superior Court Will Not Interfere.**—This court will not therefore discharge persons, committed for a contempt of the inferior courts; and especially it will not discharge or admit to bail officers of such inferior courts, committed for a contempt against them.

Major Edward White, had been appointed in the year —, Clerk of the Court of Ordinary of Chatham County, and received a commission for that appointment from the then governor of Georgia. In 1807 he was removed from office by the justices of the inferior court, acting as a court of ordinary, and the appointment conferred upon Thomas Burke, Esq. Major White was then required, by an order of the justices, to deliver up to his successor all the records, documents, and papers, which had been in



his custody as late clerk. Upon his refusal to do this to the extent required by the justices, under the belief that the justices possessed no right or power legal or constitutional to deprive him of an office which had been secured to him by a commission from the government, during good behaviour,—upon his refusal, the justices issued an attachment against him in the following words, viz:

“Georgia, Chatham County.

“To the Sheriff of the County of Chatham:—

“Whereas it appears, that Edward White, late keeper of the records, papers, and documents of the court of ordinary of said county, hath removed a part of the said records, papers, and documents, from their usual place of deposit, and to some other place to which access cannot now be obtained. And whereas, by such removal, the present keeper of said records, papers, and documents, is prevented from taking the same into his possession, as he has been directed to do by the court. These

are therefore to authorise and command you,\*forthwith, to take and attach the body of the said Edward White, and to bring him before us, that he may be done and dealt with for his said contempts, as the law directs.

“Given under our hands and seals, in open court, this 5th day of May, 1807.

“Edward Telfair, J. I. C. C. (ls.)

“John H. Morel, J. I. C. C. (ls.)

“A. S. Bulloch, J. I. C. C.” (ls.)

Major White being arrested and brought before the court, persisted in his refusal to comply with the order of the justices, whereupon he was committed, by the following order of the court, viz.:

“Court of Ordinary, May 5th, 1807.

“Present.—Edward Telfair,

“John H. Morel,

“A. S. Bulloch,

Justices of the Inferior Court, and Court of Ordinary.

“Edward White, by virtue of an attachment issued by the court of ordinary, being brought into court, in consequence of the said Edward White having removed a part of the records, papers, and documents, appertaining to the court of ordinary, from their usual place of deposit, and in consequence of his refusal to deliver up the said records, papers, and documents to the court; and the said Edward White having declared, in the face of the court, that he will not deliver up the said records, papers, and documents agreeably to the order of the court, the said Edward White, not having therefore purged himself of the contempt with which he is charged, it is ordered, that he be committed to the common prison of the county of Chatham; and it is further ordered, that the jailer of said county, do receive into his custody, the body of the said Edward White, and to detain him until discharged by due course of law.”

125 \*On the 11th of May, 1807, the judge

of the Superior Courts, was applied to, at chambers, for a writ of habeas corpus, which was issued, and the prisoner, Edward White, being brought up, the preceding order of the justices of the court of ordinary was returned with the writ, as the cause of his detention and imprisonment.

The grounds upon which the counsel for the prisoner moved for his discharge, or bail, will be found in the opinion delivered by the court; and the reporter regrets, that it is not in his power to insert their arguments at length. He cannot, from recollection, or from any notes in his possession, do justice to the learning and ability with which the motion was supported. He is compelled to offer a similar apology to the gentlemen who were retained with Mr. Attorney General, to oppose the motion.

Mr. Attorney General.

The justices of the inferior court removed the prisoner from his office as keeper of the records of the court of ordinary; and upon his refusal to deliver up the records, papers, and documents appertaining to that court, —and it also appearing, that a part of those records had been taken and removed from their usual place of deposit,—upon these grounds, an attachment was issued against him; and being brought before the court, he still refuses to deliver up the records, as he doubted the authority of the court to remove him from his office; whereupon he was, by order of the justices, committed for a contempt.

His counsel now, upon the return of this writ, move for his discharge, upon the ground, that the prisoner is a commissioned officer of the government and therefore could not be removed by the justices, as an officer holding an appointment *durante bene placito*; and that, therefore, if he could not be removed at pleasure, he could commit no contempt by a disobedience to an order which did not recognise him as an officer of the court.

The question then to be investigated is, whether the keeper \*(or the clerk, as he is called by the other side), of the records of the court of ordinary holds his appointment *durante bene placito*?

The solution of the question must be sought for in the principles of the constitution.

By the constitution, some officers hold their appointments during good behaviour: of this class are, 1. Justices of the inferior court. 2. Justices of the peace. 3. Clerks of the Superior and Inferior Courts. Others for a term of years, or some determinate period. Of this class are, 1. The governor. 2. The judges of the Superior Courts. 3. The officers of the law department. 4. The members of the general assembly. 5. Sheriffs.

There is a third class of officers, who hold their appointments *durante bene placito*, as examples might be enumerated, staff officers among the military, and all these appoint-

ments created by a constitutional officer, and are merely auxiliary to some duties which the laws impose on him, and all those appointments which are created by the legislature, the duration and continuance of which is left indefinite, and may therefore, at the pleasure of the legislature, be revoked.

To which of these classes of appointments is the office of keeper of the records to be attached?

The constitution leaves the tenure of no office uncertain, where it has been conceived necessary to designate and express it.

It is not barely satisfied with declaring that this, or that officer shall hold his office during good behaviour, or for a certain period of time, but it also declares, that a commission shall be given; it declares too, the form of prosecution to be pursued against the delinquent officer.

The constitution treats (if the expression may be allowed), the person having charge of the records, with the most striking levity. It does not specify the tenure by which he shall hold his office; it does not declare, that he shall be commissioned, it gives him no official title, he is to be appointed by the justices of the inferior court, any one of whom, except

127 as \*to the granting marriage licenses, may assume his functions, and discharge the most important of his duties. 6

Sect. of art. 3; Marb. and Crawf. Dig. 28.

The constitution points out no form of prosecution, judicial or legislative, through which he may be removed for abuses, misdemeanors, or malpractices in office.

The constitution is to be construed literally et expresso unius est exclusio alterius.

If it was intended, that the officer should hold his appointment during good behaviour, the constitution would have said so; if the nature and importance of the office had required a commission, the constitution would have given one.

If it had been deemed necessary that a judicial or legislative prosecution should take place previous to his removal, the constitution would have specified it. But in all these respects the constitution is silent; can this court or any other tribunal then, strip and borrow the attributes of a tenure, which is certain and defined, which is protected by all the ramparts of the law against the ipse dixit of authority, the jubeo, volo, stet pro ratione voluntas of an uncontrolled power, to clothe another appointment with them, which the letter of the constitution has left naked, insulated and unprotected? would not this be *jus dare*, and is that the province of the court?

What a solecism, that an appointment merely incidental to another appointment, the functions of which may be suspended at any time, and exercised by one or more of the justices of the inferior court, should stand upon the same footing, on the scores of tenure and responsibility as the power which created it!!!

The principle being admitted, that the duty of keeper of the records may be exer-

cised by one or more of the justices, is an admission of the principle, that he is dependent upon the justices for the tenure of his office; for the assumption of those functions by one or more of the justices, presupposes a power of removal *ad libitum*, or, it treats the person having the care of the records as a person whom they may at one moment dress up in a little "brief 128 authority," and in the "succeeding moment perform his official part for him! Is this compatible with the tenure of an office *durante bene se gesterit*, which creates, as English books say, an estate of freehold, and an interest which can only be determined by his own misbehaviour, which must be determined by judicial investigation? Co. Litt. 42; Show. Parl. Cas. 161.

If the "keeper of the records" holds his appointment during good behaviour, he would have an estate of freehold, or for life, and the privileges, rights, and functions of his office, would be incommunicable, they could not be trespassed upon in any manner, that would diminish the full enjoyment and possession of those rights and junctions; but the functions and duties of the "keeper of records," may be assumed and exercised by himself, or any one or two of the justices.

Though it is very clear, that neither the constitution, or any analogous principle of the British law, give to this appointment an interest during good behaviour; yet it is contended, that this officer holds a commission from the government, of which he cannot be divested by this summary mode of proceeding.

The law of England says, that wherever an officer, who holds his office by patent, commits a forfeiture, he cannot regularly be turned out without a *scire facias*, nor can he be said to be completely ousted and discharged, without a writ of discharge, for his right appearing of record, the same must be defeated by matter of as high a nature. 9 Co. 98; Cro. Car. 60; Co. Litt. 233; 3 Modern, 335.

The law of England may require the process of *scire facias* to revoke the operation of the great seal; but with us the constitution is the *sci. fa.* which corrects all the errors of the great seal.

If the great seal of the state has been affixed to a commission or patent unknown to the constitution, it is *ipse facta* a nullity. In such a case the constitution must give way to the commission, or the commission must give way to the constitution.

The act of the legislature authorizes 129 the justices of the inferior \*court acting as a court of ordinary, to "appoint its own clerk," who shall be "commissioned by the governor," and who shall take an oath previous to his entering upon the duties of his office. Marb. and Crawf. Dig. 219. Now in two particulars, this act is violative of the constitution: 1. In directing a commission to be given, and, 2. In calling the person appointed a clerk.



An officer cannot be commissioned unless the constitution expressly directs it, nor is a commission ever given to an officer unknown to the constitution, and who derives his appointment and authority from a legislative source.

Upon all these grounds, then, this commission is a matter of supererogation; it is legislative surplusage, and vanishes at the touch and application of the constitutional principle.

If the point, however, is conceded, that this commission is constitutionally given, what advantages will the prisoner derive from the concession? If he still holds his appointment *durante bene placito*, the commission is no stumbling block in the way of his removal.

Let us reason from analogy.

By the 2d section of the 2d article of the constitution of the United States, "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the heads of departments." Now it is a fact, within the knowledge of every one, that the inferior officers so appointed by the President receive commissions under the great seal of the United States; and it is a fact of equal notoriety, that these inferior officers are removed by him at pleasure.

This section establishes another principle of equal importance to us; it is this,—that when the constitution does not specify the duration or tenure of office, it submits the duration or tenure to the arbitrary discretion of the person or department, from whom or from which the office is derived.

This doctrine, it seems, has been uniformly acquiesced in, and at times when the spirit of faction would have offered  
130 an \*opposition, if that opposition could have been offered with success, or was even susceptible of plausibility.

Where is the difference in the case of the inferior officer who is removable at the pleasure of the President, because the tenure of his office is left indefinite in the constitution of the United States, and the case of the inferior officer appointed by the justices of the inferior court, the tenure of whose office is left indefinite in the constitution of Georgia?

Having disposed of the commission, I will just advert to the other particular, in which the law and the constitution are at variance.

The 6 sect. of the 3 art. of the constitution gives the power to the justices of the inferior court of vesting the care of the records of the court of ordinary in the "clerk," or such "other person" as they may appoint. This appointment may therefore be a simple appendage to, a kind of accident of, the office of clerk of the inferior court; for though this section does not add the words, "of the inferior court," after the term "clerk," yet it would be a person of sense too gross for the genius of verbal equivocation itself to contend, that

"clerk," in this section, refers to any other clerk, than clerk of the inferior court.

If the clerk of the inferior court is not referred to, then this section is repugnant and nonsensical, which otherwise is easily reconciled, for, in one breath it would give to this officer the title of clerk, and in the next render such an appellation or title totally incompatible with the nature of his trust, which may be confided to some "other person."

This kind of verbal criticism is not deemed very essential; yet it establishes what we had in view, that the language of the constitution and the law, are not precisely similar; and that the then governor had no right to commission any officer as "clerk of the court of ordinary," and that therefore no such officer can be recognised in this court.

I shall now consider the questions, 1. Whether a contempt has been committed?

and, 2. Whether this court being apprised \*that the prisoner is charged with, and imprisoned for, a contempt, he can be bailed or discharged?

1. Has the prisoner committed a contempt?

An attachment for a contempt issues at the discretion of the judges of a court of record, against a person for some contempt for which he is to be committed, and may be awarded by them upon a bare suggestion, or on their own knowledge. 1 Bac. Ab. tit. Attachment, p. 180.

It is scarcely necessary for me to inform this court, that a court of record, has a disposing power over his records, and can command its officers. This is a power possessed by a court of record, and consequently by the inferior court as a court of record, (Marb. and Crawford Dig. 293,) considered abstractedly from the other power, it is conceived, it possesses of removing one of its officers.

The attachment in the present case was bottomed upon the denial of the right of the court to dispose of its own records, and upon the refusal of an officer to obey the command of the court.

All officers of courts of record are punishable by attachment for disobeying the commands of such courts, or otherwise misdemeaning themselves in their offices. 2 Hawk. P. C. 145; 3 Bac. Abr. 744. Whether, therefore, the prisoner is considered in or out of office, he has disobeyed a command of the court, and has misdemeaned himself in his office, and whether therefore he is in or out of office, he has committed a contempt.

An obedience to the command of the court, would not have infringed his right to contest the constitutionality of his removal, and it would have saved him from the penalties of a contempt. He still might have resorted to a mandamus to restore him to office.

2. Can this court interfere?

The court of King's Bench will not admit to bail a person committed for a contempt

in any other court in Westminster Hall. 1 Wilson, 300.

The court of King's Bench will not admit to bail, or discharge \*a person for a contempt of an inferior court; in those matters it never interferes. 1 Stra. 567; 1 Hawk. (old Ed.) 112, 113.

The inferior court, acting as a court of ordinary, bears the same relation to the Superior Court, as the court of Common Pleas does to the court of King's Bench, and if an interposition will not take place in the one case, it cannot in the other.

The constitutional power of the superior courts to control the errors of inferior judicatories is not denied; but as the doctrines of contempts are borrowed from the British authorities, and have always been adopted by this court as contained in those authorities, we hope the British authorities in this case will be exclusively consulted.

This being a case not only of great expectation, but one of the first impression in this district, the judge said, that he would not give an immediate decision, but endeavour to obtain the opinions of the others judges. In the meantime the prisoner was ordered to be bailed *de die in diem*, until he was notified of the preparation of the court, to deliver its judgment.

Cur. adv. vult.

June 16, 1807.

The opinion of the court was now delivered, by

JONES, Judge:

Upon the return of the habeas corpus the counsel for the prisoner moved, that he be discharged, or that he be bailed, to answer any charge that may be preferred against him.

In support of the motion it was contended,

1. That this court, in virtue of the general and superintending jurisdiction with which, by the constitution, it is invested, over all inferior judicatories, can interpose and control, and is bound, upon application, to interpose, and control the proceedings of such inferior judicatories, in all cases where such \*proceedings are violative of the constitution and laws of the state.

2. That even in England, the doctrine, that one court will not interfere to discharge a person committed for a contempt by another, is only true where such other court is of equal or superior dignity.

3. That this commitment is not to be considered as a commitment for a contempt, because it concludes, for "safe custody;" but if so considered, such conclusion violates it.

4. That if considered as a commitment for a contempt in disobeying an order of court, it may be discharged by showing that such order is illegal.

5. That the order of the 4th May, 1807, (a) is illegal, because,

(a) The attachment was founded upon a disobedience to this order.

1. The justices of the inferior court have thereby appointed an officer not known to the existing laws of this state.

2. They have thereby required the clerk of the court of ordinary, to surrender up the records, and other papers attached to his office, without having removed him from such office, if they had the power so to do.

3. The person so appointed to receive the said records under the order of the said justices, was not legally authorised to receive them, since, if his appointment was legal, he was neither commissioned nor qualified.

4. Edward White, having been commissioned by the governor, although appointed by the justices, and no period being given by law for the determination of his office, is entitled to hold the same during good behavior; or, if during pleasure, during the pleasure of him by whom he is commissioned, and is not, therefore, liable to be removed by an order of the justices of the inferior court.

For all which reasons the said order is illegal.

5. That the commitment is illegal, because no opportunity \*was afforded to the prisoner to purge the contempt alleged against him in the warrant of arrest. (b)

6. That the commitment is not founded on sentence or judgment.

7. That the Superior Court, under the constitution, to review sentence, if there had been one in this case. (c)

8. That if it had not jurisdiction generally, yet it has in this case, because it involves a jurisdiction which belongs exclusively to this court. (c)

And against the motion it was contended,

1. That the court of ordinary is a court of record, and has a right to punish for contempts.

2. That the court of king's bench will

(b) Mr Attorney General did, in the court below, exhibit the following interrogatories:

"Interrogatories to be administered to Edward White, Esq., charged with a contempt.

"1. Did you refuse to deliver to Thomas Bourke, Esq., the keeper of the records of the court of ordinary, the records, papers, and documents, appertaining to said court, and which had been in your possession as late keeper of said records?

"2. Did you, without the permission of the said court of ordinary, remove a part of the said records, papers, and documents, from their place of deposit; and what was your intention in doing so?"

These interrogatories were, however, withdrawn, in consequence of an opinion expressed by their honours, the justices, that the flagrancy of the contempt superseded the necessity of this mode of proceeding.

(c) The clauses of the constitution referred to, are these, in the 3d article of the constitution, section 1. "The Superior Court shall have final and exclusive jurisdiction in all criminal cases;" and "shall have power to correct errors in inferior judicatories by writs of certiorari." Marb. and Crawford, Dig. p. 27.



not interfere to discharge a person committed, for a contempt, by another court, when such other courts is of equal or superior dignity. Therefore, the Superior Court will not interfere in this case.

135 \*3. That by the 6th section of the third article of the constitution, the court of ordinary having the power to appoint a person to take care of the records, it had, therefore the power to remove, at pleasure, notwithstanding the clerk is commissioned by the governor. (a)

4. That no civil right can be investigated upon a return to a habeas corpus.

The question being one of delicacy and importance, affecting the powers of the court of ordinary, and the rights of the clerks of the said courts, I took time to consider of it, and advise with the judges of the Western and Middle Districts, in order to establish a decision, as might be considered as settling the principle.

The prisoner was in the meanwhile bailed to appear from day to day. Some delay has necessarily arisen from the distance at which the judges reside from this place. Their opinions have however at length been received, and duly considered.

In order to determine, upon the motion submitted by the prisoner's counsel, it appeared to me important first to decide:

Whether, the court of ordinary is a court of record, or,

Whether it be considered as, having only the powers of the ecclesiastical courts in England, which are generally taken to be not courts of record. For whether the

136 Superior Courts would judge of a contempt committed in the court of \*ordinary or not, depended much, in my opinion, upon a determination of this point.

It appears then by the constitution, art. 3, sect. 6, "The powers of a court of ordinary, or register of probates, shall be vested in the inferior courts, in each county."

These courts being courts of record established by the constitution, have the power to inflict punishments at the discretion of the court, for all contempts of their authority.

All courts of record, (even the lowest,) may commit for a contempt, and without this power no court could possibly exist. The law upon this subject is of immemorial antiquity, and there is not any period, when it can be said to have ceased, or discontinued.

(a) "The powers of a court of ordinary or register of probate, shall be vested in the inferior courts of each county, from whose decisions there may be an appeal to the Superior Court, under such restrictions and regulations, as the general assembly may by law direct; but the inferior court to vest the care of the records, or other proceedings therein, in the clerk, or such other person as they may appoint, and any one or more justices of said court, with such clerk or other person, may issue citations, and grant temporary letters, in time of vacation, to hold until the next meeting of the said court; and such clerk, or other person, may grant marriage licenses." 6 Sect. 3 Art. of the Constitution. Marb. and Crawford, Dig. 28.

All courts of record have a discretionary power over their own officers, and are to see that no abuses be committed by them which may bring disgrace on the courts themselves. And all officers of courts of records, are punishable for disobeying the commands of such courts, or otherwise misdeeming themselves in their offices.

In proceedings for contempts, if the return shows a good cause of commitment, it will be valid though it may want form.

This court will not therefore discharge persons, committed for a contempt of the inferior courts; and especially this court, will not discharge or admit to bail officers of such inferior courts, committed for a contempt against them.

I give no decision on the other points.

For these reasons, it is ordered that the prisoner be remanded.

A. G. Charlton, Harris, and Bulloch, for the state.

Noel, Davis, and Berrien, for the prisoner.

137 \*Major White, having afterwards complied with the terms imposed on him by the justices of the inferior court, he was discharged from his imprisonment by an order of that court. He then applied for and obtained, from the judge of the Superior Court, a rule to show cause, why a mandamus should not issue to restore him to the offices, from which he has been removed, by the justices of the inferior court. Vide Min. Sup. Court, Let. F. p. 372.

Cause was ordered to be shown on the first day of the ensuing term in January. In the meantime, however, the legislature interposed, and, by an act of the general assembly, restored him to the office of clerk of the court of ordinary, and escheator of the county of Chatham, from which he had been removed by the justices of the inferior court. The rule for the mandamus being thus abandoned, the question, Whether the court of ordinary can remove their clerks at pleasure, notwithstanding his commission from the executive, remains judicially unsettled; as, also, Whether the legislature can review the proceedings of the court, and restore to office, under all the circumstances of this case; particularly as a mandamus appears to be the clear remedy under the 7th section of the 3d article of the constitution.

Minutes of Superior Court, letter F. p. 345.

138 \*Executrix of Houston v. James Mossman.

Chatham County, June 1807.

**Judgments—Interest.**—A judgment is a liquidated demand of the highest dignity upon which the creditor is entitled to interest.

It is stated, that the plaintiff obtained a judgment in the inferior court, on the 24th February, 1801, against the late James Mossman, on his bond, dated 23d May, 1775, conditioned for 297 dollars. The judgment

was for the penalty, the principal, and interest, on that day, amounting to the penalty, to-wit, for 5956 dollars and 20 cents. On this judgment the plaintiff issued execution, and claimed interest on the judgment up to the time of payment. This was objected to by the representatives of the defendant, and the question was referred to the justices of the inferior court of this county, at the last term in July. The justices of the court, on hearing the argument, decided, that the judgment did not carry interest. From that decision, the plaintiff appealed, and the subject is brought before this court for a final decision.

Two questions are made:

1. Do judgments carry interest?
2. If they do, is there any thing in this case to take it out of the general rule?

The plaintiff claims interest on the following grounds:

1. A judgment is a liquidated demand, and as such, carries interest.
2. It is agreeable to the uniform practice of the courts for the plaintiffs to charge and receive interest.
3. The action is founded in reason and justice.

The defendant objects:

1. That the judgment is a final liquidation, and cannot be increased by interest.
- 139 \*2. That at the time of the entry of the judgment the penalty was due, and has since been satisfied; and the plaintiff can go no farther.

**PER CURIAM.** It is a settled point, that all liquidated demands carry interest. A judgment is a liquidated demand of the highest dignity. The penalty of the bond, it is said, is the utmost of the debt; but when a judgment is passed on it, there is an end of the original contract. The bond is merged in the judgment. There is a new debt created. The execution, under our judicial system, keeps the judgment alive, and the creditor has it in his power, at any time, until the judgment be satisfied, to compel immediate payment. If, therefore, there be a case in which a creditor be entitled to interest to recompense the delay of payment, the forbearance on a judgment must certainly entitle a creditor to interest. It has been the uniform custom of plaintiffs to use forbearance, and to charge and receive interest thereupon; and the claim is clearly founded in reason and justice.

The plaintiff in this case is, therefore, entitled to interest on the judgment, up to the time of payment.

Woodruff, for Plaintiff.

Noel, for Defendant.

THOMAS U. P. CHARLTON,  
Elected Judge of the Eastern District of Georgia,  
November, 1807.

Minutes of Superior Court, letter F. p. 375.

Chambers, November 26, 1807.

- 140 \*James Johnston v. J. E. White, Administrator of Alexander.

Chatham County, November 1807.

Statute of Limitations—Exception to Running of.—The

statute of limitations does not run against the plaintiff during the time in which the debtor is banished from the state.

CHARLTON, Judge.

Joshua E. White, the defendant, in the justices' court, states, in his affidavit and petition, "that, on the 2d of November, 1805, he obtained administration on the estate of James Alexander; that a few months after, James Johnston made a return of a note, given by the deceased to the said James Johnston, for £4 13s 2d, dated October 21, 1776, and payable 20th Nov. following; that in September, 1807, he was sued on this note as administrator of Alexander, in the court of Sheftall Sheftall, Esq. justice of the peace, by whom a judgment was given in favour of James Johnston, from which judgment the petitioner appealed, and a verdict also rendered in favour of Johnston, for the amount of the note without interest; and that the petitioner opposed a recovery before the jury, upon the grounds, that the debt was barred by the statute of limitations, and no demand of payment made by Johnston, so as to take the case out of the operation of the statute."

Upon these grounds, the petitioner, Joshua E. White, applied to the court, and obtained a rule for Sheftall Sheftall, Esq. and James Johnston to show cause why a certiorari should not issue.

- 141 \*In obedience to this rule, Justice Sheftall and Mr. Johnston have appeared, and contend, that the debt hath not been barred by the statute of limitations; because James Alexander was banished this state by the confiscation act of May 4, 1782, and was only released from the pains and penalties of that act, by an act of the general assembly, passed December 10, 1803, and because James Alexander was, the whole of that time, absent, beyond the limits of this state—did not return until March or April, 1804, and died in September, of the following year, 1805.

It appears that James Alexander was among the prescribed persons on the 4th of May, 1782, and that he and some others were taken off the act of confiscation and banishment, by a law of the legislature, passed 10th Dec. 1803. Marb. and Crawford. Dig. p. 32.

Under these circumstances, Mr. Johnston has committed no laches. As a prescribed person, no action could be brought, in this state, against Alexander, between the years 1782 and 1803; because this court cannot suppose, that he was within the limits of this state during that interval; and computing the time from March or April, 1804, and excluding from computation one year, after the letters of administrations were granted to Joshua E. White, the statute of limitations does not consequently attach to the case, or bar a recovery. The plaintiff, James Johnston, is entitled to the benefits of the provisory clause of the act of March 26, 1767, (which has been revived) for during the period of time between the 4th of May, 1782, and



10th of December, 1803, James Alexander must be considered as a person beyond seas, and his creditors in this state, within the savings of the statute. For that period, the law imposed no obligation on the plaintiff below, to demand a payment, or to pursue the debtor in the country to which his treason had driven him. *Marb. and Crawford*, Dig. 35; Laws of 1806, (extra session) 30.

I am, therefore, of opinion, that no error appears in the judgment and verdict below.

Rule discharged.

Minutes of Superior Court, letter F. p. 378.

Chambers, December 21, 1807.

142 \**State v. John Plime and John Vessel.*

Chatham County, December 1807.

**Habeas Corpus—Confinement of Seamen for Desertion—Jurisdiction.**—The state courts of Georgia have no jurisdiction to grant the writ of habeas corpus to seamen committed by a justice of the peace, under authority of an act of congress, for desertion from their vessel.

By the Court.

It appeared, on the return of this Habeas Corpus, that the prisoners, John Plime and John Vessel, two seamen, who had signed a contract, had been committed for desertion from their respective vessels, by a justice of the peace, pursuant to the act of Congress. A motion was made for their discharge, upon some objections to the formality of the warrant of commitment.

The act of Congress makes it lawful for any justice of the peace to issue a warrant, upon complaint of the master of the ship; and if it appears, that the seaman has signed a contract, and that the voyage is not finished, and that the seaman has absented himself without leave, he shall be committed to the common prison, until the vessel shall be ready to proceed to sea, or till the master shall require his discharge. *Laws of U. S. vol. 1, p. 142.*

The proceedings of the justice appear to be regular under this act; and though this court hath not denied the benefit of the writ of habeas corpus, yet it is conceived, that it possesses no jurisdiction in the present case. The powers given to the justice and master are derived from the law of the United States, and whether exercised properly or improperly, by the one or the other, is not a subject for the investigation of this court.

Prisoners remanded.

Minutes of Superior Court, letter F. p. 418.

January Term, 1808.

143 \**Edward Lloyd v. William Smith.*

Chatham County, January 1808.

**Judges of Superior Court—Interest—What Disqualifies.**

—A judge of the superior court, when a member of the bar, having been retained as counsel for

the defendant is not the species of interest contemplated by the act of assembly, authorizing the interposition of the justices of the inferior court, in all cases where the judge of the superior court is a "party" or "interested." Such interest contemplates a participation in the results of the suit, as damages or property recovered.

Thomas U. P. Charlton, now one of the Judges of the Superior Courts of this state, and presiding in this court during the present term, having, when a member of the bar, been retained as of counsel for the defendant, William Smith, it is contended, that that is a species of interest contemplated by the act of the General Assembly, authorising the interposition of the justices of the inferior court, in all cases where the judge of the Superior Court is a "party, or interested." Laws of the General Assembly.

A rule was granted to show cause why the justices of the inferior court should not be requested to attend and preside in the trial of this case.

In showing cause, the counsel for the defendant objected to the interposition of the justices of the inferior court;

1. Because the law was unconstitutional.
2. Because the interest contemplated by the act was not an abstract bias resulting from the feelings of a retained attorney, but such an interest as is created by an ultimate participation in the damages, or property recovered by the verdict of a jury.

In support of the rule it was urged, that the law was not unconstitutional, 1. Because it did not interfere with any exclusive power delegated by the constitution to the Superior Court, but only authorize an interference of the justices of the inferior court, in cases where the jurisdictions possessed a concurrent authority; and, 2. Because the interest contemplated in the act was such an interest as was calculated to bias the mind of the judge, or to produce a prejudication which would result from his having received a fee as counsel for one of the parties.

144 \*By the Court.

My first impressions were with the plaintiff's counsel, and under the influence of those impressions, I intimated at the last Superior Court, of Bulloch county, that I would feel no difficulty in requesting the attendance of the justices of the inferior court in cases like the present. I then conceived, that where the judge had acted as an attorney, and received a fee from one of the parties, it would or might create an interest in his mind and feelings incompatible with an unprejudiced, impartial discharge of his duty, and that if such might be the result, it was an "interest" intended to be guarded against by act of the General Assembly.

The decision in *Bulloch* was not then, nor has it been since acted upon; and as I discovered that it had not given general satisfaction, I consented to grant the present rule, in order that I might avail myself of the advantages which always

accompany the arguments of my learned brethren of the bar.

I am now of opinion (and that opinion, with the exception of counsel for the plaintiff, is concurred in by this bar,) that the term "interested" ought not to be taken in its common acceptation, or as used by philologists, but that it must receive a legal and technical import,—an import having a relation (as it was emphatically observed by my brother Harris) to "pounds, shillings, and pence;" that is to say, an advantage to be derived, or more properly, a right to be established, and last, by the verdict of a jury. Such an advantage, or such a right, as a "party" to the action expects to gain, or to be deprived of. The agency of attorneys, and the fees they may have received, repel the idea of such an advantage or such a right.

Having decided on this point, an opinion on the constitutionality of the law, becomes unnecessary; and I am glad that it is so; for, although I should not hesitate giving an opinion on that point, when the principles of justice and the case may require it, yet I shall always avoid a conflict with the legislative department by voluntary declarations.

Minutes of Superior Court, letter F. p. 420.

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\*Horskins v. Williamson.

Chatham County, January 1808.

**Executors and Administrators—Case at Bar.**—Waldberger, in his lifetime gave a bond to Jones and Fox executrixes of Bonquin. Jones survived Fox and the debt not having been paid the present plaintiff claims the right to recover it as administratrix de bonis non, with the will annexed of Jones, the surviving obligee. On the other hand Williamson claims the right to recover it as executor of Waldberger. HELD, that since Jones, as surviving obligee, had a right to maintain this action in her individual capacity, that right can be delegated to no other person than the one who represents her estate, but the representatives of the first testator have a right to the ultimate beneficial interest, and the court will take care that the trust is properly discharged.

The petition of the plaintiff stated, that the defendant, John G. Williamson, is the surviving executor of Bartholomew Waldberger: that B. Waldberger, in his life time, gave a bond to Henrietta B. Jones and Frances Fox, in their lives executrixes of one Henry Bourquin, for the sum of £1000: that H. B. Jones survived Frances Fox, and that the debt has not been paid to the present plaintiff, who claims the right to recover it as administratrix de bonis non, and with the will annexed of H. B. Jones, the surviving obligee.

To this action the defendant's attorney plead in bar, "that the said bond, and cause of action accruing thereon, devolved on the said H. B. Jones and Frances Fox, as executrixes of H. Bourquin, and that the said bond can only be sued by the executor or the administrator of the will annexed of Henry Bourquin, and not by the administratrix of H. B. Jones."

In support of this plea, it was argued as a principal objection to the action in its present shape, "that if the present administratrix recovers the amount of the bond, it will be assets in her hands for the debts of the intestate; whereas it appears on the face of it, and by the declaration, to have been given to the executors of H. Bourquin, whose heirs and creditors are entitled to the proceeds."

In opposition to a recovery as administratrix of the surviving obligee, and not as the representative of H. Bourquin, the following cases were cited. Dougl. 637; Salk. 306; Skin. 143, pl. 15; 6 Modern, 290; Ld. Raym. 1072; 4 T. R. 619-622.

Against the plea it was contended, that the true criterion for the determination of the question, would be the ascertainment \*of the person to whom this right of action originally belonged; for, if this right of action existed in the life time of the first testator, and was vested in him, then the right of H. B. Jones, the executrix, would be merely derivative and upon her death this derivative right would be transmitted to the administrator de bonis non, as the next representative of him from whom it was derived; but if such right never had existed in the life time of the first testator, if it accrued originally and not derivatively, to H. B. Jones the executrix, then it must pass directly to her representatives, and not to the representatives of the first testator, upon this obvious principle of law and reason, that the representative cannot derive from his principal a right, which that principal did not himself possess. Now the bond which is the foundation of this action is given to H. B. Jones and Frances Fox, executrixes of H. Bourquin, the conclusion was then obvious, that H. Bourquin in his life time, never had an action upon this bond.

In support of these positions, and of the right of the executor, and his representative, to sue for debts contracted by bond, or otherwise, with the executor, and that in such suits it is not necessary to specify the interest of the first testator, the following cases were cited. 1 Wils. 172; 11 Vin. 108, Sect. 7; 2 Freem. Rep. 139; Chan. Cas. 224; 11 Vin. 108, Sect. 5; Vent. 275; Sc. 2 Lev. 100; 11 Vin. 110, Sect. 17; 10 Mod. 315; 11 Vin. 110, Sect. 16; 6 Mod. 181; 4 Term Rep. 619, 622; 7 Durn. and East's Rep. 45; Vern. 94; 11 Vin. 109; Vern. 473; 3 Bacon Abr. 20; 2 Vernon, 362.

Per CHARLTON, Judge.

The strong current of English authorities runs in favour of the present plaintiff to recover this bond; and I think the apprehension suggested of its being considered a component part of the offsets of the executrix of the first testator, are not well founded.

The right to maintain this action is one thing, the right to the money when recovered is another. The bond is given 147 \*to H. B. Jones and Frances Fox, executrixes of H. Bourquin, it is so stated in the bond. It is not alleged any



where, that this is a debt due to the surviving obligee in her individual capacity. Where there is the danger of the amount of this bond being considered as assets, in the hands of the administratrix de bonis non, courts of law as it has been said by the defendant's attorney, will take notice of trusts, and upon this principle have gone so far as to allow pleas, not consistent with a bond. In addition to the authority of 4 Term Rep. 619, 622, the cases of *Rudge v. Birch*, 1 Term Rep. 622, and *Winchester v. Keely*, 1 Term Rep. 619, might have been cited. These cases show, that courts of law are authorised to guard and protect the beneficial interest of the cestui que trust, whenever that interest is connected with cases, brought properly before them. And, therefore, if an apprehension is entertained of an improper application of money, which a trustee has been allowed to recover in courts of law, they can take the trust under their control, and through the medium of the sheriff, direct the money in its proper channel; they can prevent a confusion of interests, by designating the proper party to be benefited, as was done in the case of *Winch. v. Keely*.

If such a latitude is now given courts of law over trusts, the fears of the representatives of H. Bourquin, the first testator, should disappear; for the law as well as the circumstances of the case show, the capacity of the plaintiff to be that of a trustee, and that the beneficial interest is in the heirs of the first testator. There cannot be a mistake as to assets. The case in 7 T. Rep. does not deny the power of courts of law to take notice of trusts, with the restrictions mentioned; but they shall not so far take notice of them, as to throw down the barriers established between those courts, and the chancery. The principal objection of the defendant's counsel, I think, I have now satisfactorily disposed of. It remains for me to consider, whether this action should have been instituted by the plaintiff, or a representative of the first testator.

148 \*The cases cited by the defendant's attorney, prove the right of the representative of the first testator to control the ultimate beneficial interest, but do not controvert the right of the plaintiff in this action, to recover. The case quoted from *Douglass* is not analogous. The question then could not occur, because as the administratrix durante minore estate had terminated, no subsequent administration could interfere with the sci. fa. of the executor.

The principles in *Salkeld* are not apposite, because it does not appear that there were conflicting rights, as in the present case. The same observation will apply to the case in *Raymond*.

But the cases cited by the plaintiff's counsel are conclusive, and with a substitution of bond for note, one case is in point. 10 Mod. 315, *Betts v. Mitchel*.

The case of *Jenkins v. Plume*, 6 Mod. 181, establishes this doctrine, "that when executor recovers in a case, in which he need not name himself as executor, and

dies intestate, his administrator shall sue executor, and not the administrator de bonis non."

And it appears, if a bond is given, or a note made to the executor, for an antecedent debt, due to the testator, the executor may sue in his individual capacity, and that the mention of his derivative capacity is surplusage, not affecting his right to recover. 1 Rolls. Ab. 602; 1 Esp. 217.

If, upon this principle, therefore, *Henrietta B. Jones*, as surviving obligee, had a right to maintain this action in her individual capacity, surely that right can be delegated to no other person than the person who represents her estate. And this court will take care that the trust is properly discharged.

Plea overruled.

Noel and Berrien, for Plaintiff.  
Harris, for Defendant.

Minutes of Superior Court, letter F. p. 460.

#### 149 \**Callahan v. Administrator and Administratrix of Thomas and William Smith.*

Chatham County, January 1808.

1. **Administrators—When Appointment Complete.**—An administration cannot be recognized as completely efficient and operative, until the security shall have been given which the court of ordinary may require.

2. **Same—Entitled to Year's Exemption from Suit—From What Time It Runs.**—Therefore where an administrator fails to give approved security and another administration is granted in its stead the year in which the administrator is exempt from suit commences to run from the latter date.

By an order of the 9th January, 1806, administration on the estate of Thomas and William Smith was granted by the court of ordinary unto Susan M. Smith, widow of William Smith, and Joseph Welscher, a creditor of Thomas Smith. On the 5th February, the court, being notified of the death of Joseph Welscher, one of the administrators, directed a settlement of his accounts by his attorney, and the administration bond of the said William Welscher to be cancelled. On the 6th of April, 1807, a vacancy in the administration was declared to have taken place, and that the qualified administratrix, Susan M. Smith, had not given the bond and security that could be approved of by the court; on the 13th August, Alton Pemberton, gave the security required by the court, and was joined in the administration with Susan M. Smith. And by an order of the 3d March, 1806, letters ad colligendum which had been granted to William Callahan, and Susan M. Smith were revoked. Actions were instituted against Alton Pemberton and Susan M. Smith upon the supposition, that the year given by law to administrators had expired, as the time ought to be computed from the 7th July, 1806, when letters of administration were granted to Joseph Welscher and Susan M. Smith, the former

administrator and administratrix. It was now contended by the counsel for Alton Pemberton and Susan M. Smith, that the administration formerly granted to Susan M. Smith was suspended and revoked by the court of ordinary on the 6th of April, 1807, and that the administration from that period, was never complete or efficient, until the 13th August, 1807, and upon these grounds a motion was made to dismiss the actions brought against the present administrator and administratrix, one year not having expired from the granting of the administration.

CHARLTON, Judge:

The requisites of the law not being complied with, the courts of ordinary certainly possess the power of revoking administrations, or of declaring them vacant.

An administration cannot be recognised as completely efficient and operative, until the security shall have been given which the court of ordinary may require. This appears never to have been done by Susan M. Smith: the virtual revocation of the court of ordinary was therefore founded upon a correct principle. If the security had been given by Susan M. Smith, to the extent required of her by the court of ordinary, I would consider the present administration as a continuation of the former, and would therefore compute the time from the 7th July, 1806; but the former administration, so far as it relates to Susan M. Smith, never having legally and efficiently existed, I am of opinion, that the granting letters of administration to Alton Pemberton and Susan M. Smith, was the commencement of a new and different administration; and they consequently should be allowed one year from the 13th August, 1807, at which time they had complied with all the requisites imposed upon them by the court and the law.

It is therefore ordered, that actions brought against Alton Pemberton and Susan M. Smith, administrator and administratrix of Thomas and William Smith, returnable to the present term, be dismissed.

Lawson, Davis and Berrien, for Plaintiff.

Mitchell and Bulloch, for Defts.

Minutes of Superior Court, letter F. p. 460.

151

\*M'Caskill v. M'Caskill.

Chatham County, January 1808.

1. **Wills—Probate—When Error Not to Admit.**—The will of Donald M'Caskill being offered for probate, the court of ordinary conceiving that it had the appearance of fraud or forgery, directed an issue which was tried in the form of an indictment, against a subscribing witness who was charged with the forgery and the jury returned a verdict of not guilty. Upon a second application by the executrix to have the will probated, it was error in the court to refuse the application, since the question of forgery was settled, and no other ground was suggested why the will should not be admitted.

2. **Court of Ordinary\*—How Decision Reviewed.**—

Prior to December 7, 1807, the decision of the court of ordinary on the question of the probate of a will could not be reviewed by appeal to the Superior Court, certiorari being the proper remedy for the correction of errors of the inferior court.

3. **Same—Same—Certiorari—Appeal—Election.\***—The party has now his election, either to apply for a certiorari upon the basis of error, or to appeal.

4. **Certiorari—Appeal—Judgment.**—The judgment of the court upon certiorari is either error, or no error, upon appeal an affirmance or reversal of the inferior court.

CHARLTON, Judge.

The last will and testament of Donald M'Caskill being offered for probate by the court of ordinary, that court conceiving that the will exhibited some appearance of fraud or forgery, referred it, together with certain affidavits, to Mr. Attorney General. A bill of indictment was preferred against Samuel Kingsley, the subscribing witness, who was charged with forgery. Kingsley was tried and acquitted, and the jury in addition to the verdict of "not guilty," gave it as their opinion, that the signature to the will "was the handwriting of the testator." After this trial Abigail M'Caskill, the executrix, renewed her applications for the establishment of the will, and upon the refusal of the court of ordinary to recognise it as the last will and testament of Donald M'Caskill, her testator, exceptions were taken to the determination of the court, and a certiorari granted. The question now for the opinion and decision of the court is, whether there has been such an error in the judgment of the court below, as to require the superintending constitutional power of this court, by the writ of certiorari.

It is objected by Lawson, attorney for Affy M'Caskill, caveator, and sister to the testator, that the executrix should have entered her appeal. That the decision of the court below cannot be affirmed or reversed by any determination of this court on certiorari.

The 6th section of the 3d article of the constitution declares, "there may be an appeal from the decision of the court of ordinary to the Superior Court, under such restrictions and regulations as the General Assembly may by law direct." This section, so far as it relates to the subject of appeal, was carried into effect by an act of the General Assembly, passed December 7, 1805.

152 \*The decision of the court of ordinary, to which exceptions were taken, appears to have been on the 1st of March, 1802. It was therefore not in the power of the executrix to pursue her remedy by appeal; the mode not having been designated by the legislature. But if the section of the constitution had been carried into

\***Court of Ordinary—Review of Decision—Certiorari—Appeal—Election.**—For the proposition that the party now has his election either to apply for certiorari upon the basis of error or to appeal, the principal case is cited and followed in Roser v. Marlow, R. M. Charlton 543.



effect by an act of the General Assembly, antecedent to the 1st of March, 1802, still the writ of certiorari would have been the proper remedy for the correction of the error in the inferior judicatory. The constitution places the writ at the disposal of a party, who supposes an error to have been committed in the court below; and it cannot be innovated upon, or superseded by any legislative measures. The party has now his election, either to apply for a certiorari upon the basis of error, or to appeal. The judgment of this court upon the first must be error, or no error, upon the latter an affirmance or reversal of the inferior judicatory.

In the present case it appears to this court, that the court of ordinary committed an error, by their decision of the 1st of March, 1802, in rejecting the application of Abigail M'Caskill, for the establishment of the will of the testator, Donald M'Caskill. This application was originally rejected, under an impression of that court that the will was a forgery; and for the ascertainment of that fact they directed an issue. It was tried in the solemn form of an indictment, and the fact of forgery repelled by the acquittal of Kingsley, and the special declaration of the jury. This fact being ascertained in the only manner it could have been ascertained, should not again have been suggested as a difficulty to the establishment of the will, unless the court were satisfied as to the insanity of the testator, which does not appear in the transcript presented to this court. Either party will be entitled to an appeal from any future decision of the court of ordinary on this case.

Proceedings remanded.

Lawson, for the certiorari.  
Cuyler, against it.

Minutes of Superior Court, letter F. p. 470.

April, 1808.

### 153 \*Ex Parte Paul Grimball.\*

Chatham County, April 1808.

1. **Injunctions—Definition.**—An injunction is a prohibitory writ, restraining a person from doing a thing which is against equity and conscience.
2. **Equity Practice—When Creditor Will Be Restrained from Satisfying Execution.**—Therefore a court of equity will restrain an execution creditor from selling his debtor's property when the conditions of affairs (by the passage of the Embargo Act) are such that the property will not sell for, by any means, its fair value, and the debtor will be practically ruined by such sale.

This was a bill in equity, stating, that several judgments had been obtained at law, against the complainant, Paul Grimball, for nearly 5000 dollars, while he had a judgment in his favour for 8000 dollars, suspended by an appeal; that executions had been issued against him, and a sale threatened, which, if it took place, would prove ruinous to the complainant, inasmuch as nearly double the

property would be sacrificed now, at a forced sale, which it would have required only four months ago, to pay these judgments; and praying an injunction to delay any farther proceedings at law for the present.

The case was argued on the 7th inst. Leake, the complainant's solicitor, stated, that the bill sought relief on two grounds.

1. Equity will relieve on grounds of public utility or convenience; because a national measure (the embargo acts) ought not to produce individual ruin, when this court can prevent it.

2. Equity ought to relieve, from the peculiar situation of the party; because the plaintiff was deprived at law of a rightful advantage.

Lawson and Stites, for plaintiffs in execution, opposed the injunction, principally on the ground, that it could not issue from the apprehensions of the party; that no levy and sale was yet ordered; and that the complainant ought to give security before the relief prayed for could be obtained.

### 154 \*CHARLTON, Judge.

The complainant in this bill states, that executions have been issued against his property, and a levy and sale menaced; that if a sale is made by the sheriff, at this time, when the pecuniary embarrassments, occasioned by the embargo acts, are so general and distressing, it will involve him in ruin, as no price, or no fair price can be obtained for his property, and that he has no other means of paying his debts.

Upon these grounds he applies to the chancery side of this court for a writ of injunction, to restrain a sale under these executions. I shall not bottom a decision upon the peculiar circumstances of this case only, or as a peculiar case involving such features of hardships and oppression, as renders necessary the interposition of this branch of the court. On the contrary, I shall view this as a case in which all our citizens are interested, and as calculated to establish a precedent for the general benefit.

I ask the question, Is it not against equity and conscience? is it not in the highest degree oppressive, to compel the sheriff to obey the mandate of a writ of execution, when the facts are before the whole public, that the sale of produce, in its usual course of traffic, is suspended, or bought up by monied men from the necessitous planter, for a song? From the planter who must sacrifice his crops to prevent a greater sacrifice; who must sell to obtain provisions (if a cotton planter) for his negroes, and necessities for his family; who must sell for this song, to prevent his negroes (a more valuable property, and upon whose uninterrupted labour and increase the future support of himself and children depend) being knocked off under the hammer of the Sheriff, at a price far less than half their cash value. Is this picture overcharged? is it not rather a correct delineation of the distresses of the agricultural interest at this moment? If it is, then relief ought, somewhere, to be found.

It has been, and is at this time, a subject

\*The principal case is cited in Cook v. Walker, 15 Ga. 468.

of sufficient magnitude to require one of the extraordinary meetings of this legislature, which the constitution authorises. But  
 155 until a \*legislative suspension of sales  
 • is given to the people, cannot relief be afforded by this court?

I have given to the power with which the law and the constitution have invested me, their full deliberation; and though I do not possess all the powers of a lord chancellor, because by our local system, the interposition of a jury is required in equity cases, yet that system cannot, and does not interfere with these matters in chancery, which in their nature must be exclusively referred to the discretion of the court. Of this nature I consider the application for the writs of injunction.

An injunction is a prohibitory writ, restraining a person from committing or doing a thing which appears to be against equity and conscience.

This is the simple definition given by one of the elementary compilers, and it is sufficiently comprehensive for me to adopt it.

The principal use made of this writ is, to restrain some rigorous proceedings at law.

I shall then consider whether a sale by the sheriff, at this crisis of our national affairs, big with calamities, as I have described, to the agricultural interest, should be restrained as a rigorous proceeding at law, and as a proceeding against equity and conscience.

1. Is it a rigorous proceeding in law? An execution is the last stage of our common law proceedings. It places the person, or the property of the defendant, at the mercy of the judgment of the creditor, who may make his election. I am speaking of the execution, of which nothing can be alleged in chancery against its parent judgment. Of this nature are the executions before us, and they assume the appellation of rigorous proceedings, because there is no remedy at law; and unless a remedy is found somewhere, ruin stares the defendant in the face; a ruin not brought on himself by want of probity, or of property in his possession exceeding, probably ten times, at a cash valuation, the amount contained in the executions, but a ruin brought down on him by a necessary  
 156 measure of the national legislature and government, \*which unfortunately obstructed the channels through which he had been accustomed to pay his debts, probably with punctuality.

2. Is it a proceeding against equity and conscience?

This is the broad basis of the writ of injunction.

It is admitted by both sides, that no remedy can be had at common law. When we resort to law, it is expected that precedents will have their full weight of authority; and though precedents may militate with that justice which the particular circumstances of a particular case may require, yet, for the sake of general and uniform rules, a judge will seldom deviate from an established and settled principle to accommodate the circumstances of one case, however strong the

reasons may be to exempt it from the operation of precedent.

In the case of Doe, 5th Pott. 2 Douglass, 120, lord Mansfield is reported to have said, "the absurdity of lord Lincoln's case is shocking; however it is now law." This observation of his lordship may be selected as the most strongly illustrative of the authority, given by common law judges, to precedent.

A court of equity is not so trammelled. It is governed by uniform rules of evidence, and though a respect is evidenced in that jurisdiction for precedents, yet they are seldom permitted to stand in the way of the particular circumstances of each case.

A lord chancellor of Great Britain is almost as omnipotent as parliament. Give him but a strong hold on an equitable principle, and he will be sure to substitute the intention of an act of parliament for its letter; he will push aside precedent for abstract honesty. What are the many cases in the equity reports, on the statutes of frauds and perjuries, but indirect repeals of the plain and literal requisites of that all-important statute?

It is only necessary to advert to the nature of law and equity to account for the latitude of power given to the latter.

The law is stubborn and unbending.  
 157 It marks out for \*itself a course from which no fascinations can allure, no obstacles impede.

It neither looks to the right nor to the left. It neither relents nor forgives. It issues its mandates, and will be obeyed; it takes into view no consequences.

"Fiat juititia" is its maxim, whether contemplating its operation upon a nation, or upon an individual.

We perceive at once, that such should be the nature and effects of law; they necessarily result from that indiscriminating and eternal justice, upon which the common law is founded.

Our ancestors felt, as we have felt after them, the necessity of some tribunal, armed with the attribute of alleviating the inexorableness of the law. This tribunal is called a court of equity, whose decisions are guided by the particular circumstances of the case.

This court of equity lends mercy to the law, and steps in as a kind mediator between rigid justice, as established by the artificial institutions of society, and that justice which traces its origin to the laws of nature, and of God.

In cases like these before me, the law places every thing at your disposal. It holds out to you the means of rioting upon the spoils of your neighbor, your debtor, or the community.

The nation, in order to redress itself for outrages on its sacred rights, imposes distresses on its own citizens. These distresses are the deprivation of those means which heretofore poured wealth or competence into the lap of the planter.

His ostensible wealth is, however, now the same. He shows you his cotton, his rice, and his negroes. He proves to you that his property has even greatly accumulated since



he engaged to pay your debt; but to pay that debt now he tells you that he is unable, unless a sale is directed by the sheriff, the consequences of which would be a payment to you of fourfold; for a sale of his property now, would amount to diminution of quadruple its intrinsic and just value, and in that ratio less than it would have sold for at market previous to the embargo.

How immense, and at the same time how unrighteous, are the advantages which the creditor derives, if he himself become the purchaser, and pay with his judgment! How much more unrighteous and against conscience is a purchase under these circumstances by a capitalist, who, with his ready money, speculates upon the misery and the ruin of the unfortunate debtor!

Time has not been allowed me to search for apposite cases in the books. I do not recollect, at this moment, any cases reported in the English authorities involving the principles of the cases before us.

I shall, therefore, bottom my decision upon the abstract grounds, that cases of this description involve hardship and oppression; that they are against equity and conscience; that they are promotive of injury to the public; that they enable monied men to accumulate usurious wealth; and that they tend to convert a just and salutary measure of the government, into an engine of political disaffection, through the medium of distressed and persecuted debtors.

Let the writ of injunction therefore issue, to stay sales upon these executions, until the first day of September next, the claimant depositing with the sheriff, when required to meet the day of sale, sufficient property, the valuation of which to be ascertained by the price at market three months preceding the embargo act.

Leake, in support of motion for injunction.  
Lawson and Stites, against it.

Minutes of Superior Court, letter F. p. 521.

May 5th, 1808.

159 \*Ex Parte John Caig, an Applicant for Administration.

Chatham County, May 1808.

**Administration—Application by Principal Debtor—Statute of Limitations.**—Where a principal creditor applies to the court of ordinary for administration on the estate of his deceased debtor, the fact that his debt appears to be barred by the

**\*Administration—Application by Principal Debtor—Statute of Limitations.**—In *Conyers v. Bruce*, 109 Ga. 191, 34 S. E. Rep. 279, it is said: "In the case now under consideration, Bruce's judgments had apparently not become finally barred at the time of the death of Conyers. They may have been dormant, but the three years in which he had the right to revive them by *scire facias*, or to sue upon them as debts, had apparently not expired. The fact that the judgments were dormant did not prevent their being debts. Bruce could still have maintained an action upon them. *Lockwood v. Barefield*,

statute of limitations is no ground for refusing him administration, since such fact is a matter of ulterior investigation.

By the Court.

John Caig's application for administration on the estates of Robert Smith and Alexander Gillen was rejected by the court of ordinary, as appears from the exemplification of the proceedings of that court, upon the ground, that the instrument, or bond, was barred by lapse of time. (Mr. Caig applied for administration as principal creditor, and predicated that application upon a bond which appeared to be barred by the statute of limitation.) (a) The application should not have been dismissed upon that principle, for it was not competent for the court below thus to destroy the remedy by action, which the applicant might have possessed. That was a subject of ulterior investigation, which could not take place before the court of ordinary.

The case is therefore remanded, in order that administration may be granted to the applicant.

Harris, for Certiorari.

Minutes of Superior Court, letter F. p. 518.

May 5th, 1808.

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\*Huron v. Huron.

Chatham County, May 1808.

**Attachment—Service of Process upon Garnishee—Effect Where He Is Not a Resident of County Where Suit Brought.**—The constitution provides, that the party shall be sued in the county where he resides; but this privilege applies to original actions which clearly designate the parties, plaintiff and defendant. A garnishee is not a party in its technical application and is not recognized as a defendant, and an attachment served upon him being incidental or auxiliary to the original action, and not falling under the constitutional privilege given to defendants, he may be served with process in a county other than that in which suit is brought.

In this case returns were made by garnishees residing in different counties, and upon motion of Davis and Berrien to enter up judgment against them for the amount of their returns, it was objected by Harris, for the garnishees, in arrest of this motion, that the 3d section of the attachment law was unconstitutional, because no person could, (except in the case of joint obligors,) be sued

7 Ga. 393. In *Ex parte Caig*, T. U. P. Charlton's Rep. 159, the ordinary refused to appoint an administrator, on the ground that the debt upon which the application was based had become barred by the lapse of time. On *certiorari* it was held that "The application should not have been dismissed upon that principle, for it was not competent for the court below thus to destroy the remedy by action which the applicant might have possessed. That was a subject of ulterior investigation, which could not take place before the ordinary."

(a) The words in the parenthesis do not appear in the decision, but it is here inserted in order that the ground of dismissal may be more clearly understood.

out of the county in which he resided : and these garnishees resided in the county of Richmond.

By the Court.

The constitution directs, that the party shall be sued in the county where he resides ; but this constitutional privilege applies to original actions which clearly designate the parties, plaintiff and defendant. It does not interfere with those incidental remedies, which necessarily result from the exigencies of the original action. A bill may be filed in equity to procure testimony in aid of the bill original (or for other collateral purposes,) against a person not a resident of the county. This is mentioned for the purpose of illustration, and the present case may be assimilated to it. The garnishee is not a party, in its technical acceptation, he cannot be recognised as a defendant. He is called a "third person" by the attachment act : and by the process served upon him, he is merely required to surrender to the attaching plaintiff (creditor) property which may enable the plaintiff \*to derive a benefit from his action. None of the rights of the garnishees are so implicated as to require a trial of his vicinage. The attachment served upon him is therefore incidental, or auxiliary to the original action, and does not fall under the constitutional privilege given to defendants.

Davis and Berrien, for Plaintiff.  
Harris, for Garnishees.

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**\*Same v. Same.**

Chatham County, May 1808.

It appearing to the court that the following persons, viz. A. Lorcey, R. W. Groves, A. Simonet, T. Mendenhall, A. Delannoy, M. Rein-geard, and L. Barrie, who were duly summoned as garnishees, have severally made returns, admitting that they were indebted to the defendant at the time of service of the attachment, in the sums therein specified.

On the motion of counsel for plaintiff, it is ordered, that the plaintiff have leave to enter up judgments against the said garnishees severally for the amount by them respectively admitted to be due at the time of service of the attachment.

It further appearing to the court, that two thousand eight hundred and eighty-six dollars and eighty cents, now remain in the clerk's office of this court, being nett amount of sales made by order of this court of property levied on under this attachment : It is ordered, that the same be paid over to the plaintiff in attachment, or his attorney, without delay.

And it further appearing to the court, that Samuel Williams, B. Maurice, H. Ross, M. Nazaret, and Charles Machin, who were summoned as garnishees in the above cause, have severally made default, and have failed to make their returns on or before the first day of this term, in conformity with a rule of this court, made in the term of January last, and due proof of the service of the said rule

being made to the satisfaction of the court : It is ordered, that attachments as for contempt do issue against the said several garnishees.

Davis and Berrien, for Plaintiff.  
Harris, for Garnishees.

Minutes of Superior Court, letter F. p. 521.

May 6, 1808.

**163 \*Administrator of Straffin v. Thomas and Robert Newell.**

Chatham County, May 1808.

**Charter Party—Right of One Partner to Bind Other by Seal.**—A charter party being exclusively a mercantile transaction and always in the course of trade, one partner can therefore bind the other by signature and seal in this species of mercantile contracts.

This was an action of covenant brought upon a charter party, signed and sealed thus,—“Thomas and Robert Newell.” A verdict has been rendered for the administrator, and a motion is now made to arrest the judgment, upon the ground, that one partner cannot execute a deed to bind the other.

CHARLTON, Judge.

The point for the decision of the court is, whether one partner can bind another by deed ?

The general principle of the law is, that all partners are bound by what one of them does in the course of the business ; for quoad hoc, each partner is considered as the authorised agent of the rest, and all are respectively implicated, and each becomes liable to the fullest extent, in such trade or business. Law on Part. 105 ; Davies' Bank Law, 8.

It is said that partnerships embrace only chattel interests, and the free disposition of these requires not the solemnity of deeds or indentures. The right of one to bind the interests of all is wisely restrained within the limits of personal estate, and it is with a view to this, that partners are allowed to bind each other by deed. Amer. Lex Mer. 437.

It is also laid down in the case of Gerard v. Basse, 1 Dallas Rep. 119, that “one partner cannot execute a deed for another.”

But the case principally relied on by 164 Davis and Berrien, is \*Harrison v. Jackson, 7 T. R. 207, where it is said by lord Kenyon, C. J., “that the law of merchants is part of the law of the land. And in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted, but that one partner might bind the rest. But the power of binding each other by deed, is now, for the first time, insisted on except in the nisi prius case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety.”

I have given to this case, and to all others I have had an opportunity of inspecting on this subject, the most attentive investigation, and whilst I assent to the general propositions



of lord Kenyon and of Shippen, I do not conceive that they apply to the mercantile transaction of a charter party. It does not say in this case of 7 Term Rep. upon what kind of agreement covenant was brought, and I can find no cases of actions upon charter parties where the question was directly involved, as it relates to the signature of the partners; but there is a case in point as to the liability attached to both or all of the owners of a ship by the signature and seal of one. It is thus stated in Beanes' *Lex Mercatoria*, who cites 2 Rolls. Abr. 22, "if an indenture of charter party be made between A. and B. owners of a ship of the one party, and C. and D. merchants of the other part, and A. only seals the deed on the one part, and C. and D. on the other part; but in the indenture it is mentioned that A. and B. covenant with C. and D. and C. and B. covenant with A. and B. In this case A. and B. may join in an action v. C. and D. though B. never seals the deed, for he is a party to the deed, and C. and D. have sealed the other parts to B. as well as to A." Beanes, *Lex Merca*. 133.

If one of the freighters or owners of a ship, who are quoad hoc partners, can bind the other by his seal, a fortiori, the signature and seal of one merchant then can bind the other in this species of mercantile contract; because in the one case there is only a special, and in the other a general partnership, the principles of which are more liberal and extended.

I bottom my decision upon the broad 165 ground that a charter \*party is exclusively a mercantile transaction, and always in the course of trade. The general proposition of lord Kenyon must refer to deeds not in the course of trade: I mean a deed so inseparably incidental, so closely blended with partnerships and mercantile pursuits, as the contract of charter party is. A charter party is as essential in the course of trade, as the negotiation of bills of exchange; and I can perceive no difference between the exigencies which would impose a liability in the one case, and destroy it in the other. This contract could not have been in the contemplation of judges when they decided, that one partner could not bind the other by deed. The silence of the books, when it is supposed, that many cases might have occurred, affords the strongest reason to believe that the deed of charter party is not within the general principle stated by Kenyon and Shippen. The deeds they speak of are those which reach the separate estates of the partners, are unconnected with the partnership, or have no relation to the course of trade. A charter party has so peculiar a view to mercantile matters, and ideas, that all the parties covenanting become liable in a given extent, as partners according to the law merchant; Law of Part. 89, and like all mercantile contracts, it ought to have a liberal interpretation. Doug. 277. I have consulted some merchants on this subject, and they inform me, that it is customary either to sign the name of the firm, or for one part-

ner first to sign his own name, and then add "for self and other partners," mentioning their names. Still, however, there is but one seal, and the signature is by one. I have also examined a printed precedent, and I find it is signed and sealed in the manner of this, which illustrates the understanding of writers on the subject.

The motion in arrest of this judgment is therefore overruled.

Davis and Berrien, for the motion.  
Leake, against it.

Minutes of Superior Court, letter F. p. 351, 523.

## 166 \*The State v. George Campbell.

Chatham County, May 1808.

**Statute of 9 Geo. 1—Application to Condition of American Colonies.**—When the American colonies were first settled they brought with them so much of the common law as was applicable to their local situation and change of circumstances. The statute of 9 Geo. 1 as shown from its preamble was not applicable to the then conditions, and therefore an indictment founded on such statute will be quashed.

This indictment is founded upon the 9th Geo. 1, commonly called the Black Act, passed 1722.

It was moved by Mitchell Bullock, to quash this indictment for the following reasons:

1. Because the statute 9 Geo. 1, is inapplicable to our country, and contrary to the nature and genius of our government.
2. Because the statute 9 Geo. 1, was a temporary statute, revived and made perpetual by a statute passed long after the period when the statutes of Great Britain could have any binding efficacy in this state.
3. Because we have an act passed by our own legislature, which sufficiently answers the purposes of stat. 9 Geo. 1, so far as it relates to malicious shooting.

Mr. Leake, Solicitor General, in opposing the motion, considered, that the stat. 9 Geo. 1, could never be considered as temporary statute, for that that statute, and all the intervening statutes reviving it, down to 24 Geo. 2, which perpetuated 9 Geo. 1, was to be taken as one statute, upon the principle of the well known maxim of *pari materia*: and that the crime of malicious shooting at another, was not an offence confined to the local relations of any country; but might be incorporated in the system of this, or any other nation, without any violation of its government or policy. It punishes attempts at assassination. He considered the statute of 9 Geo. 1, as it relates to the crime of malicious shooting as part of the statute law of England, adopted at the colonization of this state, and as expressly revived by the act of February, 1804.

## 167 \*CHARLTON, Judge.

When the American colonies were first settled by our ancestors, it was held as well by the settlers, as by the judges and lawyers of England, that they brought

hither as a birthright and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judges for itself what parts of the common law were applicable to its new condition, and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. 2 Dal. 394.

In 1732 this state was settled by James Oglethorpe, and the 116 persons who came over from England with him; and from that period the colonization of Georgia is to be dated. From that period we began to adopt such parts of the common and statute laws of England, as were applicable to the then relations of the colony. The government of the trustees assimilated itself, in the tenure of lands, to the feudal system, and in that respect deprived our ancestors of many of the benefits which they would have derived from the laws of England; but the penal code of the mother country was still in force to the utmost that it could be applied to the relations of an infant colony.

Was the statute 9 Geo. 1, ever in force in this state as a colony, a province, or an independent republic? Is it applicable to our present relations?

It was observed by Mitchell and Bulloch, that the statute of 9 Geo. 1, never could have been in force, because that statute, as is discoverable from the preamble and the context, is founded upon a tender solicitude for the amusement and property of the aristocracy of England. It was made to protect from the violation or profanation of the people, the forest of his majesty or the park of the peer. How then could it apply to a country which was but one extended forest, in which the liberty of killing a deer, or cutting down a tree, was as unrestrained as the natural rights of the deer \*to rove, or the tree to grow; and where was the aristocracy whose privileges were to be secured?

In this view of the statute, there was nothing left for its provisions to operate upon in this state. It was therefore a local statute, fit only for the internal polity of England.

I accede to this construction. It is very evident from the reasons stated, that this statute was not applicable to the relations of the colony at its first settlement, and if not applicable at that period, its subsequent operation must depend upon some legislative or judicial recognition of it, neither of which can be found.

None of our reviving statutes can comprehend it by the utmost stretch or latitude of construction. They refer to those statutes and principles of English law, which were applicable and in force. The intention of the 9 Geo. 1, has been sufficiently explained; that intention is deducible from the preamble, and the preamble of an act is in general a good mark to come at the meaning of the legislature. I am disposed, in this case, to resort exclusively to the preamble for the intention; for this law

is not only penal to a feudal degree, but it is productive of tyranny. I shall give my consent to narrow the construction. 1 Durn. and East, 49.

I cannot agree with Mr. Solicitor Leake, that one part of this statute can be considered as applicable, and the rest not so. Mr. East says, that in the construction of that branch of the statute, which refers to malicious shooting at any person, or the rescuing any person in custody for that offence, it has been holden that it has no relation to the preceding part of the clause; and in confirmation of this he cites the case of *Rex v. Arnold*, 8 State Trials, 290, 213, as approved by all the judges. 1 East 412.

This rule of demarkation may be drawn by the English judges, but it cannot be drawn here; we cannot, as it was observed by my brother Mitchell, cull this flower or that flower of the English statutory law, and (to pursue the metaphor) make a pleasant bouquet of the whole.

169 \*We must adopt the statute en masse, or not at all; legislative wisdom may select, but judicial discretion cannot.

I consider, that our own statute is sufficiently penal to guard against any personal injury or mayhem which may result from malicious shooting, and perhaps the indictment for an assault, with intent to murder, may always inflict a punishment equal to the nature of the offence. This mode of prosecution is recommended in the present case.

It is ordered that the indictment be quashed.

Mr. Solicitor Leake, for the state.  
Mitchell and Bulloch, for prisoner.

Minutes of Superior Court. Letter F. p. 351.

170 \*Mein, Mackay & Co. v. West.

Chatham County, May 1808.

**Injury Occasioned by Act of God—Liability of Bailee.**—An injury occasioned by the act of God is *damnum absque injuria*.

CHARLTON, Judge.

It appearing upon the face of the record, that the injury upon which this action is founded, was occasioned by the storm of September, 1804, a verdict was at this term rendered for the plaintiffs. And a motion in arrest of judgment is now made by Harris, upon the ground, that the injury complained of was occasioned by the act of God; and therefore *damnum absque injuria*.

This action is founded on the misfeasance of the defendant, and the only point for the opinion of the court is involved in the question, whether an injury, occasioned by such cause as is stated in the record, can be considered as arising *ex delicto* of the defendant.

Trespass is founded upon a misfeasance, or, the injury which is the basis of that action, must be wilful and voluntary. It is



a fundamental, and one of the best maxims of the law, that the act of God can do no injury. Then what is denominated the act of God, as contradistinguished in the books from the act of man? It is thus defined by lord Mansfield, "such as would not happen by the intervention of man, as storms, lightning, and tempests." 1 Term Rep. 33.

If such is the definition of an act of God, and if any one of those acts which are enumerated in that definition, will excuse a common carrier, loaded as he is by the law with all the responsibility of an insurer, and for whom the law shows very little mercy; so much stronger therefore is the reason for applying its benefits to the case of a common person, who only impliedly contracts that he will not do an intentional wrong. Was it practicable—was it physically possible, for \*human exertion to repel the accidents which resulted from the storm of 1804. Was it not an act of God, irresistible in its operation, and above the intervention of man? It certainly was an awful interposition of divine energy, which it would not only be illegal, but impious to convert into a pecuniary advantage to one who has suffered from its inevitable effects. All the cases are with the defendant. It is therefore ordered, that judgment be arrested.

Judgment arrested.

Stites, for Plaintiff.

Harris, for Defendant.

Minutes of Superior Court, letter F. p. 543.

**172 \*Administrator of Straffin v. Thomas and Robert Newell.**

Chatham County, May 1808.

**Admission of Illegal Evidence—Effect.**—At the trial the protest of the master of the vessel was admitted as evidence in chief. But such protest is not evidence per se; it can only be used, in a court governed by the rules of the common law, to impeach the testimony of the master himself, or as incidentally corroborative of the log-book. There was therefore a misdirection of the judge on this point of the evidence.

By CHARLTON, Judge.

A rule has been granted to show cause, why a new trial should not be granted, and Davis and Berrien, in support of their motion, show the following causes:

1. Because the verdict is contrary to law, equity, justice and to the evidence adduced.
2. Because illegal evidence was permitted to go before the judge.
3. Because the verdict was contrary to the direction of the court, in matter of law.

I shall decide upon the second ground only. At the trial, the protest of the master of the vessel was admitted as evidence in chief. Now the protest of the master is not evidence per se; it can only be used in a court governed by the rules of the

common law, to impeach the testimony of the master himself, or as incidentally corroborative of the log-book. There was therefore a misdirection of the judge, on this point of the evidence.

In this case the plaintiff is the administrator of the master, which ought to have suggested an invincible objection to the admissibility of the protest. 2 Esp. Rep. 489; 7 D. and E. were cited by Davis and Berrien.

This court is governed by the rules and principles of the common law, so far as they are permitted to operate by our constitution and laws. The case therefore cited from 1 Dallas, p. 6, militating with those rules and principles, cannot be received as authority.

Rule made absolute.

Davis and Berrien, for the motion.

Leake, against it.

Minutes of Superior Court, letter F. p. 549.

June 27. 1808.

**173 \*Samuel and Charles Howard v. Corporation of Savannah.**

Chatham County, June 1808.

**1. Ordinances—Retroactive Effect.**—An ordinance which is not explanatory of a statute or declaratory of the common law cannot have a retroactive effect.

**2. Same—Execution—Illegal.**—Where a city ordinance only authorizes an execution against the goods and chattels of one who violates a by-law or ordinance, an execution directed both against his goods and chattels and lands and tenements is illegal.

The petitioners, Samuel and Charles Howard, obtained a rule to show cause why a writ of certiorari should not issue, to remove into the Superior Court the proceedings of the corporation against them, upon the following grounds:

1. Because from the 1st of May, 1806, to the 30th November, 1807, the petitioners could only be required to pay a tax of 50 cents, upon the invoice price of goods sold between the above periods, whereas, by the execution, report, and certificate of the officer issuing the same, it manifestly appears, that the assessment upon which the same is founded, is made on the amount of sales of the said goods, from, and to, the periods therein mentioned.

2. And because, the said execution is directed generally, and in the first instance, against the goods and chattels, lands and tenements, of the petitioners, whereas, the ordinance authorises an execution against the goods and chattels only.

CHARLTON, Judge.

Two questions arise out of the grounds stated by the petitioners.

1. Whether the ordinance of the 30th November, 1807, can retrospect, so as to supersede the assessment imposed by the ordinance of the 24th November, 1806, and in

lieu thereof, to substitute the assessment imposed by the ordinance of the 30th, Nov.

1807? and,

174 \*2. Whether an execution, issued by an officer of the corporation, can be levied on lands and tenements?

1. The ordinance of the 24th November, 1806, directs a tax to be levied of fifty cents on every hundred dollars value of goods and merchandise, to be ascertained by the invoice price.

The ordinance of the 30th November, 1807, directs, that a tax be levied of fifty cents, on all goods, wares, and merchandise, which shall be sold on commission, on every hundred dollars sold.

No laws can operate retrospectively unless they are explanatory of the statute, or declaratory of the common law. With these exceptions, statutes or ordinances will always be construed as applying their principles to cases in future, or subsequent to their enactment.

The ordinance of 30th November, 1807, cannot, therefore, divest the petitioners of their right to pay the tax of fifty cents on the invoice price of the goods, from the 24th November, 1806, to the 30th November, 1807, the amount of which assessment will be ascertained by the returns made on the 1st of January and 1st of May, 1807, or by the assessed value of the city treasurer.

2. A sale of lands and tenements under an execution of a city officer, for a violation of a city ordinance or by-law is illegal, and repugnant to the rights, which are expressly or impliedly delegated to the corporation. Upon the footing too of general doctrines, the appropriate remedy for all infractions of ordinances or by-laws, is against the goods and chattels.

This execution cannot, therefore, be supported by principles of law, nor has it been issued conformably to the directions of the ordinance itself.

Rule made absolute.

Davis and Berrien, for the Petitioner.

Mr. Recorder Habersham, for the Corporation.

Liberty County.—Superior Court.

November Term, 1808.

175 \*P. Grimball v. F. Ross.

Liberty County, November 1808.

1. Act Providing for Postponement of Certain Civil Cases—Effect.—The clause of the constitution providing for jury trial is not infringed by an act providing for the postponement of the trial of certain specified civil cases for a certain time, nor does such act impair the obligation of contracts.

2. Act to Alleviate Debtors—Construction.\*—An equity

\*Constitution—Construction.—In *Gilbert v. Thomas*, 3 Ga. 575, it is held that, equity cases are not embraced in the term "civil cases" as used in § 1, art. 3 of the Constitution of 1798. And at page 580, LUMPKIN, J., says: "The case of *Grimball v. Ross*, T. U. P. *Charlton R.* 175, has been cited in opposition to the foregoing construction. It was there decided, and we believe rightly, that an equity case was a civil case

case is a civil case within the meaning of the act to alleviate debtors.

CHARLTON, Judge.

A motion has been made by Noel and Berrien, to bring on the trial of this cause, upon these two material grounds:

1. Because the act entitled "An act to alleviate the condition of debtors, and afford them a temporary relief," does not prevent the trial of equity cases, our statutes having created a distinction between equity and civil cases; and if this ground should not be sustained, it is still contended that this equity case can be tried.

2. Because the "Act to alleviate the condition of debtors, and afford them a temporary relief," is unconstitutional.

The counsel for complainant, as well as Mr. Harris, who opposed the motion, have supported their respective arguments with learning and ability; and the ample information elicited from the discussion, has enabled me, in the course of the few hours allowed for the daily adjournment of the court, to arrange my ideas, and to give some kind of method to the opinion which I am now about to deliver. I shall take the liberty of reversing the order in which the grounds for the motion have been stated: because, if the act is unconstitutional, it will be perfectly unnecessary to advert to the distinction between an equity and a civil case.

First. Is the act of the General Assembly unconstitutional?

The power which the judicial department claims of deciding on the constitutionality of laws, is a power inseparable from the organization of that department. It is a power which results from the peculiar construction of the federal \*and state compacts; without it all the horrors of legislative omnipotence would instantly stare us in the face, followed by a prostration of those wise checks, a legitimate exercise of that power imposes upon

within the provisions of the alleviating law of 1807; and it shows that words and phrases are to be interpreted according to their collocation, and not their abstract signification.

"The Act of 1807 forbade the courts 'to issue any civil process or to try any civil cases which had before been sued out, except for the trial of the rights of property, and in cases of attachment,' &c. Here the intention of the legislature was sweeping, embracing all civil cases except those specified. The superior courts were then exercising an equity jurisdiction under the Act of 1799. The process issued in them was no doubt civil, as contradistinguished from criminal process, and equity cases were consequently within the provisions of the act. This was rendered yet more certain by the object and intent of the act, which was 'to alleviate the condition of debtors,' to relieve them from being sued; and no possible reason could be assigned consistent with that intention, for distinguishing between suits at law and suits in equity. The constitutional question, therefore, remains untouched by this adjudication."

The principal case is also cited in *Beall v. Bealls*, 8 Ga. 218.



all wicked usurpations on the sacred rights of the people.

In England they have no constitution; hence their parliament possesses omnipotent powers. Englishmen call *Magna Charta*, their bill of rights, and the act of settlement, component parts of the British constitution. But we all know that the people had no agency in any of those measures, consequently they were acts of an omnipotent legislature, or of an oligarchy, assuming and exercising the sovereign authority.

A constitution stands upon a different basis. It emanates directly from the will of the people, in whom, from the very nature of things, the sovereign power necessarily resides. As soon as the people have given existence to this constitution, it becomes the supreme law of the nation or the state; it is paramount to all other authority; and that mighty fiat, and that fiat only, which gave it life, can announce its destruction.

These are the political tenets which cling to, and are dear to the hearts of all true Americans. They are the tenets dear to Americans, because who can oppress or can be oppressed, under the benign and energetic influence of a written constitution, which designates and guarantees all the rights of man, and which raises up every arm in defence of them!

From passion, from unprincipled ambition, from the illusions of ignorance, from the ebullitions of political acrimony or misguided zeal, it is very easy to perceive the possibility of an unconstitutional act of the legislature. What then is the remedy? A recourse to the people's vengeance? Must the people be called upon to defend in their aggregate capacity, that compact and those privileges which flowed directly from the source of their volition? If this is the remedy, our boasted republicanism is nothing more than systematical anarchy; and it

would, therefore, be better for us to repose <sup>177</sup> on the thorny protection of an absolute monarch. Is the remedy found in a patient endurance of the evil, until succeeding legislatures think proper to repeal the unconstitutional edict? This would be worse than an appeal to popular insurrection; for it is founded on preposterous expectation, that the same hand which cruelly and deliberately inflicted the wound, will be benevolently extended to heal it; it is worse than popular insurrection, because it presupposes an acquiescence in an outrage upon the constitutional rights, longer than ought to be borne by American citizens. The remedy can only be found, then, in the wisdom and independency of the judicial department. Here the passions, the feelings, and the interests which may, and frequently do, sway deliberative bodies, cannot be found. This department is aided by all the lights which cool and dispassionate investigation can afford, and it is governed by maxims of jurisprudence, which, *apertis foribus* offer a secure asylum to every citizen whose weakness

or injuries solicit admission and protection. This department cannot deviate from those fixed principles which, for ages, the approbation of mankind has stamped with the seals of truth and authority. In this respect, the judicial is unlike the legislative department, whose functions are regulated by the caprices of an arbitrary discretion. Under this view of the judicial department, it is surely the best, the safest, and in our republic, can be the only mediator between a citizen and an unconstitutional act of the legislature.

The objection, that the judicial department cannot decide on the constitutionality of an act of the legislature, because the judges are elected by the legislature, and that therefore the creature cannot be greater than the creator, is a mode of reasoning abhorred by the constitution. It is true, that the judges are elected by the legislature, but when elected they constitute a department co-equal and co-ordinate with the legislature. What other inference can be deduced from the distinctiveness established in the constitutional declaration? Article

1, section 1. Precedents are not wanting either in <sup>178</sup> the federal or state jurisdictions, to prove that the judicial department possesses, and has actually exercised, the power of deciding on the constitutionality of legislative acts. I have here no access to books, and therefore will not venture to state, from recollection, the principles upon which each case was decided. My mind is satisfied with throwing out these general, and perhaps they may be called desultory, observations, which convey, on this point, my opinion as strongly as I can express it. But if the judicial department can declare an act unconstitutional, in what manner ought a power of such magnitude be exercised? I think it ought only to be exercised where the act is directly in the teeth of the constitutional provision; and I agree with what fell from Mr. Harris, that no nice doctrines, no critical exposition of words, no abstract rules of interpretation, such as may fit the elucidation of principles in a legal contest between individuals, can, or rather ought, to be resorted to in deciding on the constitutional operation of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of every one, as an axiomatic truth; as that the parts are equal to the whole.

I shall endeavor to illustrate this: the 1st section of the 2nd article of the constitution declares, that the "executive shall be vested in the governor." Now, if the legislature was to vest the executive power in a "standing committee of the house of representatives," every mind would at once perceive the unconstitutionality of the statute. In such a case as that, therefore, the judicial department would be authorised without hesitation to declare the act unconstitutional. But where it remains doubtful whether the legislature have or have not trespassed upon the constitution, the conflict ought to be avoided, because there is a

possibility in such a case of the constitution being on the side of the legislature.

If this act therefore involves principles as evidently unconstitutional as the cause I have stated, I shall say so, and at the same time feel perfectly tranquil under the clamour or the consequences which may result from such a decision.

179 \*If, on the other hand, the 4th section of this act, or the parts of it which have been particularly alluded to, can be placed in alliance with the constitution; or if it becomes a matter of difficult solution whether that section is or is not reconcilable with the constitution, I shall then feel much gratification in escaping from a combat of legislative authority. This section of the act declares, "that neither of the aforesaid courts shall issue out any civil process or try any civil case, except for the trial of the right of property, real and personal," &c. This act expires on the 25th of December next. Mr. Berrien says, that this section of the act is unconstitutional, because it inhibits a citizen from taking advantage of the trial by jury under the usual and regular administration of justice, and because it interferes with sittings of the Superior Court, which are directed by the constitution to be held twice every year in each county.

Mr. Noel says, that this section of the act, or the whole of the act is unconstitutional, because it impairs the obligation of contracts.

The first objection may, I think, be answered laconically. The trial by jury is not taken away by a bare postponement of the trial of cases, in which the interposition of the jury may be required. The positive and unqualified deprivation of a right, is surely different from the temporary delay of the enjoyment of that right. A denial of a right, legally speaking, is an unlimited prohibition of its enjoyment. If the right is not annihilated, it exists. Now in the case under discussion, there is no express inhibition of the trial by jury, and therefore, agreeably to the positions I have before suggested, if the denial of the right of trial by jury is not the clear and explicit language of the act, the judicial department will not resort to fine spun deductions to find out the violation of that, or any other constitutional franchise. As a conclusion to this objection, I am then of opinion, that so far from taking away the right of the trial by jury, this act acknowledges the unimpaired existence of that right, and only affects the trial of cases for a definite period.

180 \*The second objection may have its weight in the opinion of the learned gentlemen who urged it, but with me it has none.

The constitution merely declares, that the "Superior and Inferior Courts shall sit in each county twice in every year, at such stated times as the legislature shall appoint." Sect. 1, Art. 3.

This act does not interfere with the sit-

tings of the Superior Court in each county every year.

If the legislature had declared, that the Superior Court should not sit at all for the term of one year, or that its sittings should be held only once in each county for the term of a year, under such a prohibition, the act would be pronounced unconstitutional. But how can the idea of the business, which is properly cognizable in the Superior Court, be identified with the sittings of that court? To me there appears as wide a difference between the sittings of the court, (which the constitution must mean an opening of the courts) as there is between the action of trover and the daily adjourning proclamation of the sheriff. The constitution is silent as to the manner in which the business of the court shall be managed and conducted, the process that shall be issued, the service of the process, or the periods at which cases shall be tried. All this is left to legislative wisdom; and however much I may doubt and deny the policy, the necessity or the justice, in interfering with, or prescribing distant periods for, the trial of actions, under any combination of circumstances, yet I am compelled, by official duty, to say, that the discretionary exercise of this power is not meddled with by the constitution, and that is therefore a portion of that residuum of authority retained by the people, and may be exercised by the legislature. Again, it is said this act impairs the obligation of contracts.

The 10th section of the 1st article of the federal constitution declares, that no state shall pass a law impairing the obligation of contracts. What is meant by the terms "im-

181 Any measure, I presume, \*which lessens the value of contracts, that gives them a diminished value, takes from them any of the essential properties of contracts, or which divests them of that priority of lien, obligation, or recovery, which they would otherwise possess. This impairing of contracts must mean their partial rescindment, by legislative authority. This act, therefore, as it does not innovate upon the obligation of contracts, either by a partial rescindment, by destroying any of the properties of contracts, or by diverting the usual operation of the lien, cannot be said to impair the obligation of contracts.

The usual periods at which contracts were heretofore enforced by action, are protracted, and the facilities of recovery have been suspended; but does this impair the obligation of contracts? Certainly not. This obligation remains entire, and a bond or covenant is as valuable, and, on the score of obligation, is as operative now, as before the passing of the act.

Under these impressions, I am, therefore, of opinion, (bottoming my opinion upon these specific objections) that this act is constitutional.

2. The second ground of the motion now demands investigation; and the question it



involves is, whether, under our system of laws, an equity case can be denominated a civil case.

There can be but this division of cases; 1. Criminal. 2. Civil.

Criminal cases are those which involve a wrong or injury done to the republic, for the punishment of which, the offender is prosecuted in the name of the whole people.

Civil cases are those which involve disputes or contests between man and man, and which only terminate in the adjustment of the rights of plaintiffs and defendants.

It is said, however, that a criminal examination and collation of our statutes establish another class of cases, to wit: Equity cases, as contradistinguished to civil and criminal cases. I have taken infinite pains to trace, in our laws, the \*lines of distinction between an equity and a civil case; but without adopting implicitly the inferences of the gentlemen who contend for this distinction, I can see nothing in the plain letter of the law which creates it.

The argument I think stands fairly thus: The constitution gives to the Superior Court exclusive and final jurisdiction in all criminal cases, and in cases respecting the titles to land. Art. 3, Sect. 1.

Here then is one distinction between criminal cases, and that class of civil cases relating to real property. The inferior courts shall have cognizance "of all other civil cases." Art. 3, Sect. 1.

Here then is another distinction between criminal cases, and "all other civil cases," cognizable in the inferior courts; and ex concessu of counsel, there is nothing in the constitution which excludes the inferior courts from sustaining a jurisdiction over equity suits, under the sweeping clause of "all other civil cases." But the third section of the judicial act of 1799, is, I think, conclusive as to the scope and latitude which should be allowed the terms "civil cases." It declares, that the said Superior and Inferior Courts shall have full power and authority to hear and determine all causes, both civil and criminal, of which they shall severally have jurisdiction. Now the term "civil," must evidently mean all cases (whatever technical appellation they may assume, in the shape of an action or chancery bill,) which cannot legally be denominated criminal cases. The 53d section of the judicial act of 1799, confers a chancery jurisdiction upon the Superior Courts.

Therefore equity proceedings must be denominated civil cases, agreeably to the mode of classification adopted in the 3d section of the judicial act; and I may add, that the terms "all other civil cases," used in the 1st section of the 3d article of the constitution, appear to authorise a similar conclusion, for the constitution speaks of only two classes of cases, criminal and civil; and it will not, I presume, be con-

tended, that the judicial department can take cognizance of cases \*which do not fall under the one or the other of those classes; the conclusion is then ir-

resistible, that if an equity case is not a civil case, the court has no authority to try it.

This is the dilemma we are reduced to by establishing, or rather attempting to establish, a distinction between an equity and a civil case. Upon the second ground of the motion, I am, therefore, of opinion, that an equity case is a civil case, and that this bill cannot be tried under the prohibitory provisions of the act of assembly, it not being a case relating to the right of personal property.

Motion overruled.

Davis and Berrien, for Complainant.  
Harris and Bulloch, for Defendant.

Minutes of Superior Court, letter G. p. 3.

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### \*The State v. Asselin.

Liberty County, November 1808.

**Habeas Corpus—Right to Controvert Return.**—Upon the return of habeas corpus no evidence extraneous to the depositions and information taken by the magistrate, ought to be admitted to controvert the facts contained in these depositions, or the charge exhibited in the warrant of commitment; nor can any one controvert the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it.

By CHARLTON, Judge.

The prisoner has been arrested and committed by virtue of the following warrant:

"State of Georgia.—Chatham County.

"To any lawful constable of said county:

"You are hereby commanded to take the body of Charles Asselin, and bring him before me, or any justice of the peace of said county, to answer to a charge exhibited against him by Lewis Mallet, for enveigling and feloniously carrying off the following named negroes, which the deponent was legally possessed of, to-wit: Sophia, and her son, a child; Benjamin, Delphine and her son; Muttpuin, Dublin, Antonia; in all eight negroes, and one horse, and bring him and the said negroes and horse, if found, before me or any other justice of the peace of said county; and this shall be your warrant. Given under my hand and seal, the 27th day of July, 1808.

"John Pooler, J. S. C."

This is the language and form of the warrant, and the affidavit of Mallet upon which the warrant is founded, states the commission of the felony in the most positive and unequivocal terms.

The prisoner is now brought up by habeas corpus, and his counsel move for his discharge, upon the exhibition of evidence, written and parol, which they contend clearly show that no felony had been committed, and that this prosecution is a mere dispute about the right of property.

It appears from the evidence adduced by the prisoner, \*that he took posses-

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sion of the negroes named in the warrant in pursuance of a letter of attorney from one Monet, an inhabitant of the island of Cuba, who is admitted, on all sides, to be the legal owner. This letter of attorney is dated at the Isle of Cuba, 13th May, 1808.

The prosecutor, Mallet, claims a right to retain the possession, and to exercise a qualified property over these negroes, by virtue of an authority given to him for that purpose, by Madame Monet, the wife of the proprietor, Monet, who had delegated to his wife, in a letter of an attorney, dated the 8th day of October, 1806, a full power to sell or otherwise to dispose of them for his advantage. It was in evidence that when Mrs. Monet left this state two years ago, she deposited in the hands of her brother, Lewis Mallet, a blank power of attorney, to which she affixed her seal and name, in the presence of a witness, P. Dupon. This letter of attorney transfers to her brother all the rights relative to these negroes, which she had derived from her husband, Monet, but was filled up not longer than six weeks ago, and is dated the 30th July 1807.

Farther evidence was offered to prove that Mallet had full notice of the authority given by Monet to the prisoner, Mr. Asselin, and, consequently, of the revocation of Madame Monet's authority.

It is unnecessary to dwell on the exchange of these negroes with Charles Debrosse, as by the deed of the 7th of July, they were re-possessed by the agent or attorney of Monet.

This, in substance, was the nature of the testimony adduced to repel, and to controvert the round charges of felony stated in the affidavit of Mallet, and the warrant of the magistrate.

The felony charged is of a capital nature, and against my then conviction, I (in favorem vite) permitted this extraneous investigation, urged at the same time by the prisoner's counsel, who felt no doubts as to the admissibility of this kind of testimony,

on the return of a habeas corpus.  
186 \*Mitchell and Bulloch the prisoner's counsel, contended, that not only the general doctrines of the law, but universal practice authorised an examination of all the circumstances of the case, as well on the part of the republic, as on the part of the prisoner; that this examination was not confined by the principles of law to the depositions taken before the magistrate, but might be legitimately extended to every and all kinds of evidence, which could be produced on either side, to show that a felony had or had not been committed. And under this impression of the law, they moved for a discharge of the prisoner Asselin, because it did appear, from the evidence submitted to the court, that instead of a felony having been committed, this prosecution was founded upon the grossest malice, and every bad propensity of the human heart.

These positions having been asserted with much confidence, by my brother Bulloch, I hesitated in giving an immediate opinion

from that respect which is due to his professional abilities.

A few hours' reflection, however, have not produced an evolution, in the general opinion which I gave yesterday. Whatever sentiments I may entertain of this prosecution, or of the character of Mr. Asselin, I feel my conscience and my judgment encompassed by obligations, which I shall faithfully discharge, without permitting my passions to be warped by circumstances which are connected with the relative situation of men in society. I must decide upon the principles of law; and when my mind is irresistibly convinced of their applicability to a particular case, I am not at liberty, in order to come at a purer system of justice, to consult my discretion or my feelings.

I am tied down by precedents where they do not militate with the constitution or the law. It is the glory of our people, that their rights are dependent upon fixed principles, and those fixed principles are contained in the fundamental provisions of the constitution; in the adjudication of our courts; in the precedents established

by our ancestors. The imperial  
187 \*legibus solutus is established so soon as a judge sets up his opinion against an uniform current of authorities, which have been stamped with the seal of wisdom, and acquiesced in by the people. The plain and upright Grose once said, that it was better for the subject, that even faulty precedents should not be shaken, than that the law should be uncertain. 2 Term Rep. 24.

In this sentiment I concur, and will now proceed to show, upon the authority for precedents, 1st, That it is not competent for the prisoner, on the return of the habeas corpus, to go into a full defence of his case, for the purpose of establishing his innocence, or of controverting the facts stated in the depositions of state witnesses; and 2d, I will laconically state the reasons upon which is founded the necessity of an ex parte investigation, on a motion to bail or to discharge the prisoner.

1. The first case I will cite, is that of the King v. Horner, Leach, Cr. Law, 226. It is there said, that the practice of this court is, and upon a reference to the officers for the crown office, we find it to have been long established, that even when the commitment is regular, the court will look into the depositions to see if there is sufficient ground laid to detain the prisoner in custody; and if there is not, they will bail him.

So, also when the commitment is irregular, if it appear that a serious offence has been committed, this court will not discharge or bail the prisoner, without first looking into the depositions, to see whether there is sufficient evidence to detain him in custody.

What depositions are here alluded to? Any depositions which may be offered on the part of the prosecution, or by the prisoner and his witnesses?



Certainly only the former.

The stat. 1 and 2 P. and M. and 2 and 3 P. and M. order, that justices of the peace, when any prisoner is brought before them, on a charge of felony, shall take the examination of the said prisoner and the 188 information of them that bring \*him, of the fact and circumstances thereof, as may be necessary to prove the felony, shall be put into writing two days after the examination, and certified to the next general jail delivery.

No prisoner brought before a magistrate is sworn to his examination. 1 M'Nally on Ev. 47. Nor are any depositions taken by the magistrate, other than those of the persons charging the prisoner with the felony. What other depositions can then be exhibited on the return of an habeas corpus, requiring the cause of the caption and detention of the prisoner, than the depositions of the persons informing him? No others can be exhibited in aid of the warrant. I am therefore irresistibly compelled to say, that the depositions spoken of in Horner's case, are those taken conformably to the statutes of Philip and Mary; the depositions of the persons bringing the prisoner before the magistrate. By no data presented to my mind, can I for a moment suppose, that this case refers to all depositions which may be produced, as well by the public officer as the prisoner himself; because, in pursuance of the requisitions of the stat. of Philip and Mary, no other depositions than those of the informers can be exhibited to the court on the return of the habeas corpus.

This case was determined in the 23d of George 3.

The next case is anterior in point of date, 13th George 2, and it is as conclusive on this doctrine, as can be conveyed in the English language: I will state in the words of the reporter.

"*Dominus Rex v. Greenwood*. He came up on a habeas corpus, charged with a commitment for a robbery on the highway, and the prosecutor attending, said he was the man; and though eight affidavits of credible persons, proving him to have been at another place at the time the robbery was sworn to, were read, yet the court refused to admit him to bail, but ordered him to remain until the assizes." 2 Strange, 1138.

Here then was evidence brought forward by the prisoner which proved an alibi, yet the court would not depart from 189 \*the fundamental principles of the law, which, at this stage of the prosecution, confines the investigation to the ex parte depositions of the crown or state witnesses.

Upon the authority of these cases, and the reasoning I have attempted to connect with them, it results, that no evidence extraneous to the depositions and informations taken by the magistrate, ought to be admitted to controvert the facts contained in these depositions, of the charge exhibited in the warrant of commitment. These cases are fortified too by another principle of law, that no one can, in any case, controvert

the truth of the return to a habeas corpus, or plead or suggest any matter repugnant to it. 2 Hawk. P. C. 113; Bac. Abr. 1 vol. p. 226, note.

2. I will now state the reasons which induce the necessity for the adoption of the principles and doctrines advanced.

The first reason is, that if the court undertakes to decide from evidence dehors, that which is certified by the magistrate, it consequently goes into a plenary hearing of the merits of the case, and per obliquum decides on the innocence or guilt of the accused.

It consolidates the facts with the law, against the maxim *de facto juratores, de lege judices respondent*, and against the law and the constitution, which place an ultimate condemnation and acquittal in the hands of a jury. Is there a greater hardship in refusing a full statement of the evidence on both sides before the court, at this incipient stage of the prosecution, than in that other stage of it, when the accusation is delivered to the grand inquest, in the solemn form of an indictment, in which the whole republic complains of an injury to its peace, its government, and dignity? And yet the investigation before the grand jury is *ex parte*.

Another reason is, that if evidence on both sides is admitted at this stage of the prosecution, the court must weigh the credibility of the witnesses, which is the peculiar province of the jury. Cases may occur, in which honest men may be temporarily the victims of perjury and malice; 190 but virtue \*and integrity cannot long suffer under the benignant reign of our laws. Is the citizen or the man illegally arrested? The indictment and the action for false imprisonment afford an ample redress. Is the citizen prosecuted without cause, with fraud and malice? He finds a reparation in the action of malicious prosecution. Is he falsely charged? The degrading and everlasting punishment of perjury atones for the outrage on his reputation and honour.

At the same time then, that I feel myself obliged to obey the stubborn principles of law, in opposition perhaps to what abstract principles of justice may suggest, it ought to be a consolation to the persons who must submit to this opinion, that for every injury the law affords a co-extensive remedy.

Though I cannot receive this evidence on a motion to discharge the prisoner, yet I am not precluded by any principle of law from permitting it to regulate the bail which I conceive it proper to require.

It is therefore ordered, that the prisoner be bailed in the sum of five hundred dollars, and two securities in the sum of two hundred dollars each, to appear at the next court, to answer to a bill of indictment, for the felony charged, and that security in similar sums, to prosecute, be given by Lewis Mallet.

Noel and Stites, for the prosecution.

Mitchell and Bulloch, for the prisoner.

Camden County.

October Term, 1808.

## 191 \*Ex Parte Clerk of Camden County.

Camden County, October 1808.

**Constitution—Amendment—Effect as to Clerks Already in Office.**—The amendatory act passed 16th Dec. 1808, "to alter and amend the 10th sec. of the 3rd art. of the Constitution," which 10th section provides that, "The clerks of the superior and inferior courts shall be appointed in such manner as the legislature may by law direct, and shall continue in office during good behavior," does not vacate the commissions of the clerks elected under the commissions of such 10th section.

By CHARLTON, Judge.

On the opening of this court, a difficulty was suggested, which presents itself in the following question:

Whether the "Act to alter and amend the 10th section of the 3d article of the constitution," passed at Milledgeville on the 16th December, 1808, has changed the tenure of office secured to the clerks of the Superior and Inferior Courts, who were elected and commissioned during good behaviour?

The general impression is, that this amendatory act requires a re-election of the old clerks, who were chosen *durante bene se gesserint*, and therefore, if their commissions are by that act vacated, the proceedings of the Superior Courts must be impeded until new commissions are issued, adapted to the biennial tenure of office. I say, that this is the general impression, because elections have been held in every county of the state, for clerks of the Superior and Inferior Courts, as directed by the amendatory act. I would be unwilling as an individual, to oppose my private judgment against a weight of authority so respectable as that which rests upon popular opinion; but compelled by official duty to decide, according to what I may conceive to be sanctioned by the constitution and the law, I shall endeavor to decide in that manner on the present occasion, uninfluenced by the sensations my opinion may probably produce upon the public mind.

The 1st section of the act of the 16th December declares, "That the clerks of the Superior and Inferior Courts shall  
192 \*be elected on the same day, as pointed out by law, for the election of other county officers."

By the act of February 16th, 1799, Marb. and Crawford, Digest, other county officers "are elected on the third Tuesday in October in every second year." This statute and the amendatory act are to be considered as statutes *in pari materia*; whatever therefore is ambiguous in the one, may be explained by the perspicuity of the other. The amendatory act does not specify the time for which the clerks of the Superior and Inferior Courts shall hold their respective offices, but as it directs their election to be held the same day, as pointed out by law for the election of "other county officers," it necessarily refers us to the act of the 16th February, 1799, which confers a bien-

nial tenure of office upon all "other county officers." So far then the amendatory act is sufficiently clear and intelligible. That is to say, in future the clerks of the Superior and Inferior Courts are to be elected by the people, on the third Tuesday in October in every second year. But the question, the important question, which now offers itself for my decision is, whether this act amendatory of the constitution retrospects to the offices of the clerks of the Superior and Inferior Courts, who were elected during good behaviour, and vacates their commissions?

The 10th section of the 3d article of the constitution, which has been amended and altered by the act of the 16th December, 1808, is in these words: "The clerks of the Superior and Inferior Courts shall be appointed in such manner as the legislature may by law direct, and shall continue in office during good behaviour." Crawford, Digest.

Was it the intention of the legislature passing the amendatory act, that this section of the constitution should be rendered totally inoperative, as it relates to the tenure of office thus guaranteed to the ancient clerks? The solution of the question before me must, I humbly conceive, depend entirely upon a critical exposition of the intention of the legislature; for, let the amendatory act stand alone and un-  
193 protected by \*the law of the 16th February, 1799, and it will then be impossible to extract from it any principle of definitive and conclusive nature. It does not specify the time for which the clerks shall hold their offices; it does not require a commission from the executive department. We can only then ascertain the extent to which the legislature intended it should operate, by calling in the aid of the 10th section of the constitution, and the act of the 16th February, and 4th December, 1799.

The 10th section of the constitution, and the act of the 16th February, render a commission necessary; and though the amendatory act is silent on this subject, yet the legislature did not certainly intend to interfere with this prerogative of the governor. From whatever points we pursue this investigation, intention becomes the ruling principle of construction. Resting the interpretation therefore of the amendatory act upon the ground of intention, from what data are we to presume that it was the intention of the two succeeding legislatures to vacate the commissions of the ancient clerks? If their re-election is required by the amendatory act, then the difficulty which now occurs, will occur every second year at this period, and one half of the people of this district will be deprived of the regular administration of justice, as it will be found impracticable to forward commissions in time for the regular sessions of the Superior Court, as far as Liberty county. This argument *ab inconvenienti* is to be irresistible, and repels any construction of the act, unfavourable to the commissions of the ancient clerks.



I take the intentions of the legislature as the polar star of direction in the present investigation; there are, however, other auxiliary principles equally favourable to the construction I have given to the amendatory act, and to which I shall now briefly advert. Unless an act is declaratory of a common law principle, it cannot retrospect. Our escheat act is merely declaratory of the common law, and therefore embraces all antecedent cases of escheated property, that is to say, it has a retrospective operation. In this respect, an act, declaratory of a common law principle, or of what was the law previous to its statutory form differs from an *ex post facto*, which can only be applicable to crimes. (a)

The amendatory act is not a declaratory statute, and therefore cannot retrospect to the commission of the ancient clerks.

Again: If I mistake not, (for I have here no access to books, and am obliged to decide immediately on the question before me,) a statute is never construed to operate retrospectively, if such a construction tends to defeat a freehold interest; and such an interest is held under the commissions of the ancient clerks.

Upon these principles, therefore, the commissions *durante bene se gesserint*, stand upon a basis which cannot be subverted. And are these principles to be rejected when it is impossible to find, in the amendatory act, any expressions which militate with their adoption? I repeat the question which was put by the solicitor general, in the argument with which he favoured the court. I say, I repeat the question, can a mere implication divest an officer of an appointment derived from the constitution, dependent for its duration upon the moral conduct and good behaviour of that officer, and recognised by all the solemnities of the executive department? If the legislature had intended to vacate the commissions of the old clerks, would they have left so important a principle subject to implication or arbitrary deduction? I have too high a respect for legislative wisdom to suppose so.

We may yet, in this discussion, proceed a little further. The maxim *expressio unius est exclusio alterius*, applies with all its force in the construction of a constitutional principle, we ought never to trespass upon the letter of the constitution. It is a compact upon which the fundamental rights of the people repose, and therefore should be as plain and explicit in its language as those rights are in their nature. A constitutional principal cannot, ought not,

to be put afloat upon the sea of construction. Its meaning and operation ought at once to be as obvious to the meanest, as to the most enlightened capacity. Now it is only by a construction, refined and professional, we can draw the inference, or force the implication, destructive under the amendatory act (now a part

of the constitution) of the commissions held by the ancient clerks.

Quacunque via data, therefore, from whatever point the subject is viewed, whether upon the intention of the legislatures, the undisputed rules and maxims which govern the interpretation of statutes, or the plain letter of the amendatory act, which forms a part of the constitution; upon all these grounds, it appears to me, that the commissions of the clerks, elected under the guarantee of the constitution, have not been vacated. The clerk of this court holds one of these commissions, and I am therefore of opinion, that his re-election does not so far impair the tenure of his office as to render necessary a renewal of his commission. The court will of course proceed in the discharge of its duties.

Minutes of Superior Court, letter G. p. 345.

Chambers, June 16, 1810.

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\*Carnochan v. Abrahams.

Camden County, June 1810.

**Administration—Who Entitled to.**—The principal creditor having obtained the authority of the next of kin of the decedent, he is entitled to administration on the estate of such decedent, and though such creditor had created himself executor *de son tort* the subsequent grant of administration purges and legalizes his tortious acts.

By CHARLTON, Judge.

This case comes before me, on an appeal from a decision of the court of ordinary, of Glynn county; and the question for my determination is, whether the appellant, Carnochan, or the appellee, Abrahams, is entitled to administration on the estate of Thomas B. M'Kinnon.

The history of the case is, I think, as follows:—Upon the death of Thomas B. M'Kinnon, the court of ordinary of Glynn, in consequence of some intermeddling with the estate by Mr. Carnochan, granted letters *ad colligendum* to their clerk, John Saunders. In consequence of a mandamus from this court, a citation was issued, informing the public of the application which had been made by the clerk, and inviting all persons in the usual form, to show cause why administration should not be granted to him. The court of ordinary, at the period appointed for the contestation of the administration in the citation, confers the administration upon their clerk. It appears that Carnochan did not attend to dispute the right of Saunders to the administration, and the reason for this neglect, is stated to have been occasioned by the occurrence of some family affliction. A caveat was, however, interposed by Mr. Carnochan; and upon the decision of the court of ordinary that their clerk was entitled to the administration, Mr. Carnochan has applied to this jurisdiction. From the mass of evidence before me, I collect, that the decision of the court of ordinary was founded upon the commission of certain acts by Car-

(a) See case of White, escheator, v. R. Wayne, ante.

nochan, relative to the estate, which usurped the powers of the court of ordinary; and which constituted him an executor de son tort. The court conceived, that by his intermeddling with the property, he had evinced a contempt and disregard of the authority which the laws exclusively vested in the courts of ordinary, and which rendered it improper and dangerous to the interests of the estate, to confer the administration upon him.

Carnochan, on the other hand, contends, that he did not intermeddle with the estate in any manner, which could either evince a want of respect for the legal authority of the court of ordinary, or that could constitute him an executor de son tort; and that he was at the time the administration was conferred upon Saunders, and subsequently upon his successor, Mr. Isaac Abrahams, and is now entitled to the administration upon the following grounds:

1. Because he is a principal creditor; and,
2. Because he has been duly empowered and authorised, to apply for administration by all the nearest of kin, and others, the principal creditors of the deceased.

These were the grounds taken by Mr. Bulloch, and they were made the basis of the arguments of the other learned counsel on that side.

The counsel for the appellee contend, that he is entitled to the administration:

1. Because he is also a creditor.
2. Because the principal creditor is not entitled to the administration, as a matter of right, for that, on a failure of kindred, it is discretionary with the court of ordinary to grant the administration to a creditor, or any other person.
3. Because the court of ordinary has exercised this discretionary authority, and therefore it is not competent for this tribunal, acting as an appellate jurisdiction, to revoke that administration, unless fraud, corruption, and partiality, appear to influence the proceedings of the court below.

4. Because the intermeddling with the estate, and thereby making him an executor de son tort, he had divested himself of the right (if he possessed any) to the administration as principal creditor.

198 \*I shall, in the first place, examine the grounds of the appellant.

1. Is he a principal creditor?
2. What are the rights delegated to him by the nearest of kin, and some of the principal creditors?

1. Is he a principal creditor?

In support of his pretensions as a principal creditor, Mr. Carnochan exhibits two accounts: the one, for articles furnished and monies advanced to Mr. M'Kinnon, in his life time, amounting to \$669.60 cents: the other, for articles furnished and disbursements made for the use and benefit of the estate of Mr. M'Kinnon, amounting to \$333.59 cents.

I made the enquiry and was informed, that the large account was laid before the court of ordinary.

It appears from the testimony of Mr.

Hamilton, that Hamilton and Cowper were creditors of Mr. M'Kinnon, on bond and mortgage for the amount of \$3000, and that it was their intention to apply for administration; but that they were induced to relinquish that intention, in consequence of a representation from Carnochan, that if he got the administration, it was his determination to bring the affairs of the estate to "as speedy a close as possible," and in consequence of Carnochan's having advanced the amount of an instalment then due upon M'Kinnon's bond. Upon the footing of this species of compromise, Hamilton and Cowper consented to waive their application for administration.

It is not in the evidence, that there is any other domestic creditor, claiming as large an amount as the debt due to Carnochan. I allude to the account of \$669.60 cents; for his right to the administration must be bottomed upon that account, as his pretensions to the administration must rest upon a right which existed antecedent to the intestate's death. I therefore cannot, and do not, connect with this account, the demand which was created subsequent to the intestate's death.

I take it for granted, then, (as nothing to controvert it appears,) that Mr. Carnochan is the next principal creditor 199 in \*this state. This point being disposed of, I am brought to the consideration of the second.

2. What are the rights derived from the powers delegated to the appellant, by the next of kin, and principal foreign creditor?

It was alleged in the argument of one of the counsel for Carnochan, that Alexander C. Wylly, residing in the county of Glynn, is one of the nearest of kin in this state, to the intestate, and that he had relinquished his right to the administration, in favor of the appellant. The fact of his being one of the kindred of the intestate does not appear from any part of the evidence submitted to me. I find, that a citation was issued on the 13th day of January, 1808, which states, that Mr. Wylly had applied for letters of administration on the estate and effects of Thomas B. M'Kinnon, for the benefit of the heirs and creditors. If he had applied as next of kin in this state, it should have been so expressed in the citation. I am to presume, therefore, that he is not related to the intestate. *Expressio unius, est, exclusio, alterius.*

Be this, however, as it may, Mr. Wylly did, by his letter of the 7th of February, 1808, agree to transfer his right to the administration; provided he, Carnochan, would withdraw a caveat he had entered against Wylly's application. That this arrangement was made, is evidenced by the transcript of the proceedings of the court of ordinary, of the 2d of May 1808, which reject the application of Carnochan for the administration, and confer upon Saunders their clerk, letters ad colligendum. In the proceedings of that day, no notice is taken of Wylly's application, which presupposes a knowledge on the part of the court, that



he had made the arrangement suggested, as it was the regular period, at which his application should have been decided upon by the court. This combination of circumstances proves, beyond a doubt, I think, that Wyly had transferred his right to Carnochan. Cowper and Hamilton then, and A. C. Wyly having abandoned in favour of the appellant their rights or pretensions to the administration, the only competitors 200 left (save the clerk of the \*court of ordinary) were the brother and sister of the intestate, (the former residing in the Bahamas, the latter in London,) and the foreign British creditors.

It is said, that Charles M'Kinnon, the brother, and Lydia Haven, the sister, as well as the foreign creditors, have devolved upon the appellant all the rights which they possessed to the administration. For the purpose of establishing this, various powers of attorney, and other documents were produced, which are alleged to be a complete and full delegation to Carnochan, of all the claims which the brother, sister, and those foreign creditors could possibly have had to the administration.

I have looked into these powers of attorney, and documents, and shall now advert to them in the order in which they were introduced by the appellant's counsel.

The first is a power of attorney from William Ogilvy, the younger; George Mylne, and John Chalmers, merchants of the city of London, carrying on business under the firm of Ogilvy, Mylne, and Company. It appoints Mr. Carnochan their attorney, to collect the debts due the firm, from the citizens, or other persons in the United States; and for this purpose, it confers on him a very extensive authority.

The lord chancellor, Erskine, granted a commission of bankruptcy against this firm, and Thomas Hagan, John Tunno, David Gordon, George Hobson, and John Auldjo, were appointed assignees. To Ogilvy, Mylne and Company, the intestate, Thomas B. M'Kinnon, was indebted by bond, in the sum of £4350. Their assignees appointed Adam Tunno and James Cox, of Charleston, attorneys, to collect, in the United States and East Florida, all the debts due the bankrupts; and the authority vested in these attorneys, is similar to that which Ogilvy, Mylne, and Co. had previously conferred upon Carnochan. Tunno and Cox, according to the power vested in them, substituted Carnochan, their attorney, to act in the state of Georgia, so far as it related to the collection of debts due the bankrupts, Ogilvy, Mylne, and Co.

The next documents produced, were 201 two letters from Bain \*and Webster, merchants of Nassau, New-Providence; and a bond for £4536 13s. 2d. from Thomas B. M'Kinnon, the intestate, to that firm. In a letter from these merchants, to Carnochan, dated 22d December, 1807, they say, "That they approve of Carnochan's attending to the property of the intestate, and have no objection to his administering on the estate, so far as they were concerned."

In another letter, dated 22d July, 1808, they say, "We do not know how we can authorize you by power of attorney, to sue out administration. We were not left executors by any will of his, that we know of. Our authority is nothing more than as bond creditors; and, in fact, we are ourselves, and as attorneys for William Ogilvy, Sen. Esq. the only bond creditors we know of. These bonds, no doubt, give us preferable claims of payment of our demands from the administrator, wherever he may be; and if our having such preferable claims will authorize you to obtain exclusive administration on the late Thomas B. M'Kinnon's estate, you are at liberty to consider this letter as our complete sanction to sue out administration, 'so far as depends on us.'"

The next document introduced by the counsel, was a power of attorney from Lydia Haven, of Sloane-street, in the county of Middlesex, England, appointing John Carnochan and James Johnston, her attorneys, to obtain administration on the estates of her husbands, Stephen Haven, and Charles M'Kinnon; the former of whom died in England, leaving his wife, Lydia Haven, his executrix; the latter died intestate, in Nassau, New-Providence, and to take possession, and to dispose of negroes, and other property in Georgia, which belonged to the said S. Haven, and Charles M'Kinnon. In a letter of Mrs. Haven's, dated London, Sloane-street, March 31, 1809, she says, "If, as I conclude, you have obtained letters upon poor Tom's estate, I am sure I cannot wish it in better hands, and the power I have sent will not affect that measure in the least."

Do these powers of attorney, and letters devolve upon Mr. Carnochan, jure representationis, (if I may so express it) the rights which Mrs. Haven and the 202 creditors, if they were here, \*could have interposed to the administration?

No specific authority is given from Ogilvy, Mylne, and Co. to take out administration on the estate of Thomas B. M'Kinnon: nor was it possible to be given, as the powers of attorney bear date on August, 1804. The same observation will apply to the letters of attorney, from the assignee of Ogilvy, Mylne, and Co. for this power of attorney bears date in May, 1807, which was in the lifetime of the intestate. Mr. M'Kinnon was dead when Tunno and Cox executed their substitution; but this substitution refers to the power of attorney from the assignees, and can consequently delegate nothing more than would be warranted by that power of attorney.

I do not consider that a general authority to sue for, and collect debts, is necessarily a delegation of the appointer's right to apply for administration on the estates of intestate debtors. I do not, therefore, conceive, that the court of ordinary of Glynn, was legally bound to consider these powers of attorney as placing Mr. Carnochan precisely in the shoes of these assignees, if they were here, had applied for, and were entitled to, the administration as

principal creditors. Messrs. Bain and Webster refuse to give Mr. Carnochan a power of administration to sue out (as they express it) administration; but inform him that he is at liberty to consider their letter as a sanction to apply for the administration, so far as their interests were here concerned.

Mrs. Haven, the sister, in 1801, and long after the knowledge of the death of her brother Thomas, transmits a power of attorney, by which Carnochan and Johnston are appointed her attorneys, to take possession of, and to sell, or otherwise dispose of, negroes and other property of the estate of Stephen Haven, Helen Haven, and Charles M'Kinnon; but not a word is said relative to her brother, Thomas B. M'Kinnon. This power of attorney must, consequently, rest upon the same basis as that of the assignees of Ogilvy, Mylne, and Co. It appears however from her letters of March, 1809, that she supposed Carnochan had obtained the administration, and expressed her satisfaction at it.

203 \*Except Mrs. Haven, then, and Bain, and Webster, no other creditors have specifically expressed a wish, that the administration should be conferred upon the appellant. Supposing all disabilities removed, Mrs. Haven would certainly, upon application, be entitled to the administration, as nearest of kin. But is it in her power so to transfer her right to any other person, that the court of ordinary would be bound to consider that person so completely her representative, as to preclude the granting of administration to any other applicant. I think not; and I will attempt to illustrate this position, by a reference to a few legal doctrines. Suppose A. dies intestate, leaving a brother of the half blood, and an uncle, the ordinary in this case, would have no discretion. The administration must be granted to the brother. 1 Vent. 425. The brother, however, transfers his right to B., a stranger, and solicits the administration for him. Would any technical obligation be imposed upon the court of ordinary, to consider B. as the representative of the brother, and exclude the uncle from the administration? Certainly not; and upon the refusal of the brother to assume the administration, the court would be compelled to grant it to the uncle. Mr. Carnochan, therefore, can derive no legal claim to the administration, from the expression of Mrs. Haven's wish, that he should obtain it. Having made these remarks, it is unnecessary to notice farther the letter of Bain and Webster, which embraces, but more emphatically, the same point. But admitting these conceptions to be erroneous, still it appears, from the powers of attorney, and the other documents referred to, that Lydia Haven and the creditors, are aliens; Ogilvy, Mylne, and Co. and their assignees, are merchants, of London; Bain and Webster are merchants, of a British province; Mrs. Haven resides in London, and in her power of attorney, calls her father "formerly of Antigua." I am induced to believe, there-

fore, that her father was a British subject; that she was born a British subject; has also continued one, or is one at this moment.

The second section of the act, entitled, "An act to carry into effect the sixth section of the third article of the constitution," declares, that no letters testamentary, or letters of administration, shall be granted to any person, or persons, who is, or are not, a citizen or citizens of the United States, residing in Georgia. The act of assembly is not singular in this respect. There is a similar law of the state of Maryland. 3 Cranch, 326.

Under this section of the law, a citizen of the United States, who did not reside in Georgia, could not obtain letters of administration. How much stronger, therefore, does the objection apply to Mrs. Haven, or any one of the creditors alluded to, whose domicile is proven by the exhibits of the appellant, to be in England.

If Mrs. Haven, or these creditors, then, could not, from their alienage and foreign residence, obtain administration, the question, so repeatedly put by the appellee's counsel, recurs, "Could they delegate to another, powers which they themselves did not possess?" Mr. Solicitor did, with great ingenuity, state one or two cases in which he attempted to establish the possibility of a right being communicated by a person who would not himself exercise it. But I take the clear principle of the law to be, that a derivative right cannot be greater than that from whence it is derived. The maxim, *qui facit per alium facit per se* would be rendered unintelligible and inoperative, if the principle can devolve upon his agent or attorney, privileges which he himself could not assume. The result of my opinion on this point, therefore, is, that neither Mrs. Haven, or these foreign creditors could obtain administration; and consequently, they were incapacitated from deputing to Mr. Carnochan, a right of which they were divested by the law. I must confess, however, that the wishes of these creditors ought to have been respected by the court of ordinary of Glynn.

They were the persons most deeply interested in an honest administration of the estate. They had evinced an high confidence in the integrity of the appellant, and if they were satisfied that the administration should be entrusted to him, I 205 \*think it presented a consideration (other impediments being removed) which should have had an appropriate weight in the determination of the court.

I shall now examine the grounds taken by the appellee's counsel, and investigate the principles on which was founded the decision of the court below.

1. The first ground assumed by the counsel is, "that the appellee is also a creditor." The account which Mr. Abrahams presented, is for a very small amount—I think not more than forty dollars; and could not



be the basis of a competition with another creditor, claiming a debt so inconsiderable as that offered by the appellant. Upon this insulated ground, therefore, I have no hesitation in saying, that I consider the appellee's account as totally insufficient to found a claim to the administration upon.

2. The second ground taken by the appellee's counsel, denies, that upon a failure of kindred, a principal creditor is, ex debito justitiae entitled to the administration. It is in vain that we resort to the English authorities for satisfactory information on this subject. Mr. Harris did, with great skill and ability, endeavor to show, from the British books, that it was discretionary with the court of ordinary to grant administration, upon a failure of kindred to any person that court had the most confidence in; and that therefore, the granting of administration to the principal creditor, or a creditor under such circumstances, was discretionary, and not, as it was thought, a matter of course. For the establishment of these positions he referred to Toler, an authority which professes to afford some additions to Wentworth, attributed to Justice Dodderidge, who is said to have compiled it under that fictitious name. Toler asserts that the ordinary exercises a discretionary right in granting administration to a principal creditor, yet I cannot find that opinion so expressed in any of the authorities I have referred to. I cite Toler from recollection, as, since the argument, all my efforts to procure this book have been unsuccessful.

The British statutes, as they relate to the administration of intestate's effects stand in this order. The ordinary once had the absolute disposal of the intestate's effects. Of this power they were deprived by the stat. of Westminster 2, which subjected them to an action at the suit of creditors. 3 Inst. 397; 2 Bac. Abr. 414.

The statute 31 Edw. 3, c. 11, enacts, that in case where a man dies intestate, the ordinary shall depute the next and most lawful friends of the deceased to administer his goods. Law of Ex. p. 187.

Before this statute, the ordinaries might have granted administration to whom they pleased. The most lawful friends meant by this statute are the next of blood. 9 Co. 40.

The 22 and 23 Car. 2, compels the administrator to make distribution, and the 29 Car. 2, declares the right of husbands to demand administration on the estates of feme coverts, dying intestate. 2 Bacon, Ab. 414.

The stat. 21 Hen. 8, permits the ordinary to grant administration, either to the widow, the next of kin, or both; and gives the ordinary an election to accept which he pleases of two in the same degree. 2 Black. Com. 495.

This is all I can find of statutory law, and it is silent on the subject of creditors.

Blackstone lays it down, "that if none of the kindred will take out administration,

a creditor may by custom do it." 2 Tuck. Blk. 505, refers to Salk. 38.

Blackstone, alludes I imagine, to the case of Blackborough v. Davis, but nothing is said in that case of the custom to grant administration to the creditor, upon the refusal of kindred. (a)

Blackstone is however a much higher and more respectable authority than the one he refers to, and I shall therefore upon his authority take it as law, that the creditor is by custom, in England entitled to the administration upon the refusal of kindred.

It has also been the invariable custom in this state to grant the administration to a principal creditor, upon the refusal of, or failure of kindred.

Our act of Assembly of the 23d December, 1789, enacts, "that the same rules shall obtain in regard to the granting letters of administration on intestate's estates, as before mentioned for the distribution thereof." Marb. 217. And it farther enacts, "if any case should arise, which is not expressly provided for by this act, the same shall be referred to, and determined by the common law of this land, as it has stood since the first settlement of the state. Ibid. Now the right of a creditor to obtain administration is not expressly provided for by this act. Was therefore the custom spoken of by Blackstone, a part of the common law of this state, as that law "hath stood since the first settlement of this state?" The settlers of Georgia brought with them all the statutes, and common law principles of England, which were not hostile to their colonial relations. I mean all those statutory and common law principles which were in force, and obtained in the mother country anterior to the year 1732. The custom which Blackstone alludes to, was certainly prevailing at the time of the decision, in the case of Blackborough v. Davis, and that was in 13 Will. 3, thirty years previous to the settlement of this state; it must be considered, therefore, as a part of the law brought here by the settlers. This custom is recognized in the act of the provincial assembly of 1764, which the compilers of our digest have inserted as a revised statute. That act declares, "that no letters of administration shall hereafter be granted by the ordinary of this province to any person or persons whomsoever, as principal creditor or creditors, to any intestate, but upon special trust and confidence, and for the benefit of all and singular the rest of the creditors." Marb. and Crawford, Dig. 216. The language of this act is not mandatory. It does not direct that letters shall be granted to the principal creditor, but it establishes, beyond the possibility of refutation, the previous operation of the custom, to grant letters to a principal creditor, upon failure of kindred. With all deference, then, to

\*the argument of Mr. Harris, I do not think that the court of ordinary possessed a discretionary authority to reject the application of a principal creditor, the kindred having failed or refused the admin-

(a) S. C. Lord Raymond, 684; 21 Mod. 615.

istration; and that creditor labouring under no legal disability. This supersedes the necessity of adverting to the 3d ground of the counsel; but it is said in the 4th ground, that the appellant's intermeddling with the effects, created a legal disability to his obtaining the administration.

John Parling in his testimony stated, that he was present when an inventory was taken of the property, under the direction of the appellant; but he knows of no other facts of importance.

The affidavit of Mr. Leach establishes no fact that can have a legal bearing upon the case. It proves nothing of the intermeddling, and to that point I must confine myself.

The affidavit of F. Parsons states, that the appellant removed two negroes from the intestate's plantation, and that he, or a Mr. Gibson, acting under the appellant's instructions, had taken away three other negroes; and that the appellant assumed this authority in consequence, as this deponent understood, of Mr. Wyll's relinquishment of his application for the administration in favour of the appellant.

The appellant also by his letter of the 20th January, 1808, in his instructions to Mr. Leach, assumes an authority over the plantation and property on it, as if he had been legally empowered to do so. The letter from W. Bain was not so explained as to satisfy me whether he had been placed on the plantation of Thomas B. M'Kinnon by Carnochan, or whether the plantation he alludes to in his letter to Parling, of April 18, 1808, is intended to mean the plantation of Carnochan. The same difficulty presents itself as to the import of Parling's letter to Bain, which has no date.

Bain's affidavit is however explicit, and it states, that he was put on the plantation of the intestate by Mr. Carnochan; and it establishes various inferences of Mr. Carnochan, and his agent Parling, which constitutes an executor de son tort.

209 \*The affidavit of Mr. Wyll contains no fact of importance.

The affidavit of Mr. Ratcliff contains nothing but what can be collected from Bain's deposition.

Another affidavit of Robert Leach proves an intermeddling of Carnochan, through the medium of his agent Parling.

Carnochan's letter to Bain, of the 19th February, 1808, is confirmatory of the fact, which is stated in the affidavit, of his having been employed by Carnochan to superintend and take charge of the intestate's negroes and plantation. Mr. Carnochan's letter to Saunders, the clerk, dated 10th May, 1808, acknowledges, that he has cotton of the estate in his hands, but declares, that in anything he had relative to the estate, he had no intention of violating the law.

It was in consequence of these acts, that the court of ordinary, in their proceedings of the 2d May, 1808, deemed it improper that the administration should be confined

to Carnochan, under which impression they have ever since resisted his application.

The court of ordinary of Glynn is composed of gentlemen of high worth, respectability, integrity, and information; and in rejecting Carnochan's application, I can discover nothing but a solicitude to protect the interests of the intestate's estate. But however much I may respect that court, (which I very sincerely do,) I must, notwithstanding, be governed by what I consider the stubborn and established principles of law. *Fiat justitia ruat cælum.* I cannot, therefore, avoid saying, that the whole of the evidence I have just detailed, has not been conformable to those immutable rules which must govern the court of ordinary, and every other tribunal. The court of ordinary is not bound by those rigid rules which obtain in a court acting upon the principles of the common law. All its testimony should be reduced to writing, and taken in the course of the investigation of the case in open court, and in the presence of all the parties, to whom a previous opportunity ought to be afforded to meet or to counteract that testimony, and to avail themselves of the benefit of any evidence which

210 they may think proper to \*introduce.

In taking this testimony the court of ordinary are not bound to adhere to any formula; they have only to observe and respect the maxim, *audi alteram partem.* The testimony laid before me is *ex parte*, it was not taken in court, the opposite side had no opportunity of repelling it; and is, therefore, a deviation from those fixed external rules, which should govern every tribunal of every description.

The conduct of Mr. Carnochan was exceptionable, it was calculated to excite the indignation of the court; he committed acts which made him an executor de son tort, and in that capacity he immediately made himself responsible to the creditors. But whether his conduct, supposing the evidence to be regular, was founded upon an ignorance of the consequence which would result from it, or from a deliberate intention of counteracting the authority of the court, I cannot determine. It is a metaphysical point, which must be settled by his own conscience.

But admitting the evidence to be regular, I am still, I conceive, bound by principles of law to say, that having a previous right to the administration, it cannot be withheld upon the objection, that he has made himself an executor de son tort. In England it does not prevent administration. Lord Kenyon, in *Curtis v. Vernon*, 3 Term Rep. 590, refers to the case of *Vaughan v. Brown*, in 2 Sta. 1106, where the court said, "it would be extremely hard, that if a person entitled to administration is opposed in the ecclesiastical court, and does any acts pendente lite, to make himself executor de son tort, these acts should not be purged by his afterwards obtaining letters of administration." And they added, "that granting of administration legalizes those acts which



were tortuous at the time." The cases cited by the solicitor show, that an executor de son tort, may afterwards have the administration committed to him. The case from Strange, and the weight given to it by the high authority of lord Kenyon show, that administration may be granted to an executor de son tort, and that this administration purges and legalizes his tortuous acts.

211 \*The case of *Bradbury v. Reynel*, in Cro. Eliz. 565, and which was particularly relied on by Mr. Solicitor, does not controvert the doctrine, that administration may be committed to an executor de son tort, but it denies that such administration purges his tortuous acts; the language of that case is, "although administration is committed to a stranger, in regard that he has once made himself chargeable to the plaintiff's action, as being executor de son tort, he shall not afterwards discharge himself by matter ex post facto."

Upon the authority of this case, Mr. Solicitor admitted, that the appellant would always be liable for his acts as executor de son tort, but that those acts could not prevent his obtaining the administration, if he possessed a right to it. The modern decision in Term Reports, which sanctions the case in Strange, is to me more rational than the case in Croke, and it ought to be considered as having shaken so much of the authority of that case, which declares the liability of the administrator for all the acts which he had committed as executor de son tort. It appears, however, from all the cases, that being an executor de son tort, does not, per se, destroy the right to administration. There being no other disability it must be granted to him, the court of ordinary taking care to require security, commensurate with the mischief they have reason to anticipate from his previous conduct.

Upon the whole of this investigation the corollary is irresistible, that the appellant is entitled to the administration. This case is therefore remitted to the court of ordinary of Glynn; and the justices of that court are hereby directed to commit the administration of the estate and effects of Thomas B. McKinnon to the appellant John Carnochan. (a)

Bullock, Davis, Berrien, Miller, and Lawson, for Appellant.

Harris, Stites, and Cuyler, for Appellee.

Minutes of Superior Court, letter G. p. 1.

Chatham County.

Chambers, June 29. 1808.

213 \*The State v. P. C. Wederstrandt.

Chatham County, June 1808.

1. **Captured Vessels—Right to Detain Part of Crew for Testimony.**—It is the universal practice of captors,

(a) The conclusion of this decision, as it appears upon the minutes of the court, has been omitted, because it is not connected with any principle upon

and it is their right, to apportion the crew of the captured vessel as sound discretion may suggest, and a portion of the crew is always detained for the purpose of affording testimony.

2. **Same—Right of Captives to Have Deposition Taken.**—Seamen may at any time apply to admiralty, and solicit the taking of their deposition, after which the restraint imposed by their captors will necessarily cease.

3. **Same—Same—Refusal—Habeas Corpus.**—Where this privilege is refused seamen this court will extend the benefit of the writ of habeas corpus.

John Lorton, Martin Welch, Francis Corderin, and James Smith, were this day brought up agreeably to the mandate of a writ of habeas corpus, directed to P. C. Wederstrandt, Esq. Commander of the United States' Brig Argus, now lying in the river Savannah: Upon which writ the following return has been made, viz.

"I have the bodies of John Lorton, Francis Corderin, Martin Welch, and James Smith, as within commanded, who were seamen, and late on board the Brig Charles, captured at sea on the 17th of June, instant, for a violation of embargo laws, and brought into the port of Savannah, in the Brig Argus, who captured the Charles. The said Brig Charles is libelled in the admiralty, and a decision not yet had.

"P. C. Wederstrandt.

"Savannah, June 29, 1808."

Upon this return, a motion was made by Davis and Berrien for their discharge, upon the following grounds, viz.

1. Because if it is inferred from the return, that they are detained for the purpose of affording testimony in the admiralty against the vessel brought in for adjudication for an infraction of the embargo law, their presence for that purpose could be enforced by the process of that court.

2. Because if their detention on board the capturing vessel, until the captured vessel is brought inter presidia, for adjudication,

which the judgment of the court rested, and has therefore no other authority than as an obiter dictum:

It is in these words: "It appearing, however, that Mr. McKinnon has died, leaving no heirs in this state, capable of inheriting his estate, or the other of the escheat laws may probably fix itself upon his property. I suggested this difficulty at the argument; and such an impression was made upon my mind by the first section of the act to amend an act, entitled "an act to regulate escheats," laws of 1805. p. 23, that I then thought it would be a saving of time, and farther investigation, to ascertain by an issue, whether Mr. McKinnon had died without will, and without heirs in this state, or the United States. If this should be the fact, the court of ordinary of Glynn, will, I apprehend, still have it in their power to prevent the benefits which the appellant anticipates from his administration. I am aware of the sensations this opinion may produce, and have, therefore, given it with regret. But I hope there is sufficient solidity in the doctrines advanced, to convince the court of ordinary of Glynn, that I have obeyed only the principles of the law."

214 is legal, yet the necessity of that detention ceased \*when the captured vessel was brought into port, and in possession of the admiralty.

On the other side, it was contended by Bulloch, District Attorney, that upon general principles, the captor has the right of transferring a portion of the crew of the captured vessel on board of the captors, and of detaining them for the purpose of obtaining their testimony.

By CHARLTON, Judge.

It is the universal practice of captors, and it is a right incidentally appertaining to the powers vested in them, to apportion the crew of the captured vessel, as sound discretion, founded upon the safety of the prize, may suggest. A portion of the crew is always selected and detained for the purpose of affording testimony. The control which the captors possess and exercise over the papers of the captured, they possess and may exercise over that part of the crew which may be chosen, for giving testimony, when required to be used on the trial.

In England the crew remain with the captors, or are recognised to give testimony upon the standing, or other interrogatories of the admiralty.

For the purpose of testimony, a seaman is a component part of his ship, and until an adjudication is had he is in the custody of the captors, unless the admiralty takes some other method to obtain his testimony. The seaman may at any moment apply to that jurisdiction, and solicit the taking of his deposition, after which, the restraint imposed upon him by the captors, will necessarily cease; or he may stipulate for his appearance.

When these privileges are refused him, I should always be happy to extend to that valuable class of our citizens, the benefit of the writ of habeas corpus, for in resisting any violation upon the personal liberty of a citizen, I cannot be supposed to combat with any other jurisdiction.

Prisoners remanded.

Davis and Berrien, for the prisoners.

Bulloch, Dis. Attorney, for Wederstrandt.

Minutes of Superior Court, letter G. p. 2.

Chatham County.

Chambers, July 6, 1808.

215 \*Ex Parte John Carnochan.

Chatham County, July 1808.

**Administration—Mandamus to Clerk to Issue Citation to Creditors and Kindred.**—Mandamus will lie to compel the clerk of the court of ordinary to show cause why he will not issue a citation to the kindred and creditors of the deceased, "to show cause why administration should not be granted to the petitioner."

Before CHARLTON, Judge.

John Carnochan states in his petition, that Thomas B. M'Kinnon, late of the county of Glynn, departed this life possessed of, and entitled unto a considerable estate both

real and personal, without having made or executed any last will or testament: That the petitioner being a creditor of the deceased, and being also authorized by almost all the other creditors, as well as by the brother and nearest of kin of said deceased, applied to the honourable the court of ordinary, for the said county of Glynn, through their proper officer, the clerk of said court, J. Saunders, Esq. for a citation in the usual form, calling upon all and singular the creditors and kindred of the said deceased, to show cause at a certain day therein to be expressed, why administration should not be granted to your petitioner in due form of law. But that the said John Saunders refused to do so. Upon this statement of facts, the petitioner prays for a rule to show cause, why a writ of mandamus should not be directed to the said John Saunders, requiring him to issue a citation to the petitioner in the manner prescribed by law. And it is ordered, that the said John Saunders, Esq. clerk of the court of ordinary of Glynn county, do show cause, at the court house in the city of Savannah, on Monday, the 22d August, at 10 o'clock, A. M. of that day, why a writ of mandamus should not be granted as prayed for by the petitioner. And it is farther ordered, that a copy of this rule be served on the said John Saunders, ten days previous to the return of this rule.

Minutes of Superior Court, letter G. p. 10.

Chambers, August 22, 1808.

216 \*Ex Parte John Carnochan.

Chatham County, August 1808.

1. **Mandamus—Superior Courts—Jurisdiction.**—Under § 7, art. 4 of the Constitution the powers of the Superior Courts, in granting writs of mandamus, certiorari, or prohibition, are co-extensive with the districts in which they are held and their authority cannot be impeded by geographical limits of counties.

2. **Same—To Compel Issuance of Citations—To Whom Directed.**—Mandamus should issue to the clerk of the court of ordinary to show cause why citations should not issue, to the persons interested in the probate of a will, to show cause why administration should not be granted to the petitioner.

3. **Same.**—In this case it was proper that a peremptory mandamus should issue.

CHARLTON, Judge.

This is a rule to show cause why a mandamus should not issue, directed to the clerk of the court of ordinary of Glynn county, requiring him to issue a citation in favour of John Carnochan, who had applied for letters of administration, on the estate of Thomas B. M'Kinnon.

In support of this rule, John Carnochan suggests in the petition the following facts:

"That Thomas B. M'Kinnon, late of the county of Glynn, departed this life, possessed of, and entitled unto, a considerable estate real and personal, without having made or executed any last will or testament: That the petitioner being a creditor of the deceased, and being also authorized by al-



most all the other creditors, as well as by the brother and nearest of kin of the said deceased, applied to the honourable, the court of ordinary for the said county of Glynn, through their proper officer, the clerk of said court, John Saunders, Esq. for a citation in the usual form calling upon all and singular the creditors and kindred of the said deceased, to show cause, at a certain day therein to be expressed, why administration should not be granted to the petitioner, in due form of law. But that the said John Saunders refused to do so, notwithstanding the right which the petitioner, in common with his fellow citizens, had in all cases regarding intestate estates on which no administration had been granted, to demand and receive such citation.

Mr. Noel in showing cause, stated  
217 the grounds of objection \*to the regularity of the rule; 1. That the Superior court did not possess the power of granting rules, or of exercising a jurisdiction over cases beyond the limits of a particular county in which they originated; and, 2. That this rule should have been directed to the justices of the court of ordinary, instead of their clerk.

It will be necessary for me to enter into a consideration of these objections before the subordinate points are disposed of.

First Objection. In answering this objection, we are necessarily compelled to advert to the principles of the constitution, which define and limit the power and jurisdiction of the Superior Courts. The first section of the 3d art. of the constitution declares, that the judicial powers of the estate, shall be vested in a Superior Court, and in such inferior jurisdictions as the legislature may establish: That the Superior Courts shall have final and exclusive jurisdiction in all criminal cases, which shall be tried where the crime was committed; and in all cases respecting titles to land, which shall be tried in the county where the land lies; That they shall have power to correct errors in inferior judicatories, by writs of certiorari, and that the judges of the Superior Courts (sec. 7, art. 4,) shall have the power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect.

Now it results from these sections of the constitution, that the powers of the Superior Courts, as they relate to local jurisdiction, are confined to the trial of criminal cases, and to cases respecting titles of land.

In all other respects the powers of the Superior Courts are co-extensive with the districts in which they are held. In them is placed that superintending authority which is analogous to the court of King's Bench; an authority which cannot be impeded by the geographical limits of counties.

In granting, therefore, writs of mandamus, certiorari, or prohibition, there is an ubiquity attached to the person of the judge which confers a constitutional jurisdiction

218 tion to his \*fixed or temporary residence within the district. From that point his superintending authority may radiate in every direction where it may be necessary to carry into effect the powers of the Superior Court.

Second Objection. The 2 sect. of the act of 1799, directs, that all applications for letters of administration, shall be made to the clerk of the court of ordinary, who shall give notice thereof in one of the Gazettes of this state, and by advertisement at the court house of the county, thirty days before the sitting of the court of ordinary.

The counsel against the rule suppose, that this act is unconstitutional, because the 6 sect. of the 3 art. of the constitution declares, that one or more justices of the court of ordinary with their clerk, may issue citations, and grant temporary letters in time of vacation, to hold until the next meeting of the court.

If this act really contained any provision irreconcilable with the constitution, I should not hesitate in giving my opinion. The constitution, *res est sacra*, which I shall never, in this station, see outraged with impunity. Those who contend for the omnipotency of the legislature, in a denial of a judicial authority to declare its acts unconstitutional, knowing very little about the principles of a republican government.

By this act it appears to me to be perfectly consistent with the 6th sect. of the 3 art. of the constitution. This section delegates to the legislature the power of directing the mode in which the authority of the court of ordinary is to be exercised. It does not imperatively direct, that one or more justices, with the clerk, shall issue citation, but that it may be done in that manner. The apportionment, therefore of duties, between the court and their clerk, was left to the sound discretion of the legislature.

Giving this exposition to the constitution and the law, I am of the opinion, that the court of ordinary ought not to interfere with the application for citations, which must be submitted to the clerk, and by him granted as a matter of right. The fiat of the court, as it has been observed by  
219 Mr. Noel, \*is not at all necessary.

At this incipient stage of the application for administration, every thing is referred to the discretion of the clerk; a discretion which can do no mischief, as the controlling power of the court of ordinary, in the hearing of caveats, will always correct the errors of the clerk. A citation operates as a mere rule to show cause; and it is very immaterial at whose instance it is granted. This rule therefore has been properly issued.

I have next to consider, whether a mandamus ought to issue in this case, and if it ought to issue, whether it should be a mandamus commanding obedience, or cause to be shown to the contrary, or a peremptory mandamus.

If the first mandamus issues, the party may make his return, on which an issue

may be made, and tried at the next Superior Court of Glynn, in the manner pointed out by 9 Ann. c. 20.

The peremptory mandamus presupposes the insufficiency of a return, and commands an immediate and prompt obedience. It leaves the party no alternative.

It is used to grant a rule to show cause why a mandamus should not issue; but this form has given way to the pressing circumstances of a case, as we find in Sayer's Rep. 160, where C. J. Ryder is made to say, "if we grant a rule to show cause, while it is depending, the poor may starve."

So in this case, if the disjunctive mandamus issues, which is nothing more than an accumulative rule to show cause, the estates of the deceased may starve, (if I may be permitted to apply the term,) or suffer incalculable injuries for the want of a legal representative.

The temporary letters to collect, offer no answer to the objection against this species of mandamus, for the powers of such temporary representation are confined to a simple collection of assets and effects; nor can those powers exist longer than the next meeting of the court of ordinary; they must be renewed, or they must constitutionally expire.

Only in cases of appeals from the determinations of the court of ordinary on 220 caveats, can temporary letters \*be granted, the operation of which can extend to a period beyond the next "meeting of the court." But these letters, though they are granted by the court, and not by the clerk, (as in cases previous to an appeal) do not confer greater powers than the letters granted by the clerk; the only difference is, that the temporary letters of the clerk, can exist no longer than the meeting of the court of ordinary, the temporary letters of the court of ordinary may exist, until the Superior Court decides on the appeal.

Under these circumstances, I cannot consent to a postponement of the creation of a legal representative, until a determination takes place on the return to the mandamus, which may be protracted (if the proceedings are made up according to the statute of 9 Ann.,) beyond the next term.

But I beg it to be understood, that this is not to operate as a general precedent, but is entirely framed upon the basis of this particular case, and will only be applicable to cases involving similar circumstances.

The application of John Carnochan should not have been rejected by the clerk of the court of ordinary of Glynn; he came before them clothed with the powers of the kindred, and most of the creditors. The granting of the citation, therefore, was a matter *ex debito justitiæ*; even if he had stood upon the footing of a creditor, and there was then before the clerk no superior claimant.

If the citation which has been issued by the clerk of the Superior and Inferior Courts of Glynn, pursuant to the powers vested in him, by the 5th section of the act of 1789, (Crawf. and Marb. Dig. 218,) had been is-

sued upon the voluntary application of John Saunders, the clerk of the court of ordinary, and contained the usual requisites of a citation, I should not hesitate in discharging the rule, because the object for the motion of the mandamus would then be accomplished.

The party might caveat or appeal; but this citation is issued under the order of the court of ordinary, and they compel their officer to assume the responsibility of 221 an administrator. \*This citation, therefore, is irregular in all its features.

Let a peremptory mandamus issue.

It being suggested by Mr. Saunders, that Davis and Berrien had filed a caveat against the citation issued on his application: By the Court.

Mr. Saunders states, that Davis and Berrien have transmitted to the office of the clerk of the Superior and Inferior Courts, or addressed a letter or writing to that officer which has been considered a caveat.

If this paper should have that operation, it will there be considered whether it does not supersede the application for the rule, as well as the mandamus, which has been directed to issue.

This paper is not before the court, and consequently no opinion can be formed as to its operation upon the citation, issued upon the application of the clerk, under the order of the court of ordinary.

Davis and Berrien, in support of the rule. Noel, against it.

Minutes of Superior Court, letter G. p. 9.

Chambers, August 22, 1808.

## 222 \*Ex Parte M'Allister, an Insolvent Debtor.

Chatham County, August 1808.

**Insolvent Debtors—Purchase of Goods—Failure to Show How Disposed of—Presumption.**—Where on a petition for discharge as an insolvent debtor, the evidence shows that the petitioner purchased goods on credit, and he offers no evidence to show how they were disposed of, or that they were ever disposed of, a presumption of fraud arises, and his discharge will be refused.

By CHARLTON, Judge.

The prisoner petitions to be admitted to the benefit of the insolvent acts, and delivers into court, a schedule, which he says contains a full disclosure of all his property and effects. Some of the creditors attending, suggest circumstances of fraud, which they contend create a presumption, that he is not really and bona fide insolvent.

The principal objections to his discharge, upon the suggestion of fraud, are,

1. That it appears from the books of account of many merchants of this city, that the petitioning debtor purchased large quantities of goods and merchandise.

2. That during the time that he was considered, by his commercial creditors, as a merchant in Louisville, he drew a bill of exchange, subscribed, "Charles M'Allister



and Son, for the sum of 1019 dollars and 56 cents," which was drawn in the course of commercial dealing.

3. That from a variety of papers, it also appears that he had a store at Louisville, and acted as a merchant of that place, upon his own account.

4. That no books are exhibited which show the manner in which the goods and merchandise, purchased by the petitioning creditor, have been disposed of in the course of trade. All these circumstances are established by an exhibition of books of merchants, with whom he traded in this place; and the court is also satisfied, from the examination of some witnesses, that the petitioning debtor did assume the ostensible character of a merchant or dealer.

223 \*The law directs, that the court, in a summary way, examine the matter of the petition, and the suggestion of fraud, if any; and if, upon such examination, it shall appear to the court, that the debtor is really or bona fide insolvent, then such person shall deliver to the court a schedule of all his real and personal estates, debts, credits, or effects, and be permitted to take the oath prescribed by law.

The law is intended as well for the benefit of the insolvent debtor, as for his creditors, and it invests the court with extensive chancery powers to examine, in a summary way, the suggestion of fraud. I cannot get over the impression, that the petitioning debtor did act as a merchant, when he obtained the credits from the merchants of this city, and when he associated his name with that of his father, in drawing a bill of exchange. That he acted as a merchant, is deducible from the nature and quantity of the merchandise purchased, which cannot, by any liberality of construction, be considered as purchased for his individual use. If the petitioning debtor, therefore, acted as a merchant, it is incumbent upon him to show, by his books, or by some strong circumstances, if he kept no books, which would be a singular mode of transacting business,) the manner in which the goods and merchandise, purchased by him, were disposed of. If this is not shown, what is the violent presumption which arises? Why, that the effects have been disposed of to other persons for the purpose of concealment, or ultimate profits to himself, or that he still retains the possession of them. Fraud, then, results from either branch of this alternative, which can only be rebutted by a satisfactory proof, that this property has been taken from him in a course of fair dealing, by the operation of judgments, or that he never did assume the character of a merchant.

The debtor is therefore remanded.

Flyming, for the debtor.

Lawson, for the creditor.

Minutes of Superior Court, letter G. p. 83.

January Term, 1824.

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\**Straffin v. Newell*.

Chatham County. January 1824.

1. New Trials—Order upon Docket.—All cases ordered

for new trial, stand upon the docket, as if no new trial had been ordered.

2. Same—How Case Tried.—Where a new trial has been ordered, such retrial must be by a petit jury.

By CHARLTON, Judge.

In this case a rule has been made absolute, for a new trial upon the verdict of a petit jury of the last term, and the opinion of the court is required upon these points.

1. How ought this case stand upon the docket?

2. Is it to be tried by a special, or another petit jury?

On the first point, I am of opinion, that all cases, ordered for a new trial, stand upon the docket, as if no new trial had been ordered. A re-investigation places them in the same situation upon the docket, as if no trial had been obtained; this case, therefore, will be tried in the order in which it appears on the docket.

On the second point, I am of the opinion that this case must be re-tried by a petit jury. The 55th section of the judicial act of 1799, declares, "That the Superior Courts shall have power to correct, and grant new trials in any case depending in any of the Superior Courts, in such manner, and under such rules and regulations as they may establish, and according to law and the custom of the courts." This section must refer to new trials on the verdicts of a petit jury; for it is only upon the principles of such a reference, that we can give the section a meaning distinct or operative. The terms, "any case in the Superior Courts," are general enough to include all new trials whatever, upon the verdicts of petit juries,

or special juries; but these general expressions \*are explained and restrained by the 57th and 58th sections of the same act, which exclusively provided for new trials, upon verdicts of a special jury.

Except the terms, "all new trials," in the 58th section, these sections cannot, by any construction, bear upon the verdicts of a petit jury. A judge cannot make the law, but he has the power of construing a statute, having authority over all laws, and more especially over statutes, to mould them according to reason and convenience and to the best and truest use.

I shall therefore mould this statute according to reason; ut res magis valeat quam pereat, and confine these general terms "all new trials" to the new trial spoken of in the 57th section, which are new trials upon the verdicts of a special jury, not only upon the authority of the maxim which I have just used, and also that the most natural and genuine way of construing a statute, is to construe one part by another, of the same statute, for this best expresseth the meaning of the maker, and such construction is, (ex vis ceribus actus,) 1 Inst. 381, but because it is the only sensible construction that can be given to the act. If this construction is not given to the act, then these absurdities result, that the Superior Courts shall have power to grant new trials in any cause depending in

any of the Superior Courts, in such manner and under such regulations as they may establish, as it is expressed in the 55th section, but still, that all new trials shall be had by a special jury under the particular regulations pointed out in the 58th section. That is to say, the said Superior Courts shall grant new trials under such regulations as they may establish, yet they must adhere to the regulations established in the 57th and 58th sections of the judicial act. These contradictions are obviated by confining the words "shall have power to grant new trials," in any cause depending in any of the said Superior Courts, to new trials on the verdicts of a petit jury, under such regulations as they may establish by a rule of court, and the term "all new trials" to the verdicts \*of a special jury. These appear also to have been the impressions of one of my predecessors, who has framed the following rule:

"On a rule made absolute for a new trial, the party applying shall give security and pay costs; as in cases of appeal: thereupon the same shall be docketed and stand for trial at the next term." Min. Sup. Ct. Book C. p. 297.

Leake, for the plaintiff.

Davis and Berrien, for defendant.

Minutes of Superior Court, letter G. p. 83.

January Term, 1809.

227 \*Administrators of Sheftall v. Administrators of Clay.

Chatham County, January 1809.

1. Evidence—Bond—Admissibility to Explain Endorsement on Note.—A bond upon which suit has been brought is not admissible in evidence in an action on a note to explain an indorsement on the note.

2. Set-Off—Notice.—Under § 25 of the Judicial Act, a defendant, relying on a set-off, must give notice of the matter of set-off at the time of filing his answer.

3. Judgments—Against Four Partners—Scire Facias in Names of Three—Effect.—Where a judgment was recovered by four persons trading as a partnership, and a sci. fa. sued out on such judgment in the names of three of the partners, without suggesting the death of the other partner, or stating that they were the survivors of the original four partners, it was held that the sci. fa. did not revive the judgment and that an assignment of the judgment as revived did not carry the benefit of the judgment to the assignee.

By CHARLTON, Judge.

A new trial is moved for in this case:

1. Because the court refused to admit as evidence to go to the jury, a joint and general bond of Mor. and Levi Sheftall to Joseph Clay, dated the 23d Dec. 1774, and payable the 1st of April following, for the purpose of explaining an indorsement on the note on which this action was founded, calculated, as defendants allege, to destroy the plaintiff's right of action.

2. Because the court refused to admit as

evidence to go to the jury a bond of Mor. Sheftall to Joseph Clay and Joseph Habersham, dated the 7th June, 1774, for £49, 19 shillings, which by assignment, became the property of Clay, and was a just set-off against the plaintiff's demand.

3. Because the court rejected as evidence, an assignment dated 19th July, 1799, by Edward Telfair and William Clarke to Joseph Clay, then composing the firm of Clay, Telfair & Co., of all their interest in a debt secured by judgment against Mor. Sheftall and one Samuel Dalpaget, which judgment was in the year 1801 revived against the present plaintiffs as administrators, and is now in full force, and which judgment by such assignment became the sole property of Joseph Clay, and was sufficient to extinguish the plaintiff's demand.

4. Because the court charged the jury that the plaintiffs \*were entitled to a verdict, although upwards of twenty years had elapsed from the date of the note to the bringing of the action, and no proof was offered of any demand in the meantime, or a payment of any part of the debts, or subsequent promise to pay by the intestate or his administrators, in which particular the defendants conceive the jury were misdirected.

5. Because the verdict was contrary to law, to equity, and to evidence.

I adhere to my opinion, that the joint and several bond of Mor. and Levi Sheftall was not proper evidence to go to the jury; an action had been brought upon this bond, and in April Term, 1799, there was a verdict for the appellants, Mor. and Levi Sheftall. It is not contended that this bond is in force, that per se it has any kind of operation but it is said, that it may be introduced for the raising a presumption against the recovery of the note upon which this action is brought, because it appears from an indorsement on the note that it was offered in evidence in the suit on the bond, and from that circumstance, it was inferred that it was considered as a set-off, and prevented a recovery on the bond; this inference is not justified by the record. I am therefore bound to consider the bond as annihilated by the verdict, and as inadmissible evidence for any purpose whatever. I also adhere to my opinion, that the bond of Mor. Sheftall to Joseph Clay and Joseph Habersham, was not proper evidence to go to the jury, the rejection of this piece of evidence was founded upon a noncompliance with the requisitions of the 24th sect. of our judicial act on subject of set-offs; this bond was offered in evidence as a set-off, but I rejected it, because a copy of it had not been at the time of the filing of the answer: but it is said, it is only necessary to do this when a balance is claimed by the defendant, as no balance was claimed in the case, it was sufficient to give a general notice in the plea, of the existence of a counter debt: the act does not authorize this construction, the true construction is, if a balance is found for the defendant, he shall be permitted to enter up judgment



229 \*for it; but if there should be found no balance, the set-off shall be considered as a discharge pro tanto or as an extinguishment, if the sums are in equilibrio; in all cases, however, this section of the judicial act cannot be so construed as to dispense with the notice of the matter of the set-off, at the time of the filing the answer: dreadful injustice would result from a dispensation of such notice, the opposite side would be taken by surprise, without a fair opportunity of repelling absolute fraudulent or extinguished claims.

We ought to suppose this section incorporated in our judicial act, to prevent such consequences; even by the English laws the bond offered in evidence, under similar consequences, would have been rejected by the court.

It was not pleaded in bar, and if it was intended to be given in evidence under the general issue, the stat. of Geo. 2, ch. 22, requiring that notice be given of the particular sum intended to be set-off, and on what account it was due. Quacunque zia data, this bond was properly rejected as evidence upon the doctrine of sets-off.

The 25th section of our judicial act, declaring that all bonds, specialties, notes, and other liquidated demands, bearing date since the 9th day of June, 1791, shall be negotiable by indorsement. This is an innovation upon the maxim, that a chose in action cannot be assigned, and the counsel opposed to the rule in this case say, that admitting that a regular notice had been given of this bond as a set-off, yet as it has been assigned subsequent to the 9th June, 1791, the court must recognize the common law maxim, and therefore pay no attention to the interest of the assignee.

I am, however, of this opinion. For supposing the common law were to govern on this subject, of the assignment of choses in action, antecedent to the judicial act of 1799, yet I am supported by the authorities in saying, that the common law jurisdiction would have looked at the real right and interest of the assignee, and not to the person of the assignor, from whence the right had emanated. To this extent have the courts of common law taken notice

230 of trusts. Courts of \*equity from the earliest times, thought the doctrine of the non-assignment of a chose in action too absurd for them to adopt, and therefore they have always acted in direct opposition to it. Indeed before the courts of law ventured to go as far as the maxim cases have gone, we find in 2 Cro. 180, the assignment of a chose in action, allowed in the case of the crown. In 12 Mod. 554, the court speaks of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties, and to which they must give their sanction and act upon. So an assignment of a chose in action has always been held as good consideration for a promise; it was so held by all the judges of England in *Monsdale v. Birchell*, 2 Blk. 820; though the debt assigned was uncertain. After these cases,

we may venture to say (as was said by Mr. J. Buller, in *Master v. Miller*, 4 T. Rep. 341,) that the maxim was a bad one, and that it proceeded on a foundation which fails; but still (adds the same judge,) that though the courts of law have gone the length of taking notice of assignment of choses in action, and of acting upon them, yet in many cases they have adhered to the formal objection, that the action should be brought in the name of the assignor, and not of the assignee. I see no use (continues the judge) or convenience in preserving the shadow, when the substance is gone, and that it is merely a shadow, is apparent from the latter cases, in which the courts have taken care that it shall never work injustice. The cases alluded to by this learned judge, are, *Bottomly v. Brook*, decided in the court of common pleas, 22 Geo. 3; *Rudge v. Birch*, in the court of King's Bench, 25 Geo. 3; *Webster v. Scales*, all of which are cited in the leading case of *Winch v. Keely*, 1 Term Rep. 20, 21, 22. The doctrine in these cases, is pushed as far as it was in *Ex parte Byas*, 1 Atk. Rep. 124, where it was held, that the assignment of a chose in action was good, even though the assignor afterwards became a bankrupt.

I have taken the necessary pains to investigate this doctrine, in order that it may be now understood that the assignees \*of bonds, bearing date antecedent to the 9th June, 1791, cannot sue it in their own names, and that the action must be brought pro forma in the name of the assignor; yet that the assignee will be considered as the real party, and his interest alone taken notice of. This debt having been vested by assignment, in *Joseph Clay*, I should therefore have admitted it as a set-off, in an action brought against him by the present plaintiff, who was an obligor of the bond. I adhere likewise to the opinion expressed on the trial, that the assignment of the judgment mentioned in the third ground of the rule, was not proper evidence to go to the jury. This was the assignment of a judgment, obtained by *Joseph Clay*, *Edward Telfair*, *Samuel Elbert* and *William Clark*, of Savannah, merchants and copartners, against *Mordecai Sheftall* and *Samuel Dalpaget*, and this judgment which was obtained by the confession of *Mordecai Sheftall*, to operate upon certain conditions expressed in the confession, indorsed upon the original process, and is dated the 15th March, 1788. This judgment became dormant; but was awakened, as it is said by a sci. fa. brought in the name of *Joseph Clay*, Jun. *Edward Telfair*, and *William Clark*, known, as the sci. fa. expresses it by the firm or copartnership of *Clay*, *Telfair*, and *Co.* This sci. fa. is dated the 15th Oct. 1799. By an assignment dated ——— this judgment is referred to and transferred by *Edward Telfair* and *William Clarke*, to one of the copartners, *Joseph Clay*. This assignment, it is contended, completely vests the right to this judgment in the partner, *Joseph Clay*, and

therefore may be set-off against the demand of the judgment debtor. I cannot assent to this, without impairing the transcendant authority of a record: without impairing the fundamental principles of the contract of partnership; without subverting the best established rules of evidence.

1. The admission of this testimony would impair the authority of a record, the judgment is confessed to Clay, Telfair, Elbert, and Clarke, the sci. fa. to revive this judgment, is brought in the names of

Clay, Telfair, and Clarke, without  
232 \*any suggestion of the death of Elbert, or their right to sue for the debts by survivorship. For what data am I therefore to presume, that this is the same firm which obtained the judgment, or, that they are the survivors of that firm? I cannot collect such knowledge from the record, and will any lawyer tell me that it is to be obtained from facts extrinsic or dehors the record? can I travel out of the record to establish a fact, which will falsify it? no, I cannot. I am therefore bound by principles of law, to consider this sci. fa. as having revived a judgment obtained by Clay, Telfair, and Clarke, copartners under the firm of Clay, Telfair, and Co., and not as having revived a judgment obtained by Clay, Telfair, Elbert and Clarke, copartners under the firm of Clay, Telfair and Co.

2. It impairs the fundamental principles of the contract of copartnership.

When a partner drops off, it produces a dissolution of the house. There must be a renewal of the contract among the surviving copartners, and the world must be notified of the change in the relation of the firm. In no case can the representatives or executors of the deceased partner associate with the surviving copartners. 2 Salk. Rep. 444.

If one partner die, though the debts and effects survive, yet the survivor is considered in equity barely as a trustee for the representatives of the deceased. Laws of Partnership, 124.

Hence it appears, that if Elbert was dead when this was revived, or the assignment made, it was necessary that that fact should have been promulgated in the sci. fa., not only that the public might know the change in the commercial dynasty, but in order that the representatives of the deceased partner might know the trustees against whom they would be permitted to resort in a court of equity.

In addition to this, I would also observe, that this species of assignment among the copartners, is not binding upon the general creditors, nor does it make any  
233 alteration in the \*general liability of the house. Creditors cannot be bound by any arrangement among the partners.

This principle is settled in the case of Smith v. Jameson, 6 Term Rep. 601. In that case, one of the partners applied trust money in the trade, with the privity of the

other partner: they afterwards separated, and the partnership effects were assigned over to the first, who took upon himself the debts; this was not considered as a discharge of the other partner, but both were considered as liable to make good the trust money. So, in this case, the assignment was a private arrangement of the partners, and could not as if affected other persons, convert that into a debt of one of the partners, which, in its original shape, was due to the whole firm. Great inquiry would flow from the adoption of a different doctrine; if this kind were to have the power of vesting a right possessed by the whole firm, in any of them, the most palpable fraud would be practiced, not only upon the general, but the creditors of the separate individuals or the firm.

Upon this ground, then, supposing Elbert to be a party to this assignment, I should doubt whether a right or interest was vested in Clay, for all the purposes contended for.

3. The admission of the assignment would subvert the best established rules of evidence.

No principle is better established than that, even a trivial variance, in setting out a record, or any written instrument, is fatal; because it does not appear that the contract, given in evidence, is that on which the plaintiff declares. 4 Term Rep. 560, 3 Bos. and Pul. 559.

Now the sci. fa. does not set out the record truly; there is a variance between that which is recited, and that which is on the files of this court. The sci. fa. sets out a judgment obtained by Joseph Clay, Edward Telfair, and William Clarke, of Savannah, merchants, and copartners; there being no suggestion in the sci. fa., or in the  
234 assignment of the judgment, \*that it was revived or assigned by Clay, Telfair, and Clarke, as survivors of Clay, Telfair and Co.

I must not only consider this casus omisus, as a fatal variance, but that neither the judgment is revived by the sci. fa., nor consequently transferred by the assignment.

Rule discharged.

Harris and Bulloch, for Plaintiffs.  
Woodruff, for Defendants.

Minutes of Superior Court, letter G. p. 94.

Chatham County, January Term, 1809.

## 235 \*State v. Corporation of Savannah.\*

Chatham County, January 1809.

1. Mayor of Corporation—Proceedings against Offender—Notice.—The mayor of a corporation cannot inflict a punishment, or proceed against any person for a supposed offence unless particular notice is given to such person against whom they are about to proceed, in order that he may prepare his defence.

2. Same—Gaming—Jurisdiction.—Keeping a gaming

\*The principal case is cited in Beall v. Bealls, 8 Ga. 218.



house being an indictable offence, the corporation of the city of Savannah has not jurisdiction to try the offender and inflict upon him a fine for such offence. Such offence is triable by jury.

By CHARLTON, Judge.

A certiorari was issued from this court, to bring before it the proceedings of the mayor and aldermen of the city of Savannah, acting as a common council, upon the deposition of Vincent Pendergast, which states that the mayor and aldermen did, on the 26th day of December last, impose upon the deponent, fines to the amount of one hundred and fifty dollars, exclusive of costs, for keeping a faro bank, or table.

It appears, to the return made in evidence to the writ of certiorari, that this person was fined on the 26th, for keeping a faro table on the 15th December, thirty dollars and costs; for keeping a faro table on the 16th, the same sum and costs; for keeping a faro table on the 17th, the same sum and costs; and for keeping a faro table on the 19th, the same sum and costs; and for keeping a faro table on the 20th, the same fine of thirty dollars and costs.

It also appears from the return, that these fines were all imposed at one sitting of council, on the 26th December, as is sworn to by Pendergast. It appears that these fines were imposed in consequence of the information of witnesses; but it does not appear, from any of the proceedings of council that Pendergast was cited before them, or had any other notice of their proceedings.

In this country no person can be injured, in his personal property, without an opportunity of defending himself. He has the right of being confronted with his accusers, and of being apprized of the accusation against him. "Audi alteram  
236 \*partem, is a maxim of natural justice dear to the human heart, and associated with every principle of our jurisprudence. Conviction founded upon ex parte accusation, is the most terrible species of despotism that the human mind can conceive. It is not only a violation of the most obvious dictates of common law, but it is destitute of every principle by which the social compact is supported.

Upon the ground alone, then, that the party had not been summoned to answer to the charge exhibited against him, I would feel myself authorized to quash their proceedings. I would quash them upon what I conceive to be an infringement,—a gross, unwarrantable, dangerous infringement of a fundamental principle of eternal justice, and of the genius and simplicity of our particular form of government.

But it is not necessary to resort to these high grounds of abstract justice alone, to destroy their proceedings. No law is better established than that of corporations; and it is settled, by that law, that a corporation can inflict no punishment, or proceed against any person for a supposed offence, unless particular notice is given to the person against whom they are about to

proceed, in order that he may prepare his defence. In *Rex v. Common Council of Liverpool*, 2 Burrow, 731, it is there said, by Lord Mansfield, that the person intended to be removed, should have a particular summons to answer to the particular charge. In the case of *Rex v. University of Cambridge*, all the judges agreed, that the want of a summons was an incurable error; and on this point, the expressions of Justice Fortescue are so impressive, that I cannot avoid inserting them. (The objection, says the judge, for want of notice, can never be got over. The laws of God and man both, give the party an opportunity of making his defence, if he has any. I remember to have heard it said, by a very learned man, upon such an occasion, that even God himself, did not pass sentence upon Adam, before he was called upon to make his defence. Adam, (says God,) where art thou; hast thou eaten of the tree,  
237 whereof, I commanded thee that \*thou shouldst not eat? And the same question was put to Eve also. 1 Strange, Rep. 567.

These were decisions upon returns to mandamus for restoration to corporate offices. But the principle is a general one, and applies to the acts of corporate bodies, whether proceedings on a disfranchisement, or against a private person, for a supposed violation of a by-law.

The observations of Justice Fortescue are confined to no particular proceedings, but are founded on the broad basis, that the laws, both of God and man, give the party an opportunity to make his defence, if he has any.

The ground being sufficient to set aside their proceedings, it is not absolutely necessary that I should advert to the unconstitutionality of the summary jurisdiction, undertaking to inflict a punishment for a crime or misdemeanor.

I shall, however, dispose of that objection, in order that our fellow citizens may precisely know upon what footing their constitutional liberty stands; the 3d article of the constitution declaring, that the Superior Courts shall have final and exclusive jurisdiction in all criminal cases.

Mr. Recorder would confine this jurisdiction to crimes, as contradistinguished to misdemeanors; and he relies upon Blackstone for the distinction which he attempted to establish. No such distinction, however, is warranted by that authority. In his definition of crime, he says, a crime or misdemeanor, is an act committed, or omitted, in violation of a public law, either commanding, or forbidding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms. 4 Blk. Com. 4, 5. The annotator, Christian, says, that in the English law, misdemeanor is generally, and in contradistinction to felony; offence and misdemeanors denote inferior crimes; so says Judge Wilson in his work, vol. 3, p. 4, and so say I. Is the injury of an indictable nature? This is

the only question to be asked, in ascertaining the powers of a summary jurisdiction. If it is indictable, there is no power, short of a contention, can deprive a Superior Court of its final and exclusive jurisdiction. No act of the legislature can directly, or per obliquum, deprive the Superior Court of that jurisdiction. All acts of that description, I would, without any kind of hesitation, declare unconstitutional. I will not sit here, and suffer the constitution to be violated; no, not by the legislature, and certainly not by a small body of men, clothed with a "little brief authority," and exercising a puny legislation upon matters of city police.

Is the keeping of a public gaming house, or table, an indictable offence?

Mr. Bulloch has canvassed the question with great clearness, learning, and ability; and if I did not know before that it was an indictable offence, he has convinced me that it is.

It is expressly said, that a man may be indicted for keeping a gaming house; a gaming house being a nuisance or offence against the public police. 4 Blk. Com. 167. This is a part of that law which our ancestors brought from England, and is not impaired by our fundamental laws.

The person keeping a gaming house, may still be indicted for a nuisance, or proceeded against under the 5th section of the act to suppress lotteries, and to prevent other excessive and deceitful gaming, passed February 29th, 1764; Marb. and Crawford, Dig. 251; and this section directs, that the persons offending shall be proceeded against by indictment.

But it is always safest to proceed under the common law notion of a nuisance; because there is less difficulty in proving the nuisance, than the loss of particular sums under the 5th section of the provincial act of 1764; and it is the safest upon another ground, because many parts of the act of 1764 cannot now be carried into effect, from the important change made in the jurisdiction of magistrates, by our constitution.

It therefore appears, that the deponent, Pendergast, is charged with an indictable offence, for which the corporation of Savannah have attempted to inflict a fine. This outrage upon our constitution, I will now prevent; and will prevent in all similar cases. Moral and good men ought, however, (as was observed by

Mitchell) not to be alarmed by this check \*on the public authority of the corporation; they ought not to be alarmed because a most exemplary punishment is annexed to a conviction in this court. I have snatched the victim from the city officer, that he may have a trial by jury, and all other privileges which are guaranteed, by the constitution, to a citizen, without any regard to extrinsic circumstances. But having a knowledge of an offence having been committed, which

strikes at the root of public morality, it is my duty to take notice of the offender.

It is, therefore, ordered, that a warrant do issue, upon affidavits to be taken by the mayor, that a gaming table, and disorderly house was kept by Vincent Pendergast, and that he, therefore, be recognized to appear at the next Superior Court, to answer to a bill of indictment for a nuisance; in the mean time, let the proceedings, as they appear upon the return of the certiorari, be quashed, and the deponent be discharged from any process of the city council, which may have issued thereupon.

Proceedings of the corporation quashed.

Mitchell and Bulloch, for certiorari.

Mr. Recorder Habersham, for corporation.

Minutes of Superior Court, letter G. p. 120.

Chambers, April 14, 1809.

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\*Ex Parte Bryan Morel.

Chatham County, April 1809.

(Case reserved from Bryan county.)

**Partition—Deed—Parol Evidence to Vary.**—Parol evidence is inadmissible to vary a deed of partition which is unambiguous, and which clearly designates the boundaries and divisions of the tracts of the several parties between whom the land is divided.

By CHARLTON, Judge.

By the will of John Morel, the elder, the island of Ossabaw was devised to his three sons Peter Henry, John, and Bryan, as tenants in common, each of the said sons to have an equal part. In March, 1788, Peter Henry Morel, John Morel, and Bryan Morel, (who was then an infant,) by his guardians, William and James Bryan, applied to the Superior Court for a partition of the island, agreeably to the will of John Morel, the father. A writ of partition was accordingly granted, and in June, 1788, the commissioners proceeded to discharge the duties assigned them. This division ascertains three lots; and the lot No. 1, comprehends, as is designated in a chart brought into court, the tracts, Nos. 1, 2, 3, 4, 5, 6, 7, and a part of the tract No. 8. A tract called Cabbage Garden, 50 acres called Horse Hammock, Bradley's Hammock, containing 150 acres, and a hammock called Braddock Camp, containing 38 acres. This lot is assigned to John Morel. The lot No. 2, comprehending the remainder of the tracts, Nos. 8 and 9, and half the tract No. 10, is assigned as the portion of Peter Henry Morel. The lot No. 3, comprehending the remainder of Nos. 10, 11, 12, and including all the hammocks on the west of those numbers, is assigned to Bryan Morel, as his part, under the will of the ancestor, John Morel. This division being made, the commissioners informed us that a surplus remained, which they adjudged most beneficial to the parties, should it be enjoyed as a species of common appurtenant, but to be subject to partition whenever it



241 \*should be desired. This surplus land is supposed, by the commissioners, to contain four thousand, four hundred and sixty-six acres, and one half of an acre, of third quality land, and this is the land out of which the petitioner, Bryan Morel desires to have his portion allotted to him. In this notice, which the law directs to be given, the petitioner apprizes the other claimants that he will apply to the judge of the court for a writ of partition to divide all the undivided lands on Ossabaw, and particularly those parts of the island called the eastern division, and marked in the plat thereof, as sixteen hundred acres; also, the lands in the western division, not described as of the first and second qualities, and said, in the record of a former division, to contain four thousand four hundred and sixty-six acres and a half.

No objections present themselves against the awarding a writ of partition to appportion and divide, amongst the several claimants, the residue of the land on Ossabaw; but it is said by Mitchell and Bulloch, that this writ of partition cannot operate upon the lots specifically assigned by the commissioners in their partition of 1788; that the territory within the boundaries and lines of those lots cannot now be encroached upon, because being explicitly designated as the property of each of the heirs and unconditionally conveyed to them.

It cannot be presumed by any kind of explanation, dehors the partitioning record, that any land of the third quality which is mentioned as the surplus land in the partition of 1788, and is left undivided, can be comprised within the limits of those lots, and consequently, that the surplus land must mean the surrounding domain, or all the residue of territory exclusive of these specific allotments.

On the other side, it is contended, by Messrs. Berrien and Cuyler, that explanations may be received from the commissioners of 1788, to prove that those specific allotments were only intended to designate and convey the good land or lands, of first and second quality, and that all the lands of the third quality, whether, within the limits of these allotments, or in the surrounding territory, is still to be considered as surplus lands, \*or of the third quality, and subject, according to the decree of the partitioners of 1788, to a division.

The proportion that the lands comprise within the specific allotments, cannot be subject to a farther division; is strongly supported by the plain terms of the partitioning record of 1788, in which the partitioners say, due respect having been had by us to the true value of all and singular the several lots and parcels of land, with the improvements and appurtenances thereunto belonging; and after due and mature deliberation and consideration being had, and upon all and singular the premises, agreeably to the power vested in us, the said several lots, tracts, and parcels of land, into such parts in the manner we

adjudged most beneficial to the parties concerned, have parted and divided, and so declare and adjudge our partition and division of all and every the said premises into the writ hereunto annexed, mentioned to be in the manner following, that is to say, all that lot No. 1, which is assigned as the part of John Morel, absolutely and unconditionally.

In the same manner are the other lots assigned to Peter Henry Morel, and Bryan Morel; nothing can be collected from this deed of the partitioners, from which it can possibly be inferred that any fractions or portions of land within these lots were left undivided; on the contrary, all and every the premises are explicitly assigned by the partitioning deed, and is made final and conclusive by the judgment which incorporated it. If it conveys "all the premises," there can be of course no surplus: adhering, therefore, to the plain unequivocal expressions of the deed, the supposition is not warranted, that these allotments contain lands of the third quality, called surplus land, or common appurtenant, by the partitioners, and by them made subject to a farther division: all the remainders or surplus lands the partitioners decreed to be held and enjoyed as in common, meaning perhaps a pasturable common, or common appendant, and all this surplus is denominated by them, third quality land. The partitioners having already by the terms

243 of their deed designated \*the boundaries and divisions of three lots, can the term remainder, upon any principles of exposition, mean a portion of that territory of which it is said to be a remaining part? The partitioning deed does not authorize such a solecism.

These are the strong grounds that have been, or may be occupied by the counsel who rely upon the plain language of the deed, to defeat any attempts to effect a diminution of territory within the specific allotments by a second writ of partition; it is farther said, that if these allotments are subjected to a partition, it would probably give a slip of land to one of the claimants in the middle of the cultivated land or lot of one of the others; and hence the utmost dissatisfaction and confusion would result from the smallest infringement upon the specified limits of those allotments.

This is an argument *ab inconvenienti*, which can have no weight in the construction of the power which must be strictly construed and complied with. Partitioners are under a power—they must strictly execute that power; and when executed, a common law tribunal will give it a strict and rigid construction. The counsel for the petitioner introduced two of the partitioners of 1788 to prove, that they did not intend that the limits of these allotments should exclude a future partition of the lands of the third quality, which they might respectively contain.

Major Odingsell, one of the partitioners, in the course of his examination said, that

the lots contained all the good lands, that the good lands were of equal value, but that they also contained lands of the third quality, subject to a future partition.

Colonel Habersham, another witness, and one of the old partitioners, has but a faint recollection at this distant period of time, what was the precise intention of the partitioners, but believes that these lots contain surplus lands of the third quality; he is, however, confident that the good land in each of these lots, were so nearly of an equal value, that John and Peter H. Morel and the persons who represented the  
244 \*minor, Bryan Morel, agreed that a species of lottery should decide the parts they were respectively entitled to.

This is the testimony set up, which it is contended must control the unambiguous expression of the partitioning deed and the judgment that has been founded upon it, or rather as it has been said to supply the place of a plan adverted to, by the partitioners and annexed to this deed, which, it is urged if now produced, would designate all the qualities of the lands contained within the limits of these lots, and from which, it would of course appear, that these allotments did contain lands of the third quality; but it appears to me, that this inference is not justified by the manner in which this plan is mentioned in the partitioning deed; it is thus introduced in the following sentence of the deed, "which allotments and divisions are marked and numbered in a copy of the said plan of the island of Ossabaw, taken from the original, annexed to the grant thereof, which copy is hereby annexed for the benefit of the parties concerned." The only difference then between the plan annexed to the original grant, and a copy of the partitioning deed is, that the former is a general chart of the island, while the latter numbers the sections of the surface to which the Morels were entitled by the will of their father. If this copy also designated the quality of the lands, it is not said so by this deed, which plainly tells us what the nature of it was: There being no ambiguity then, on the face of the deed, the great question is, whether this court can legally permit parol explanations to destroy, what has been considered for upwards of twenty years, rights vested and secured by it.

It must be remembered, that only one of the witnesses, Major Odingsell, speaks with any positiveness as to the intention of the partitioners, and he occasionally displays some diffidence in the strength of his recollection. Colonel Habersham's testimony, as to all material points, is vague and inconclusive, it is conjectural and hypothetical. The partitioning deed is complete, it is therefore not competent  
245 for \*this court or a court of equity to admit evidence to have been meant to operate otherwise than the language of the deed imports. 2 Atk. Rep. 384, 3 Atk. Rep. 3.

Deeds will stand upon a very insecure footing indeed, if their operation was to

be materially changed by the admission of explanatory parol evidence. If any thing was intended to be invested which was omitted by mistake or fraud, in such cases parol evidence will be admitted, 3 Atk. 388, but in all such cases, the mistake or fraud must be deducible from the deed itself, as in the case of the Marksman, 3 Atk. 389. If the mortgage in that case had contained all the usual and necessary covenants, the chancellor would not have permitted parol evidence to be read, to show the fraud or mistake, in omitting a covenant for redemption. If parol evidence then is inadmissible to explain a deed complete and unambiguous, a fortiori, that species of evidence can never be permitted to explain a record, to explain it to have been meant otherwise than the language it imports.

The partition of 1788 has become a component part of the judgment which was entered up upon it, and is as much a record as any other part of that judgment. Speaking as an individual, I am induced to believe, from the testimony of the witness, Odingsell, that the lots contained lands of the third quality; but I cannot throw down legal principles, or shake the best established rules to suit a particular case.

The case of Moor v. Miller, 5 Term Rep. 563, lord Kenyon was reduced to the necessity of giving up the authorities, or of hazarding his own private opinions: "Taking all the authorities together, (says his lordship,) and endeavouring to establish an uniformity of decisions, I think we are bound to determine against the devisee in this case, for whatever our conjectures may be, (and, privately speaking, I think the devisee meant to give an estate in fee to his wife,) we are not at liberty to follow those conjectures, but are compelled, by the authorities to say, that she took an estate for life under her husband's will." So in this case my conjectures are on the side  
of the parol evidence; but I am not

246 \*at liberty to follow them. This is my opinion on the partitioning record of 1788, and in awarding this writ of partition, I can only direct that it do issue, to divide the surplus lands, as mentioned in the record. I cannot specify, as the partitioners' notice does, the division of the land in which this surplus may be found; that must be left to the sound discretion of the partitioners, who will take care after this decision not to infringe upon the lines of the three defined allotments, ut sit finis litium; for though this opinion ought to be considered as a directory to the partitioners, yet it is subject, under the act of the assembly, to a revision, on the motion in bar of the partition, when this decision, as well as the judgment which may be entered up on the return of the writ, may be suspended, and the whole case, the law, the parts, and the circumstances, may pass through the ordeal of a trial, according as the act declares to be the due course of law.

Whereupon ordered, that a writ of partition do issue to divide all the surplus



lands on Ossabaw, as aforesaid, directed to Charles Odingsell, Joseph Spencer, Lee Blacksell, Archibald S. Bulloch, Thomas Bourke, Benjamin Wall, James Johnston, Joseph Miller, D. E. Adams, John Eppinger, and Joseph Stultz, or a majority of them: And it is ordered, that the oath required by law be administered by Henry Austin, Esq. of Bryan county.

Berrien and Cuyler, for petitioner.

Mitchell and Bulloch, for P. H & J. Morel.

Minutes of Superior Court, letter G. p. 201.

June, 1809.

## 247 \*The Bank v. Marchand.

Chatham County. June 1809.

1. **Partnership—Joint Note—Individual Liability.**—A firm composed of two partners was dissolved after having made a note at a bank. One of them then conveyed his property away in consideration of love and affection. HELD, that the conveyance was good as against the bank, since the grantor did not owe the bank anything in his individual capacity.

2. **Marriage Settlements—Effect as to Creditors.**—Where a marriage settlement is made prior to the marriage, the fact that the prospective husband conveys all of his property thereby creates no presumption of fraud, as to creditors.

By CHARLTON, Judge.

This is a motion for a new trial upon these grounds, viz.

1. Because the verdict is against evidence.
2. Because the verdict is against the law, equity, and the direction of the court.

On all motions for new trials, the law requires that the reasons of the judge for refusing or granting the rule, should be placed upon the minutes of the court; in conformity to this requisition of the judicial act, I shall assign my reasons for granting a new trial in this case; and in discharging this duty, it is only necessary to advert to the second ground, to wit, "because the verdict is against law, equity, and the direction of the court." The power of granting a new trial is discretionary with the court, but this, as C. J. Glynn says, must be a judicial, not an arbitrary discretion. Under our system the verdict of a special jury is conclusive in all its issues of law and equity. The verdict of a special jury is, therefore, the dernier resort of a citizen, and his only relief against the injustice of that verdict must be found in a reference to the judicial discretion of the court, on a rule to show cause why a new trial should or should not be granted. The circumstances of this case, as far as they are material to the present investigation, are these:

A copartnership had been entered into between F. de Petit de Villiers, and Mathurin Reingard. The copartnership was dissolved on the 12th August, 1805.

248 \*Antecedent to the dissolution of this copartnership, a debt had been contracted at bank by Petit and Reingard.

On the 26th May, 1807, this old debt of Petit and Reingard was, according to the usage of the bank renewed, as the witness, Mr. Lampkin, expressed it, by a note signed by Petit and Reingard, in their individual capacity. On the 28th May, 1807, Mr. Reingard conveys by a deed bearing that date, for the uses of Messrs. I. M. E. F. Coquillon, three negro slaves, all the merchandise which he then possessed, together with an interest in a house and the lease of it. The consideration of this deed is expressed to be the good will and friendship which he the said Mr. Reingard bore to Miss Coquillon. On the 21st May, 1807, in consideration of a marriage to be solemnized between Reingard and Miss Coquillon, Reingard settles upon Miss Coquillon and her future issue (and the children of Reingard by a former wife,) through the medium of trustees, the identical property, which he had in consideration of good will and friendship conveyed to her by the deed dated the day before. The deed of the 20th was no doubt intended to operate as articles; but there is no provision for the issue: it conveys an absolute unconditional estate to Miss Coquillon. The deed of the 21st (with the exceptions of limitations to Reingard's children by a former marriage,) is a strict settlement; it gives an estate for life to the intended wife, with a remainder over to the unborn issue.

The important questions for my consideration, as the result from this statement are these. Was Mathurin Reingard indebted to the bank, antecedent to the settlement of the 21st May? and if so indebted, can that debt defeat the marriage settlement? I was of opinion on the trial, and now mature deliberation has not changed my opinion, that Mathurin Reingard was not indebted to the bank, in his individual private capacity at the time of the marriage settlement on the 21st of May. The note, of which the note of the 26th of May is said to be a renewal, was given by Petit and Reingard in their artificial capacity as partners; the note of the 16th of May was

given in their individual capacities  
249 nearly two \*years after the dissolution of their copartnership, here then a liability was created different from that which was created by the note of the partnership. Partners are seised "per my et per tout, qui libet totum tenet, et nihil tenet, silitotum in communi, et nihil seperatum per se." Judgment obtained therefore upon the partnership note, would have bound the whole of the partnership effects, and only the separate estates are bound by the judgment on the note given in their private unconnected capacities. The principles of law having created so wide a distinction between the liability of partners and individuals, I cannot identify the notes of Petit and Reingard with the note of F. D. Petit de Villiers and Mathurin Reingard. I know not what may be the construction given by the bank to a renewed note; but it appears to me from the evidence that they considered the renewed note as complete

extinguishment of the old debt; for the old note is upon its renewal delivered to the maker. Can that then be considered as an existing debt, which the bank, by its own voluntary act, enables the debtor to cancel or destroy? Arguing the case therefore upon the usage of the bank, the renewed note may be considered as a continuation of the old debt, but it cannot retrospect for any purpose whatever. I am of opinion, then, that there was no debt due the bank by Mathurin Reingeard in his individual capacity antecedent to the 26th of May, and that the note of Petit and Reingeard was extinguished from the moment of the voluntary re-delivery of it to one of the makers, and it appears, from evidence on the trial, that it was re-delivered to Petit. If a debt however had existed, it could not have defeated the operation of the settlement of the 21st of May, so far as that deed provided for the wife and her future issue; she would, notwithstanding, be entitled to a life estate, and the children be entitled to their portions in the manner prescribed by the deed; but if the settler was indebted, the children by the first marriage would come in as volunteers, and their interest would give way to the rights of the general creditors. The evidence upon the  
250 trial established no \*strong proofs of fraud; but if fraud had been established, I doubt very much whether the principle, that fraud vitiates every contract, can apply to the doctrine of marriage settlement. Marriage is a valuable consideration, as much so, as money paid; and it is not only founded upon a valuable consideration, but it guarantees a protection to their persons, who cannot by any possibility be consuant of the fraud of the settler, and who, in the view of morality and justice, have stronger claims upon the property than the general creditors. No cases were cited from the common law reporters, which tended to shake the consideration of a marriage settlement. We all know how solicitous courts of chancery have always been, in supporting this species of contract against the rights of all others. It is true, that in *Bennet v. Wade*, and *Jones v. Wade*, 1 Dick. p. 84, and 2 Atk. 324, that the settlement was set aside upon the ground of fraud; but as the case is reported by the Register, Dickens, it appears, the settlement was made subsequent to the marriage, and it will not be contended by me, that a settlement or provision for the wife and children, subsequent to marriage, stands upon a better footing than a voluntary conveyance. The point, however, whether a settlement in consideration of marriage, procured by fraud and imposition, in which the wife was not concerned, could be set aside, came before lord Bathurst, in the case of *Barrow v. Brown*, 13 July, 1774, upwards of thirty years posterior to the decision of lord Hardwick, in *Jones v. Wade*, and in this case the chancellor is made to say, "that whatever fraud or imposition might have been practiced by others, Charity, the wife, was not concerned in it; I

never knew an instance in which a settlement in consideration of marriage hath been set aside, and I will not make a precedent for it." 1 Dick. 504. It is needless, I presume, to multiply cases on this head. Upon the supposition that the fraud of Reingeard could subvert the marriage settlement, yet how is it established? it was not proved that he was in debt beyond the value of the property, admitting the existence of  
251 the debt of the bank. But it is \*said by Mr. Harris that Reingeard was permitted to remain in the possession of the property settled upon his wife, and this is one of the strongest evidences of fraud. I admit generally that this is an absolute badge of fraud, because, as the books lay it down, the possession is often the only indication of the property of a chattel. 3 Cro. 81. But in answer to this, it was observed by Mr. Cuyler, (and to which I assent,) that the possession of the property by the settler, is not inconsistent with the nature of the contract; and because such possession holds out no false colours, the law rendering it necessary to have the deed recorded, which is sufficient notice to the public of his situation and circumstances, Mr. Harris contends that the conveyance, as in the case of all the property, is another strong mark of fraud. I admit that the general conveyance of all a man's property, as in this case, is another strong mark of fraud; for, as the authorities I have adverted to assert, it is hardly to be presumed that a man will entirely strip himself of all his personal property, unless there was a secret correspondence and good understanding settled between him and the vendee for a private occupancy of all, or some part, of the goods for his support. In the construction of the statutes of 13 and 27 Elizabeth, such a conveyance, as it affects the immediate vendor and vendee, would be deemed fraudulent, because it presupposes the absence of a valuable consideration, without notice or collusion; and a marriage being a valuable consideration, and the children being purchasers without collusion or notice, the conveyance of all the property in a marriage settlement cannot be considered as a mark of fraud, within the British statutes of Elizabeth. It is further argued by Mr. Harris, that, merchandize, jewelry, or stock in trade, cannot legally be conveyed in a marriage settlement; because a settlement is intended to operate as a permanent provision to the issue, the object of which is frustrated by the unfixed and transitory nature of such chattels; and besides, if such settlement was recognised, it would enable unprincipled merchants to speculate with  
252 perfect security upon the rights and credulity \*of their creditors. In answer to these objections I shall only briefly observe, that as to all legal consequences there is no distinction in this state between one species of chattel and another, or between real and personal property, and if slaves can be the subject of a marriage settlement, so many bales of merchandize; this perishable and transitory property can,



on the application of the trustees to the equitable side of this court, be converted into money, and that the money invested in other property; and in this way a permanent provision obtained. The other argument "ab inconvenienti" is repelled by the necessity the law imposes, of having the deed placed upon the public record; and this settlement was recorded on the 25th of May, 1807.

For these reasons I am of opinion, that the rule to show cause, why a new trial should not be granted, be made absolute.

Rule made absolute.

Mitchell, Bulloch, and Cuyler for the rule.  
Davis, Berrien and Harris, against it.

Minutes of Superior Court, letter G. p. 208.

June, 1809.

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**\*Smith v. Lloyd and Roe.**

Chatham County, June 1809.

**Promissory Notes—Bona Fide Holder.**—The indorsee of a promissory note or bill of exchange, for valuable consideration, cannot be affected by the frauds or transactions of the original parties, unless he takes the note with a full knowledge of the circumstances, and then the consideration may be enquired into as it might between original parties.

By CHARLTON, Judge.

The complainant alleges in his bill, that some time in June, 1804, he agreed to purchase of Alexander S. Roe, (one of the defendants) and Edward L. Davis, who were then merchants and copartners in Savannah, an assorted cargo for a West India market. That among other articles, he agreed to purchase of the said Roe and Davis, 100 barrels of fine flour. That the said Roe and Davis delivered to him flour of a different quality from that which had been shown to him, and which he had agreed to purchase; the difference in the value of the flour he had agreed to purchase, and that delivered to him, being one dollar, or one dollar and fifty cents. That on the arrival of the complainant in the West Indies, he suffered a loss of two or four dollars per barrel, in consequence of the bad quality of the flour sold him by Roe and Davis. That on the return of the complainant to the United States, he came to a settlement with Roe and Davis, and gave his note to them for the sum of 2040 dollars, subject, however, to a deduction upon a future discovery of errors, as will appear from the receipt given him by Roe and Davis. That when complainant gave his note, he was informed by Roe and Davis, that it was to be endorsed by the defendant, E. Lloyd, which indorsement would have given a credit in the bank for the use of Roe and Davis. That before this note became due the complainant was assured by Roe and Davis, his note was not deposited in bank, nor had it been indorsed by E. Lloyd, and that he did upon

254 this assurance, \*and under the im-

pression of a sense of obligation to Roe and Davis, endorse other notes for them in bank, which on payment the said Roe and Davis agreed should be deducted from his note 2040 dollars, or be considered as accommodation paper. That when this note became due, the complainant did not receive a notice from the bank as is usual; but on the very last day of grace, or a few minutes before the shutting of the bank, was informed by Lloyd, that this note was in the bank, and requested him to settle it. That the complainant enquired of Alexander S. Roe, whether his note was in bank, and was told by the said Roe, that it was not in bank, nor was it in the possession of E. Lloyd. That the complainant reposing confidence in the assurance of A. S. Roe, continued to renew his indorsement at bank for Roe and Davis. That the complainant was informed by William Lamb, from whom Roe and Davis had purchased the flour, which the complainant had bought of Roe and Davis, for the West India market, that he (the said William Lamb) had sold the flour to Roe and Davis cheaper than was then the price in Savannah, in consequence of its having lain some time in his warehouse. That a discovery of what the complainant considered as an imposition, induced him to remonstrate with the said Roe and Davis, who then agreed, that if the complainant would continue his indorsements, his note should lay over until the affairs of their house should be settled, and that they would deduct an overcharge in the flour sold to him, and which they purchased from William Lamb; to all of which the complainant alleges he assented. That during the absence of the complainant in New York, actions were instituted against him in the Superior Court of this county on the note, by E. Lloyd, indorsee, and under these circumstances of his case he prayed for relief, and that an injunction issue to suspend the operation of the judgment obtained against him by the indorsee, E. Lloyd.

An injunction was granted to operate until such answers of the defendants came in; answers have been filed, and they being

255 considered, by the counsel for the defendants, as a full \*compliance with the requisition of the writ of injunction, a motion is now made for its dissolution. The answer of E. Lloyd denies all knowledge or privity of the transactions between the original parties, Roe and Davis, and the complainant, William Smith; but that these notes were deposited with him by Roe and Davis, as a collateral security or indemnity for Lloyd's indorsement on a note of Roe and Davis, for twenty-five hundred dollars. Lloyd farther states in his answer, that he does not know whether or not the smaller note of Smith was given to Roe as an accommodation note; that these notes of Smith were indorsed to him before they became due; and that a judgment has been obtained against him, by the bank, on the note of twenty-five hundred dollars, which he had indorsed for Roe and Davis,

and which he had been induced to indorse in consequence of the assurance of the letter of the complainant, of the third of April, 1805, whose note to Roe and Davis for two thousand and forty dollars, he had taken as a security against the effects of such indorsement. There is nothing in the answer of A. S. Roe that controverts any part of the answer of E. Lloyd, or from which a presumption can be raised, that any of the circumstances of the dealing or transactions of the original party were communicated to Lloyd. Mr. Roe does not appear to know whether the smaller note was or was not given as an accommodation paper, or the particular circumstances under which it was given; the receipt of Roe and Davis, however, which is one of the exhibits of the complainant's bill, expresses that his smaller note was to be considered as an accommodation note, if paid by William Smith, was to operate as a deduction pro tanto on the larger note of 2040 dollars. Upon the whole of this case, the law is extremely clear, that the indorsee of a promissory note or bill of exchange, for a valuable consideration, cannot be affected by the frauds or transactions of the original parties, unless he takes the note with a full knowledge of their circumstances, and then the consideration may be gone into as it might between original parties; or, after

a bill or note is due, it comes disgraced to the indorsee; it is <sup>256</sup>his duty to make inquiry of it; if he takes it, though he gives a full consideration for it, he takes it upon the credit of the indorsee, and subject to all the equities with which it may be incumbered, by lord Ellenborough, Mict. Im. 48 Geo. 3; Camp. Rep. 19, and though lord Kenyon, in Brown and Davies, 3 Term Rep. 83, thought to take away the right of the indorsee to recover, it must appear on the face of the note to have been dishonoured, or knowledge must be brought home to him that it had been so; yet Ashuret and Butler were of the opinion, that in an action against the maker of a promissory note, by a person who has taken it after it was due, the defendant is entitled to the same defence he might have set up against the original payee. To this doctrine lord Kenyon assented, in Bohem v. Stirling, 7 T. R. 429, and considered it so far settled, that he said he did not wish to set the question afloat again, and that the rule established in Brown v. Davies, ought to obtain in all other cases.

If, therefore, any knowledge of the transactions between the original parties, could be brought home to Lloyd, the indorsee; if he knew that a deduction was to be made from the note of 2040 dollars, in consequence of a difference which ought to have been made in the price of fresh flour; and state, if he had had a knowledge of the fact, that the smaller note was given as an accommodation paper, or that it was to be deducted from the amount of the larger note upon Smith becoming liable for the payment at bank, or, if these notes had been indorsed

to Lloyd after they became due; in either case, he would hold these notes subject to all the equities they would have been subject to, in the hands of the original payee; but the defendant, Lloyd, in his answer pointedly denies, that he possessed any knowledge of the commercial dealings between the complainant and Roe and Davis, or, that these notes were indorsed to him, after they became due. It is not in my power then to continue this injunction upon any principle of equity which results from this view of the case. It is very evident, however, that Smith has indorsed to accom-

modate Roe and Davis, with additional <sup>257</sup> indorsements \*to a larger amount, in consequence of representations, that the larger note was not indorsed by Lloyd, nor was deposited in bank; for if Lloyd had indorsed this note, it would have obtained a credit for Roe and Davis at bank, which would have superseded the necessity of the additional accommodation indorsements of Smith, and in consequence of which, judgments have been obtained against the complainant for —, exceeding the amount of the larger note, indorsed to Lloyd, and which was the only debt due by Smith to Roe and Davis. The letter from Smith to Lloyd, of the 3d April, 1805, says, "I am in debt to Roe and Davis upwards of two thousand dollars, and, to accommodate them, have given my note payable in sixty days; they can get the money from bank, provided they had your additional indorsement with theirs, which, if you will consent to, I will engage; eventually you shall not lose a cent." Mr. Lloyd, instead of indorsing this note, according to the expectations of the maker, receives it as a collateral security for his indorsement on another note for the accommodation of Roe and Davis. This is the most mysterious feature of the case, as the pleadings and exhibits present it to me. Was there a greater probability of Roe and Davis' note with Mr. Lloyd's indorsement being discounted, than Smith's note to Roe and Davis, with the weight of the additional indorsement of Lloyd? Surely the latter note held out a greater prospect of success in obtaining a credit or discount at bank for Roe and Davis, and it would have been practicable, as it appears from the answer of Mr. Lloyd, to have received from Roe and Davis notes as a collateral security for the difference of 2,500 and 2,040 dollars. From this it is possible to draw the inference, that Roe and Davis, by withholding Smith's note from the bank, always intended to obtain from him additional accommodating indorsements, under the suggestion, that it was not in bank, or that it would not be discounted. The suppressis veri alleged in the bill is, however, denied in the answer of Mr. Roe; the last hold, therefore, which the complainant can take upon an <sup>258</sup> equitable jurisdiction, must be \*found in another appeal to the conscience of Mr. Lloyd, to ascertain what his motives were for indorsing Roe and Davis' note,



when the same effect might have been produced by indorsing Smith's note; and when he could have been secured from any future liability on the difference between 2,500 dollars and 2,040 dollars, by other notes which Roe and Davis could have, and actually did deposit in the hands of Lloyd, and to ascertain whether Mr. Lloyd had any intimation of the purposes for which Roe and Davis held Smith's note from the bank. Did he suppose it was with a view of obtaining farther indorsements from Smith, by impressing him with a belief that they, Roe and Davis, could obtain no discount at a bank upon the larger note, or, that it had not been deposited in bank. I shall at present presume everything in favor of the purity and integrity of the motives which governed Mr. Lloyd; but considering the hardships which encompass the complainant's case, and that every allowance should be granted that it is within the power of a court of chancery to allow, I shall therefore order and direct.

And it is therefore ordered and directed, that the complainant be at liberty to amend his bill within ten days, so as to obtain a discovery upon the remaining principle of equity, and, that as soon as the answer comes in, the defendant have leave to move in vacation for a dissolution of injunction, giving five days' notice to the complainant's counsel.

In the mean time let the injunction continue.

Noel, for the Complainant.

Davis and Berrien, for Defendant.

Minutes of Superior Court, letter G. p. 133.

April Term, 1809.

## 259 \*In the Matter of Mussault's Executor.

Chatham County, April 1809.

(Case reserved from Camden County.)

1. **Executors—Removal—When Proper.**—There are two cases where the removal of an executor is proper; first, where he commits a devastavit, and, second, where his insolvency renders a continuation of his trust dangerous to the rights of creditors.

2. **Same—Same—When Improper—Case at Bar.**—In this case it was improper to remove the executor and appoint an administrator in his stead, since it would defeat the speedy obtainment of liens upon the assets of the testator, which the vigilance of the suing creditor entitled them to.

By CHARLTON, Judge.

It appearing from the proceedings of the court of ordinary of Camden, that, upon the petition or application of the executor of Mussault, he was removed, and the administration of the intestate's estates conferred upon F. Petit de Villiers. It was contended by Mr. Lawson, that such an authority, upon the circumstances of this case, is not delegated by the law to the

court of ordinary, for that the executor cannot by his own act or voluntary acquiescence, divest himself of the trust devolved upon him by the testator; and, in this case, the court having ingrafted its proceedings upon an accommodation to the wishes of the executor, the whole is irregular. It must be recollected, that many actions were pending against the executor at the time when the obligations were shifted from his shoulders to those of an administrator. I imagine that this fact was not known to the learned member of this bar, whose opinion this court always receives with respect, and under whose opinion the court of ordinary of Camden framed its proceedings. From such a weight of responsibility, it was not competent for the court of ordinary to release the executor, for, independent of the delay it would occasion, by driving the creditors to their action de novo against the administrator, when the actions against the executor were ripe for a submission to the jury; it would, at the same time, defeat

the speedy obtainment of liens upon 260 \*the assets of the testator which the vigilance of the suing creditors entitled them to. Our local system recognises but two exigencies which might lead to the removal of executors, and the substitution of an administration; the first is when the executor commits a devastavit, and the second, where his insolvency renders a continuation of his trust dangerous to the rights of creditors. I say, these exigencies may lead to a removal of an executor, for he may not be able to give the security, which the law authorizes the court of ordinary to demand, when he is placed in either of these precarious situations; and if such security is not given, his removal is the inevitable result. An executor is a trustee, or quasi a trustee, and concerning him in that capacity, a British court of chancery could shift the trust upon the application of the executor, and the concurrence of those who are interested in the discharge of the trust. Our courts of ordinary may do this, or if that is doubtful, it can be effected on the equity side of this court. It is time enough, however, to decide this principle when it is more directly before me.

Upon the particular circumstances of this case, and for the reasons stated, I cannot recognise Mr. Villiers as the administrator of Mussault. That capacity must be considered as dormant, pending the suits against the executor.

Lawson, for the motion.

Clarke, against it.

Minutes of Superior Court, letter G. p. 135.

April Term, 1809.

## 261 \*Administrators of Parrott v. Dubignon.

Chatham County, April 1809.

(Case reserved from Glynn county.)

Trover—Right of Executor to Bring Action.—An action

of trover will lie by an executor for a conversion in the lifetime of the testator.

By CHARLTON, Judge.

The question for the decision of the court in this case is, whether an action of trover can be brought by an executor or administrator, for a conversion in the lifetime of the testator or intestate. It is settled by the case of *Hambly v. Trot, Cowp. 371*, that trover does not lie against an executor for a conversion by his testator; and on this point the expressions of lord Mansfield, are these: "No action, where in form the declaration must be *quare vi et armis et contra pacem*, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record, the cause of the action arises, *ex delicto*; and all private criminal injuries or wrongs, as well as public crimes, are buried with the offender." *Ibid. 375*. This is not, however, the law *ex converso*, for the action of trover can be sustained by an executor for a conversion in the lifetime of the testator. This law is founded upon the stat. 4 Ed. 3, 7, which enacts, "That executors shall have an action for a trespass done to their testator, for his goods and chattels, carried away in his life, and shall recover their damage in like manner as he, whose executors they are, should have done, if he had lived." These are the principles of that statute, as abridged by *Vingat, tit. executors, f. 208*. The statute being so explicit, it is unnecessary to multiply cases decided under it. I shall only cite one

262 which will place the \*doctrine in a very clear point of view. I allude to the case of *Fisher v. Young, in 2 Bulst. 268*, the substance of it is this: If the goods, which were the property of a testator's will, are proved, and the person appointed executor, do afterwards prove the will, he may maintain an action of trover.

The motion of Mr. Solicitor Leake, to dismiss this action, because it is brought by an administrator for a conversion in the lifetime of the intestate, is, therefore, overruled.

Stites, for Plaintiff.

Leake, for Defendant.

Minutes of Superior Court, letter G. p. 216.

Chambers, June 3, 1809.

263 \*Administrators of Clay v. Administrators of Sheftall.

Chatham County, June 1809.

**Injunctions—Against Judgment.**—In this case an injunction to a judgment was refused because the effect would be the satisfaction of younger judgments to the prejudice of the elder ones.

By CHARLTON, Judge.

This is a bill praying for an injunction, upon the ground, that more money is due, upon a previous judgment revived in favour of the administrators of Clay, against the

defendants, than is due on the judgment for which the plaintiffs in this bill are now pressed for payment. It is supposed by the plaintiffs, that in order to prevent the absurdity of an immediate payment over to them of a remittitur to be entered for so much as is due on the plaintiffs' judgment, or, for so much as will amount to an extinguishment of the defendant's judgment. I doubt very much whether a court of equity will interpose by injunction to prevent circuity of action; because, the remedy is peculiarly a common law remedy. The party can obtain ample relief before a common law tribunal; the practice of which, upon liberal principles of modern days, is, to do at once substantial justice to the parties, without driving them to a cross action.

It has been decreed by this court, that the judgment against Sheftall and Dalpuget has not been revived as a judgment obtained by Clay, Telfair, Elbert, and Clarke. (Minutes of the Court Book, G. .88, 89.)

The scire facias not having pursued the terms of the judgment, it is impossible for me, without violating the sanctity of a record, to admit the argument of the complainants' counsel, which is founded upon 264 the operation \*of that judgment.

Admitting, however, the existence of this judgment, and the regularity of its revival, still there are older judgments against the estate of Mordecai Sheftall, the amount of which exceed the amount of the judgment set up by the administrators of Clay, and which, according to our judicial system, must be previously satisfied. These older judgments fix a lien upon the proceeds of the judgment obtained by the administrators of Sheftall, which the chancery side of this court cannot release.

If I were to direct an injunction to issue, as prayed for by the complainants, it would have the effect of satisfying a younger judgment, to the prejudice of the elder judgments; the assumption of such a power would indirectly repeal the law; and if such be its tendency, it cannot be assumed by me. Considering there is no subsisting debt which could, at common law, operate as a set-off; or if there is, that the equity side of this court cannot divest eldest judgment creditors of rights which are so plainly guaranteed to them by our judicial act; I shall therefore only sanction this bill so far as it seeks to obtain a discovery, but I must refuse the prayer for an injunction.

Motion for injunction overruled.

Woodruff, for Complainants.

Mitchell, Bulloch and Cuyler, for Defendants.

Minutes of Superior Court, letter G. p. 217.

Chambers, June 3, 1809.

265 \*Cook v. King.

Chatham County, June 1809.

**Appeals—Security.**—The plaintiff upon entering his appeal is not required to give the same security as a defendant who appeals, for the reason that



the plaintiff is not liable for the condemnation money, that is the money sued for.

By CHARLTON, Judge.

The question for the decision of the court in this case is, whether it is required by the law, that a plaintiff upon entering this appeal, should give the same security which is required upon the appeal of a defendant. One of the provisory clauses of the 26th sect. of the judicial act, Marb. and Crawf. Dig. p. 300, declares, "that in case either party shall be dissatisfied with the verdict, he may enter an appeal" within a certain time after the adjournment of the court; "provided, (says another clause in the same section,) the person or persons so appealing, shall previously, to obtain such appeal, pay all the costs which may have arisen on the former trial; and give security for the eventual condemnation money: except executors and administrators, who shall not be liable to give such security." No distinction is made in the clauses between the security which it would be necessary for the plaintiff to give; or that which is required of the defendant. It appears, however, evidently unreasonable and absurd, to require security of the plaintiff for the eventual condemnation money; now the condemnation money is the sum sued for. The legislature would therefore not have intended that the plaintiff should, upon his appeal, give security to the amount for which he had sued the defendant. This being the absurdity which would result from a rigid adherence to the letter of the act, I feel myself authorized to put such construction upon the statute, which the makers had in view, for *qui hæret in litera a hæret in cortice*. Williams v.

266 \*Barclay, 2 T. R. 73. The makers of the act had certainly no other object in view than to afford an ample security and indemnification to the plaintiff for the delay or vexation of the defendant's appeal. There can be no condemnation money received from the plaintiff, hence the legislature could not have contemplated any injuries to the defendant from his appeal, and as the plaintiff must pay all costs antecedent to the entering of an appeal, nothing can be recovered by the defendant upon the appeal recognisance, and consequently security by the plaintiff is nugatory, and if nugatory, the law did not intend to require it. I shall, therefore, substitute the intention of the statute for the letter of it, upon the well known principle of construction, that a thing which is within the letter of a statute, is not within the statute, unless it be with the intention of the makers. Reniger v. Taggood, in Plowden, 18, shows how far this principle was carried into operation in the construction of the statute of Marlebridge, c. 4.

I am of the opinion, therefore, that there is no irregularity in the neglect or refusal of the plaintiff to give security for the ultimate condemnation money.

Let the appeal be entered.

Lawson, for plaintiff.

Davis and Berrien, for defendants.

Minutes of Superior Court, letter G. p. 221.

Chambers, June 10, 1809.

267 \*Ex Parte Seth Bishop, an Insolvent Debtor.

Chatham County, June 1809.

**Insolvent Debtors—Failure to Account for Money Received—Effect.**—The oath of insolvency will be refused a debtor when it appears that he cannot account for the appropriation of money in his hands, the presumption of fraud being raised.

By CHARLTON, Judge.

The partitioning debtor, Mr. Bishop, is unable to account satisfactorily for the payment or application of a part of a sum of money which he received for the sale of lumber. The court cannot administer the oath to the debtor, if he is not really, and bona fide insolvent; and he cannot be considered as bona fide insolvent, if it appears from the summary examination which the law directs to be made previous to the administration of the oath, that the debtor cannot account for the appropriation of money, other than what could be presumed as expended for maintenance during his confinement. By this a fraud is raised which will preclude him from the benefit of the insolvent system, of which he will not be permitted to avail himself until a full and satisfactory discovery is made. The summary examination is intended to prevent perjury, under the influence of the temptation which the mere taking of the oath holds out to the imprisoned debtor; and if, upon such examination, a fraud is suggested, and well established, I will never permit the oath to be taken, however willing the unfortunate debtor may be to have it administered to him.

In this case we have nothing more than the ipse dixit of the debtor, that the money we wish him to account for has been remitted to Connecticut to persons to whom it belonged.

The debtor is remanded. It is ordered that he be brought up again on Monday next, at 10 o'clock.

Minutes of Superior Court, letter G. p. 229.

Chambers, July 12, 1809.

268 \*Francis Ross v. Paul Grimbail.

Chatham County, July 1809.

**Sale of Land—Specific Performance—Title.**—In an action for specific performance of a contract for the sale of land, a mere naked title from the vendor is not sufficient, the vendee must be put in possession of all the muniments of the estate. The grantor must either put the grantee in possession of all the mesne conveyances, or he must place it within his power to recover them.

By CHARLTON, Judge.

The bill states, that Francis Ross and Paul Grimbail having entered into articles of agreement for the purchase of a tract of land in Liberty County, called Woodville, circumstances intervened subsequent to the execution of the agreement, from which Ross

thought himself delivered from a specific performance of it; that Paul Grimbail filed a bill on the equity side of the Superior Court, for a specific performance of it, and in March Term, 1807, obtained a decree, from which Ross appealed; that the case came on again on the appeal in the last March Term, when the jury returned the following verdict, in favour of the respondent Grimbail: "We find for the plaintiff eight thousand dollars, with interest from the 25th day of April, 1807, and costs of suit, and that the plaintiff cause good and sufficient titles to be made in sixty days." That in pursuance of this verdict Grimbail left with Ross, sometime in April, titles executed by him and his wife to the Woodville tract of land; that upon this verdict, an execution has been issued; that since the obtaining of the said verdict the complainant Ross has discovered that judgments have been entered up against Grimbail in the circuit court of the United States for the district of Georgia, before the date of the said verdict, for the sum of 6714 dollars 28 cents; that the lien which these judgments fixed upon the Woodville, previous to the verdict, prevents a compliance on the part of Grimbail with all the requisitions of the verdict, he not being able under these judgments to give good and sufficient titles. Ross

269 farther states in his bill, that he was \*unapprized of the federal judgments at the time the verdict on the appeal was rendered in favour of Grimbail, and upon the ground stated in this abstract of his bill, prays that a temporary master in chancery may be appointed to report to this court, the nature of titles tendered by Grimbail in compliance with the terms of the verdict; that Grimbail may be required to indemnify Ross against the effects of the said federal judgment; and that an injunction may issue, to stay all farther proceedings on the execution until these things are done. My brother Harris, who argued in support of this bill, contends, that a simple title from Grimbail, with the usual relinquishment of dower from femme, cannot be considered as the good sufficient titles which the verdict requires to be given. On this point, I perfectly agree with him; a mere naked title from the vendor is not sufficient; the vendee must be put in possession of all the muniments of the estate, by which he would be enabled to make out a regular deduction of title in the action of ejectment. The grantor must either put the grantee in possession of the mesne conveyances, or he must place it within the power of the grantee to recover them. I presume that these propositions are too well established by the principles of law to require further elucidation; I think it reasonable, therefore, that the prayer of the bill, so far as it seeks a postponement of the operation of the execution, until it is ascertained whether the requisitions of the verdict have, or have not been complied with by Mr. Grimbail, should be granted; and I do hereby order and direct, that the clerk of the Superior Court of the county of Liberty, upon whom I shall quo ad hoc devolve the functions of master in chancery, do, within eight days

from this date, make a report to be deposited with the clerk of the Superior Court of Chatham county, on the nature of the titles tendered by Grimbail to Ross, in pursuance of the verdict, and it is farther ordered, that after levy made, an injunction do issue, to stay and inhibit the sale of property of Francis Ross, until a decision of the court is obtained, upon the filing of  
270 this report, and upon a \*motion which may then be made for the dissolution of the injunction

I hope my brother Noel will perceive the propriety of my not going into a full investigation of the principles which a court of chancery recognizes in decreeing a specific performance of contract; he contended, that the judgments in the circuit court against Mr. Grimbail being posterior to the articles to convey, and the first decree in favour of Grimbail, these judgments could not, upon the authority of the British adjudications in chancery, defeat the right of Grimbail to apply for a specific performance. If it should be deemed necessary to investigate the soundness of these decisions, which are founded upon the principles, that where one for a valuable consideration agrees to do a thing, such executory contract is to be taken as done, and that he who made the agreement, should not, by neglecting to perform it, be in a better plight than if he had fairly and honestly performed without delay that which he had agreed to perform. I say, if it is necessary to re-investigate the applicability of the decisions, founded upon this principle to the judicial relations of this country, I conceive it is not competent for me to do so upon the ex parte matter of the bill before me; our judicial system does not seem to me to militate with the adoption of the chancery proceedings of England, and I shall, therefore, feel no difficulty in sanctioning a bill of review, if I should be impressed with the necessity of reviewing or examining a decree made upon a former bill. Before I conclude, I would beg leave to suggest to my brother Noel, that the case of *Finch et al. v. Earl of Winchelsea*, 1 P. Wm. 277, does not seem to go the lengths contended for by him. In that case, a specific performance was decreed by Lord Harcourt, which was confirmed by the house of lords. It is said in *Powell*, 2 p. 59, that a question there arose before lord Cowper, whether the judgment creditors who were puisne to the agreement, should be paid their debts; and his lordship decreed that they should, for the equity to have the agreement performed, was not strong enough to stand in the  
271 way of the \*creditors who had a lien on the estate. Lord Cowper bottomed his decree upon the inadequacy of the consideration paid to the thing purchased; the doctrine, however, is strongly and unequivocally laid down in the manner stated by my brother, Noel, in *Peach v. Winchelsea*, cited 10 Mod. 468, where it is said, that articles entered into for the sale of the debtor's lands for a valuable consideration, and the money paid bind the estate in equity, and therefore must prevail against the claim of my judg-



ment creditor, mesne betwixt the articles and the conveyance. 2 Powell, 58.

I am not prepared to say that all the decisions of the British court of chancery is the rule of equity, which considers a thing done from the time it ought to have been done, are proper from the adoption of circumstances, through the medium of which, justice and honesty would call for an abrogation of the rule as it bore upon the principles of a particular case. If ever there was a case which required a suspension of the will, it was that of *Coss v. Rudebe*, 2 Vern. 280, to the authority of which I shall never be persuaded to give my assent, sitting here to distribute justice upon the principle of sound sense and morality, and that honesty which is deducible from natural obligation. I shall not consider myself bound by any precedent violation of these principles. If this case comes before me again in the shape I have suggested, I shall endeavour to give to the whole doctrine, that complexion which may be most suitable to the genius and simplicity of our system of jurisprudence.

Harris, for Plaintiff.

Noel, for Defendant.

Minutes of Superior Court, letter G. p. 246.

Chambers, November 25, 1809.

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\**Ross v. Grimbail*.

Chatham County, November 1809.

**Equity Practice—Voluntary Relinquishment of a Right**

—**Effect.**—Where a person, apprised of his right, voluntarily relinquishes a privilege which he might demand, he must abide by it and stand the loss, if there is no fraud, circumvention or deceit, and no unfair advantage taken of the situation of the party contracting, and a court of equity will not relieve.

By CHARLTON, Judge.

The special jury of Liberty county having decreed a specific performance of the contract between Grimbail and Ross, upon the former giving good and sufficient title to the latter, and this court having referred it to the clerk of the Superior Court of Liberty, to report on the sufficiency of the titles tendered by Grimbail, in pursuance of the mandate of the special jury, an injunction was granted until that came in. This report has been transmitted agreeably to the order of the court, and a motion is now made for a dissolution of the injunction, upon, I think, two grounds.

1. Because all the muniments of the estate, establishing a regular deduction of title, appear to have been tendered by Grimbail to Ross, in conformity to the decree of the special jury; and,

2. Because Mr. Ross has acquiesced in the sufficiency of those titles.

Mr. Harris, with considerable ingenuity and ability, endeavoured to show the insufficiency of the titles, as they are traced and enumerated in the report of the officer whom I had constituted, for this purpose,

master in chancery, and he contended the links of the chain between were so completely broken, that, with these titles in his possession, Mr. Ross could not defend himself in ejectment. I agree with Mr. Harris, that the good and sufficient titles meant by the special jury, are such titles as would defeat a recovery in ejectment against the defendant. If, therefore, any links

273 \*are broken, or step removed, the titles have not been tendered in conformity to the intention of the special jury. The solicitor general seemed, in his argument, to controvert the position, that this court has any control over the verdict or decree of a special jury; and he therefore thought the course taken in this case, was very much opposed to the simplified genius and policy of our system of jurisprudence. The law certainly declares, that the verdict of a special jury shall be final and conclusive; and whenever it is conclusive, I shall consider it my duty to reverence and respect it; but whenever it terminates no dispute, nor adjusts any right, is it then that hallowed thing so solemnly consecrated by the judicial act? I think there is no heresy in a denial of the authority of a verdict of special jury that is not final and conclusive, because such a denial would be founded upon the plain text of the law. Is this verdict conclusive? It is very far from being so. It does not assume the technical form of a chancery decree, but it amounts to a decree for the specific performance of a contract dependent upon acts subsequently to be done by the party who seeks for that specific performance. "We give you (in substance, say the jury,) the money the bargainee engaged to pay for the land, provided you give good and sufficient titles." Did the special jury intend or mean that the bargainor should be the judge of the sufficiency of the titles; that any titles he tendered should be good and sufficient titles; certainly not: then there is a verdict that is not final and conclusive, and it can be only made so in three ways, by the interposition of another jury, or by the interposition of this court, or by the consent of the bargainee to receive such titles as the bargainor may choose to tender him. Now it appears to me that another jury could not interpose, because there is no fact for their determination, the sufficiency or insufficiency of titles, in this case, being a question of law; the special jury must, therefore, have contemplated a reference to the court to decide, whether such titles were tendered as established an incontrovertible right in the grantor. The special jury and the

274 court \*sat and acted in the capacity of chancellors; and they pursued the practice of chancery; the one passed an interlocutory provisory decree, leaving it to the other to render it final, upon a compliance with certain terms imposed upon the party who is to be benefited by it. Our system of jurisprudence requires the co-operation of a special jury, in the trial of equity cases; but when the fact is blended with the equitable principle of the bill, the jury may,

if they please, separate the fact from the law point, deciding upon the former themselves, and submitting the other to the discretion of the court; and how many cases could be stated in the investigation of a complicated chancery bill, where the jury would be compelled to act as they have done in the case now under discussion. On some other occasion I shall pursue this inquiry with more method; at present my only object is, to suggest, through the medium of a few general remarks, my opinion as to the competence of this court's interference, to render conclusive and inconclusive, decrees in equity of a special jury. Under the influence of this opinion, I would now, without hesitation, proceed to decide upon the sufficiency or insufficiency of the titles as reported by Mr. Forester. I would give Mr. Harris' objections their full consideration, and I would say whether the deeds, enumerated in the report, would or would not trace out a clear title in ejectment, and that would be the footing upon which my brother, Noel, also placed the investigation. On the 28th March, 1809, the special jury decreed as follows: "We find for the plaintiff, eight thousand dollars, with interest from the 25th April, 1807, and costs of suit; and that the plaintiff make good and sufficient titles to the plantation, Woodville; titles to be made in sixty days." On the 19th April, 1809, the following receipt was tendered to, and signed by, Mr. Ross: "Received, this 14th day of August, 1809, of Paul Grimball, the conveyances for the plantation Woodville, with his titles, and the renunciation of dower from Mrs. Sarah Grimball, being, in all, as complete, as decreed by the grand jury of Liberty county, for the last March term, signed, Francis Ross." Consensus \*tollit errores; if a man, with his eyes open, and apprized of his rights, voluntarily relinquishes a privilege which he might legally demand, he must abide by it, and stand at the loss, if there is no fraud, no circumvention, or deceit, no unfair advantage taken of the situation of the party contracting; a court of equity cannot, and will not, relieve him; the badness of a bargain is not, of itself, a sufficient ground to set aside a contract.

I say, that this receipt,—this acknowledgment of the sufficiency of Grimball's titles, was voluntarily and deliberately given by Mr. Ross, and at a time when he was fully apprized of all the rights which the law placed at his disposal; for in his bill praying an injunction, which is dated 22d June, 1809, upwards of two months after the receipt, he alleges that the titles were tendered him in April, whilst there was, at that time, judgments against Mr. Grimball, operating as liens upon the Woodville plantation. Now it appears that he received the titles from Grimball, at the moment when he was apprized of the embarrassments which the judgments created; he therefore neither suggests fraud, ignorance, surprise, or circumvention; nor can any thing like them be inferred from all the circumstances of the

transaction; and I repeat, therefore, that there was a deliberate and voluntary waiver of any defectiveness in the title which he received and acknowledged to be complete, as decreed by the special jury of Liberty county.

It is ordered that the injunction be dissolved.

Harris, for Plaintiff.

Noel, for Defendant.

Minutes of Superior Court, letter G. p. 251.

Chambers, December 2, 1809.

276 \*Thomas Young et al. v. The Executor of Baker.

Chatham County, December 1809.

Appeals—Withdrawal—Consent.—An appeal cannot be withdrawn except by consent of parties.

By CHARLTON, Judge.

It appears from the minutes of the court, that this case was, by consent of counsel, placed upon the appeal docket, and from that docket it appears, that during the vacation which preceded the last Superior Court of Liberty, one of the attorneys for the plaintiff in execution, ordered the levy to be withdrawn, upon which this appeal is predicated, and at the same time renewed the execution.

The primary question is, therefore, whether this cause, having been entered as an appeal case, can be withdrawn without the consent of all parties. That part of the judicial act which relates to this point is in these words, "no person shall be allowed to withdraw an appeal, after it shall be entered, but by consent of parties." Mar. and Crawford, Dig. 300. Noel, for the plaintiffs in execution contended, that this inhibition extended only to the control which the defendant might possess over his appeal, which he had entered for the purpose of delay; for, in that case the plaintiff would for the frivolous and vexatious procrastination of the case, recover damages in addition to the debt sued for; and that therefore under such a train of circumstances it would be repugnant to justice and the intention of the act, to permit a defendant to withdraw his appeal without the consent of the plaintiff; but he thought that the plaintiff could, without any violation of the spirit of the act, withdraw his appeal, because he then \*declares himself satisfied with the first verdict; the case is then, as finally concluded as if it had progressed to the verdict of a special jury; and as no vindictive damages could be recovered by the plaintiff, under his own appeal, what force was there in the argument ab inconvenienti? where would be the oppression imposed on the defendant in permitting the plaintiff to exercise the right over his own appeal? there is certainly much of sound sense and reasoning in this argument of my brother, Noel; under such a combination of circumstances the law ought



to permit the plaintiff to withdraw his appeal; over the appeal of the defendant he can, of course, have no control.

When the law is vague, inconclusive, and indefinite, it is competent for the court to seek for its true import, upon the principles of justice, of reason, and intention: but when the legislature speaks in a language which cannot be misunderstood, it is then the duty of the judge, *jus dicere*, to declare what the law is, and to obey its plain unequivocal mandates, provided they are confined within the limits of the constitution. On the subject of appeals, the law declares "that no person shall be allowed to withdraw an appeal after it shall be entered, but by the consent of parties." The parties to a suit, are plaintiff and defendant, without the consent of the defendant, therefore, in this case, this appeal cannot be withdrawn; such is the law. Besides it would be difficult to apply Mr. Noel's argument to this particular case, for as it was entered by consent, it became as much the appeal of the defendant, as the plaintiff. The compact is this, "ut sit finis litis, we agree to waive the first verdict, and to abide by the conclusive determination of a special jury." If this appeal then, can in any point of view, be considered as the appeal of the defendant, *ex concessis*, of counsel, on all sides, it cannot be withdrawn by the plaintiff. As to the other point, whether the original record which appears to have been lost in the clerk's office can be supplied on the motion of the defendant?

I have no difficulty in saying it can.

278 \*It is therefore ordered, that this cause do stand upon the appeal docket for trial, and that the original record, which is said to have been lost, be restored, according to the practice of this court.

Noel and Stites, for plaintiff in execution.  
Harris, for claimant.

279 \*John D. Kehr v. Louis Gantier.  
Same v. Archibald Johnston.

Chatham County, December 1809.

**Certiorari—Affidavit.**—The grounds for certiorari must be supported by affidavit.

By the Court.

There is no affidavit to support the grounds upon which the certiorari was issued, which affidavit is made necessary by the practice of this court.

It is therefore ordered, that the certiorari in these cases be suspended, and that a *precedendo* issue to the justice.

Minutes of Superior Court, letter G. p. 254.

Chambers, December 20. 1809.

280 \*State v. Caswell.

Chatham County, December 1809.

**Warrants for Arrest—Seal.**—A warrant for arrest must be under seal.

The prisoner being brought up, Jones, of counsel for him, moved for his discharge

upon the irregularity of the warrant, and the chief grounds assigned by him were, that it had no seal, and that it did not specifically charge any offence.

By the Court.

The warrant should have had a seal. It is therefore quashed; but it appearing from the face of the warrant, and also from an examination of the prosecutor, Mincey, that a serious offence had been committed, it is ordered, that he remain in custody until he gives security for his appearance at the next Superior Court of Bulloch County; himself in five hundred dollars, and two securities in five hundred dollars each, to answer to a bill of indictment for feloniously carrying away six negroes, said to be the property of the said Mincey, and also to a bill of indictment for false imprisonment. And the said James Caswell, having entered into the recognizance required by the court, he was discharged on payment of fees.

Jones, for the prisoner.

Minutes of Superior Court, letter G. p. 257.

Chambers, February 20. 1810.

281 \*Catherine Fitzgerald v. David Garvin et al.

Chatham County, February 1810.

**Pleading—Suit for Dower—Plea of Ne Unquies Accouple.\***—Where the defendant relies upon the plea of *ne unquies accouple*, in a suit by a widow for dower, such plea obviates the necessity of proof of seisin in the husband, and the lawfulness or unlawfulness of the marriage is the only question that can be investigated.

By CHARLTON, Judge.

The following grounds are relied on by the defendants' counsel, in support of the rule which has been granted, to show cause why a new trial should not be granted:

1. Several persons interested in these four acres were not made parties at the time of the bringing this suit.

2. Writ, or process, is not sealed.

3. The execution of this writ appears, by the sheriff's return, to have been 17 days before the same was issued or is dated.

4. No proclamation was made at the church door, of demandant's claim of dower.

5. On making new parties plaintiff, the defendants were entitled to a term.

6. The declaration is too vague, and not sufficiently descriptive; the sheriff cannot, from that, apportion or set-off her dower.

7. His honour the judge, erred in deciding, that the plaintiff was not bound in proving seisin title and possession to the premises in Henry Osborne, and for suffering the plaintiff to take a verdict without such evidence.

8. The representatives of Peter Madden and John H. Harris ought to have been made parties defendant to this suit, as said Harris and Madden, named defendants in this suit, died during its pendency.

\*The principal case is cited in *Hopkins v. Burch*, 3 Ga. 226.

When the trial of this cause came on last March Term in the county of Camden, it was insisted by the counsel for the 282 \*defendants, that it was necessary to prove a seisin in fact or in law, the marriage, and death of the husband. I looked into the record, and found the defendants had confined themselves to the plea *ne unquies accouple*, and I therefore expressed an opinion, that the defendants, by adopting that plea in bar, had obviated the necessity of proof of seisin in the husband, and that the lawfulness or unlawfulness of the marriage, was the only fact which could be investigated, as the record and pleadings were then framed. The defendants might then have pleaded *ne unquies seise que dower*, that the husband was alive, and other pleas in bar; all of which might have been associated in the answer to the writ, for such is the loose, or, as it is generally denominated, the liberal practice established by our judicial system. You may plead what you please, and in any shape or form you may think proper; but having done so, you must confine yourself to the matter contained in the written defence, which you have deliberately filed as a record of the court.

Such is the language dictated by reason and common sense. If this was not the law, how would the plaintiff protect himself against the surprise, the fraud, the circumvention, of which a different course would be productive? when the defendant had pleaded *ne unquies accouple*, that there had been no lawful marriage between Catherine and Henry Osborne (the husband, of whose estate the present demandant sues to be endowed), it was an admission of seisin and death of that husband, two of the things requisite to the consummation of dower, and it was so decided by the court. As evidence of the lawfulness of the marriage, a certificate was exhibited signed by George Walton, formerly a judge of the Superior Courts of this state, and stating, that Catherine and Henry Osborne were married by him, in his official capacity. In England, if the tenant pleads *ne unquies accouple* in loyal matrimonie, it is tried by the certificate of the bishop, not by a jury. In this free country there is no connexion between the church and the republic; we have, therefore, no bishop to apply to, nor does a 283 \*certificate in the matter of marriage, stand upon the same footing as a trial by jury: not considering the certificate of Judge Walton as conclusive, I directed the fact to be tried by the jury, and I told them, as we have no marriage act, or register of marriages, it might be proved in any manner which would satisfy them; that an uninterrupted cohabitation and reputation would be sufficient; and that in Lord Mansfield's expressions, in *Birt v. Bristow*, 1 Doug. 174, "marriage in this country may be proved in a thousand ways." Evidence was offered of cohabitation and reputation, and the jury under this direction, gave a verdict for the demandant. It is now alleged, that I erred in my opinion of the effect of the plea of *ne*

*unquies accouple*, and in my direction to the jury. I have with much attention revolved in my mind the doctrine advanced at the trial, and those which since have been advanced by counsel; but I still adhere to my former opinion, and for the reasons that have been stated. Having decided upon this point, which is contained in the 7th ground of the notice of the new trial, it is not necessary to advert to the others, but I will do so for the satisfaction of the bar.

First ground. The judge was not to know that there were other persons who ought to have been made parties to the record; at all events, this objection should have been made on motion, to quash or to set aside the writ, according to the practice of our courts, or it should have been pleaded in abatement; but it cannot be considered as a ground for a new trial, particularly as persons not parties to the record cannot be injured by the verdict.

Second ground. This objection should have been made before issue joined; for the defect is cured by filing of the plea, which is, by our practice, always considered as a waiver of defects, which can only have a formal operation, and such an operation to all the essential purposes of justice, has a seal to the process.

Third ground. This objection stands upon the same footing as the previous one, as it bears upon a motion for a new trial; it falls 284 under the head of amendment, and on motion \*previous to the plea, the court would have directed the sheriff to amend his return. All original writs can be amended when there is something to amend by, *Barnes*, 10. In this case the return of the sheriff could have been amended by the date of the issuing of the writ. An amendment is also allowed to prevent an absurdity; this is laid down in *Beaumont v. Cosin*, and is thus reported in *Barnes*, p. 17. Rule to show cause on plaintiff's application, why declaration should not be amended by inserting in the memorandum, viz: 28th November, instead of 23d October, which was before the cause of action. Rule absolute on payment of costs. Defendant to have term to plead *de novo*, pleading in bar.

Fourth ground. As no new parties could have been added at the trial, this ground requires no farther answer.

Fifth ground. The *lex fori*, the form of the remedy to be pursued is prescribed by our own law. The proclamation at the church door after summons is directed by 31 Eliz. and if that proceeding is to be observed, we must take and adopt the whole of the English proceedings as relates to dower, viz. the preceipe, original writ, summons, assign, grand cape, counting, &c.; all this is repugnant to our own statutory regulations. We must proceed in all cases at common law by petition, process, and plea, or answer.

Sixth ground. The declaration or petition conforms to the plan or chart of the town of St. Marys, in which the lots are situated; it is, therefore, sufficiently definite and descriptive, and may be assigned by metes and bounds.



(a) Eighth ground. It is laid down in the English books, that the alien widow of a subject, shall not be endowed, and in support of this doctrine the venerable authority of Bracton is cited, Bracton, 298, and Barton's Elements, 225. The

285 \*present case differs from these cited, because the right to dower in the wife had vested previous to her intermarriage with Fitzgerald. Did this intermarriage vest the life estate of the wife in the husband? Could he dispose of it? Was it liable to his debts? By our law inheritance of the wife, freeholds and chattels become the property of the husband, unless previously secured by a settlement. We get into a dilemma, by giving the dower estate of the wife to the husband, for as a freehold, his alienage prevents him from holding it, and if he cannot, the wife losing her right, does it escheat? The policy of our law is to prevent aliens holding a title to real estate, and the present inclination of my mind is, that an alien by intermarriage with a female citizen in that way cannot, per obliquum, obtain a privilege which could not be obtained per directum. If the inheritance of freehold of the wife is not secured by previous arrangements, I am disposed to think her intermarriage with an alien produces a forfeiture to the public. This, therefore, is the most formidable ground that has been urged, but as the defendants have precluded themselves, by their pleading, from giving it in evidence, I cannot make it the basis of a new trial—they must adopt another remedy. Rule discharged.

Cuyler, Davis, and Berrien, for Demandant.  
Stites and Lawson, for Defendants.

Minutes of Superior Court, letter G. p. 261.

Chambers, February 17, 1810.

286 \*Roswell King v. William Cook.

Chatham County, February 1810.

1. **Awards—Construction.**—Awards are liberally construed, and where the award does not designate the points in dispute but refers to all differences it will embrace all differences which were laid before the arbitrators, and need not be confined to matters between the parties and individuals, but also as guardians and trustees.

2. **Same—Certainty.**—The certainty of an award is indispensable and since a special jury may mingle in their determination all the established principles of equity, so far as they are applicable, and where there is something upon which the jury have raised a presumption agreeable to all the purposes which justice may require, the court will not interfere with the award.

(a) The alienage of the demandant's husband, was suggested at the argument, and does not appear to have been incorporated in the original notice. The attention of the court was drawn to it, by its being fully argued on both sides; and it is here made the 8th ground instead of that which was contained in the notice, but which was not much pressed.

3. **Same—Finality.**—An award should be final, and where it is certain it is generally final.

4. **Same—Joining of Arbitrators with Umpire—E Converso.**—The joining of the arbitrators with the umpire where he has heard the evidence does not vitiate, and e converso, if it is denominated an award, the joining of the umpire in such case does not avoid it.

5. **Same—Necessity for Seal.**—The want of seal does not avoid this award nor does the submission require a delivery under seal.

(1) **Seals—What Constitutes.**—A wax or wafer is not essential to the validity of a deed; an ink seal is sufficient.

6. **Awards—Notice—Waiver.**—Where no evidence is advanced to show that the defendant was not given notice, it will be presumed that he had notice, because the contrary does not appear.

By CHARLTON, Judge.

This was an action of debt brought for the nonperformance of an arbitration bond. The submission recites, "that sundry disputes and misunderstandings having arisen between the said Roswell King and William Cook respecting certain accounts." It then proceeds to refer those disputes and misunderstandings to the arbitration and awards of Jonathan Fabian, and Edward Butler, who are authorized to make "a final determination of all accounts and other matters respecting property of every nature whatever." If those arbitrators could not agree, they are "empowered to choose an umpire." At the trial an award was offered in evidence, which is in these words:

"Mr. King and Mr. Cook,

"Gentlemen.—It is our opinion, that Mr. Cook's children are entitled to four hundred dollars from the sale of lands to Mr. Collins, after deducting John Cole's account, as by Mr. Cook's engagement. Dec. 6, 1800.

(Signed) Jonathan Fabian,  
Edward Butler, and  
Alexander Bailie."

The court permitted this award to be given as evidence to the jury; and the counsel for the defendant now move for a new trial upon the following grounds, viz.:

1. The award is not between the parties submitting.

287 \*2. It is not certain.

3. It is not final.

4. It is not made by the arbitrators to whom it was referred.

5. It is not under seal.

6. It is not notified to defendant.

7. It is not an award of the matters in difference.

8. The verdict is not between the parties

\***Awards—When Umpire May Join in.**—In *Byrne v. Usry*, 85 Ga. 219, 11 S. E. Rep. 561, it is said: "The arbitrators, under the terms of the submission, had no right to call in an umpire unless they themselves disagreed. Their doing so, however, would not have vitiated the award if the umpire, as well as themselves, had heard the case. *King v. Cook*, T. U. P. Charlton 286, 4 Am. Dec. 715; *Stevens v. Brown*, 82 N. C. 460; *Bryan v. Jeffreys* (N. C.), 10 S. E. Rep. 167."

to the suit. The verdict is contrary to the charge of the court in matter of law.

I shall dispose of these grounds in the order in which they are stated.

1. Awards are not construed so strictly as they were formerly, and in *Hawkins v. Colddough*, lord Mansfield declares, "against critical niceties in scanning awards made by judges of the party's own choosing in order to the determination of suits between them." 1 Burrow, p. —. Giving this award, therefore, a liberal and favourable construction, can it be considered as between the parties submitting? The disputes referred to in the submission might have existed between King and Cook in a variety of capacities, as individuals, as guardians, or as trustees; and when the award does not designate the points in dispute, but refers to all differences, it will certainly embrace all differences which were laid before the arbitrators; and the limits of so general a submission rendered unnecessary a specification of the matters, with which those differences were connected. The submission contemplates an adjustment of other things than a settlement of accounts between King and Cook, in their individual capacities; for, it expressly submits other matters, respecting property of every nature whatsoever. If these latter expressions were not contained in the award, I should doubt whether it relates to any other matter but a settlement of accounts between Cook and King, in their distinct and individual capacities, for, as it is said in the books, you cannot call in the aid of an averment matters dehors, to explain the meaning of the arbitrators, it must appear on the face of 288 the award. I can perceive nothing in the award, itself, therefore, which precludes a termination of disputes as they existed between King and Cook, as guardians of his children, or the children of his wife.

2. The certainty of an award is one of its indispensable and essential properties; the uncertainty of this award, it is contended, is contained in these words, "after deducting Mr. Cole's account." It is supposed that these words put the controversy afloat again, for the nature or amount of Cole's account is not mentioned, and from the face of the award it does not appear, whether that account has been deducted by the arbitrators, or whether it was left to be ascertained by the future exposition of the parties themselves. At the trial I was of opinion, this uncertainty is fatal to the award, and so charged the jury; but Mr. Lawson gave a different construction of it to the jury, for he said, that the terms, "after deducting," presupposed an investigation of Cook's engagement, (as it is termed in the award) and an ascertainment and deduction of Cole's account, by the arbitrators, conformably to that engagement.

Upon this construction the jury must have founded their verdict, as no other evidence was submitted to them. The jury was a special one, and sworn to try the case according to equity, and the opinion they entertained of the evidence. The un-

certainty of this award, is a subject upon which there may be a variety of constructions and opinions. I expressed one, the jury another; and this of itself, ingeniously, my brother Davis observes, was sufficient proof of its uncertainty. The award will admit of the construction given it by the jury, though the one expressed by the court was the most striking and obvious one. There is then the opinion of the court one way, that of the jury another, and in the support of the correctness of each many cogent reasons have been advanced. It is in general true, that a verdict against the charge of the court is a good ground for a new trial. But under our system of jurisprudence, a special jury are not bound by

the strict rules of common law, but 289 may mingle in \*their determination all the established principles of equity, so far as they may be applicable, or analogous. This award would not bear the nice scrutinies of common law doctrines, but it may be conformable to equity and conscience. The decree of the special jury may mould itself to all the purposes which the justice of the case required, and it is laid down in the books, that where there is something upon which the jury have raised a presumption agreeably to all the purposes which the justice of the case required, or if the plaintiff be entitled to recover in conscience and equity, the court will not interfere in granting a new trial. 4 T. Rep. 468; Salk. 644, 648, 646, 116; 2 T. Reports, 4.

3. It is requisite, that the award be final, as that it should be certain, but if it is certain, it is generally final, and that ground has been gotten over in the previous investigation. If it could embrace the disputes between King and Cook, as guardians to his children, or wife's children, (and it appears that the broad expressions of the submission would admit of such a construction,) then it is final, according to the terms of the submission; and there is no hostility between it and the verdict.

4. Looking over the authorities, I have discovered much nicety of distinction as it relates to this point. In *Bulst*, 184, it is said, "that if a submission be to four, and the umpirage of J. S. the four, and J. S. may join in making the award, otherwise, if their power had been divided in the submission; as if it had been to the four, and if they could not agree, then to J. S." 1 Bac. Abr. in margin. In *Lalnsby v. Hodgson*, 3 Burrow, 1474, this case in *Bulst*. is called by the court a mistake, an error of the reporter, at least, (continues the decision,) there could be no determination founded upon it. It is a distinction in words without any real difference in the sense or meaning. The case in *Burrow* is nearly in point to the present one, there the arbitrators joined in the umpirage, and the question was, whether it was vacated and rendered void by the arbitrators joining in it. The court, (says the reporter,) were unanimous and 290 clear, that this was \*the umpirage of the umpire, only he was at liberty to take what advice or opinion, or assessors



that he pleased. So, in this case, if a disagreement is supposed to have existed between the arbitrators, this would be considered therefore as the umpirage of Baillee. The arbitrators joining does not vitiate, and e converso, if it is denominated an award, the joining of the umpire does not avoid it, because he may be taken as accessor to the arbitrators, or his joining is surplusage.

The point is settled by the declaration of the court in Burrow, that the distinction in Bulstrade, was in words only, a mistake, an error of the reporter.

5. It has been repeatedly decided, that in this state a wax or wafer seal was not deemed a requisite to a deed, and upon the authority of these decisions, and of Dill v. Dill, Dalton p. —, and a case in M'Intosh, Superior Court, I decided that a wax or wafer seal was not essential to the validity of a deed; that an ink seal was sufficient; and that a deed was constituted such by the language, not by the magic of wax.

The want of seals does not avoid this award, nor does the submission require a delivery under seal; if it had, the parties would have been bound by their contract.

6. The award is directed to both parties to the submission. No evidence was advanced at the trial to prove, no notice to the defendant; a notice is therefore to be presumed, because the contrary does not appear, "de non apparentibus, et de non existentibus, eadem est ratio."

7. This ground has been answered in my remarks on the first point.

8. This ground may be also considered as disposed of; but it may be more satisfactory to open it by a case or two from the authorities, and they say that an award may be beneficial to the parties, though a thing is awarded to be done to a stranger to the submission; as if the arbitrators award, that one of the parties should pay money to the servant of the other. 3 Leon, 63, N. 291 Dyer, 242, vide 1 Bacon Abr. 146. \*So, again, if two brothers submit to arbitration, and one of them is awarded to pay so much money yearly to his mother, this is good, for the payment being made to his mother, shows it to be a benefit to him. Salk. 74. Upon the same kind of reasoning, payment to Cook's children is a benefit to him.

Rule discharged.

Davis and Berrien, for plaintiff.  
Lawson, for defendant.

Minutes of Superior Court, letter G. p. 265.

Chambers, February 17, 1810.

292 \*Lewis Levy v. John Ross.

Chatham County, February 1810.

**Awards\*—Action on.**—An action is not maintainable

\***Arbitration—Illegal Transactions.**—A claim arising out of an illegal transaction cannot be submitted to arbitrators, and an award founded thereon is a nullity. Benton v. Singleton, 114 Ga. 554, 40 S. E. Rep. 811, citing the principal case.

upon an award based upon the composition of a felony.

By CHARLTON, Judge.

The following are the grounds and reasons assigned by the defendant's counsel in support of their motion for a new trial.

1. The verdict is contrary to law, because the award was for the compromise of a felony.

2. The verdict is contrary to evidence, because the evidence clearly established the object of the award to be the compromise of a felony.

3. The verdict is contrary to the charge of the court in matter of law.

In this case it was proven at the trial, by the testimony of the arbitrators, that Levy had menaced Ross with a prosecution for a capital felony, and that the submission to arbitration was founded upon an understanding that the award was to adjust all matters related to the subject of that intended prosecution. It is true that the arbitrators, who were called and admitted as witnesses, did not "in totidem verbis" say, that the submission to arbitration was founded upon the compromise of felony; but it was clearly established, that the prosecution was abandoned in consequence of the agreement to refer the controversy to arbitrators. I have doubts as to the admissibility of an arbitrator as a witness, except it be to prove facts which were admitted by the parties to the submission, in their examination before the arbitrators. On this point the English authorities advance some doctrines which are not easily understood; but I shall not decide on \*that point now; it may be investigated when the arbitrators are again presented as witnesses. Upon the whole of the evidence, as it was offered at the trial, I adhere to the opinion which I expressed then, that this award was bottomed upon the composition of felony, and therefore an action is not maintainable.

Rule absolute.

Stites and Lawson, for Plaintiff.  
Davis and Berrien, for Defendant.

Minutes of Superior Court, letter G. p. 268.

Chambers, April 7, 1810.

294 \*Hopkins and Odingsell v. Bolton, Executor.\*

Chatham County, April 1810.

1. **Sheriffs—Levy upon Slaves—Fees for Subsistence.**—So long as slaves levied on by the sheriff remain in his custody he is entitled to the fees which he charges for subsistence.
2. **Same—Same—Same—Case at Bar.**—In this case the sheriff was not allowed fee for the subsistence of slaves upon which he had levied.

CHARLTON, Judge.

It was admitted that this was an amicable suit, and the execution was issued for no

\*The principal case is cited in Forbes v. Morel, R. M. Charlton 24.

other purpose than to compel an equal distribution of the estate of the testator, John C. Livingston, among the heirs and creditors. It is so expressed in the advertisement for the sale.

A levy was made by the sheriff, the property sold, and he has presented for payment the following bill of fees, viz.:

Francis Hopkins and Charles Odingsell

v.

Bolton, Executor of John C. Livingston.

Former and present sheriff's fees in this case.

Levy.....	\$	1 00
Advertising.....		8 00
201 days' subsistence, from 15th September, 1809, to 3d April, 1810, of fifty negroes, at 12½ cents per day....		1256 25
Commission at 1 per cent. about....		300 00
		<hr/> \$1565 75

The sheriff having refused to deliver the negroes, or to give titles to the purchasers, unless this bill of fees were paid, I directed a mandamus to issue, requiring him to give titles to the purchasers, or to show cause why titles should not be given. Yesterday the sheriff appeared, in obedience to the mandate of the writ, and by his counsel, Bulloch and Cuyler, alleged, that the fees he had charged were allowed \*by the act of assembly, and that all his predecessors had charged and received them.

It was conceded by his counsel, or it was not denied, that the negroes had not been removed from the plantation where they were found by the sheriff, and the levy made. It was farther conceded, that he had not furnished provisions for their subsistence, but that he was, notwithstanding, entitled to the sum charged for that item, as, from the moment of the levy, the negroes were in his custody; he was responsible for their delivery on the day of sale, and for all losses which might occur in that interval of time, from carelessness, inattention, or neglect of official vigilance. It was urged, that if the sheriff had discharged his duty with rigour, the consequence would have been, a confinement of the slaves in the common prison of the county; that, therefore, as a matter of indulgence, he had permitted them to remain upon the farm, by which indulgence the proprietor had the benefits of their labour until the day of sale; and that it had been usual, under the circumstances of such an indulgence, to charge the fee for subsistence, the labour of the slaves being considered as far outweighing that fee as an equivalent. On this point, Mr. Bulloch pressed the argument ab inconvenienti. He said, that if the sheriff were not allowed his charge for subsistence, under such a relaxation of his strict duty, the result would be highly injurious to the agricultural interest; for that the sheriff would, in all future cases, take the slaves from the plantation, and put them in prison, where they would remain until the

day of sale, which would only have the effect of saving the sheriff some trouble, but that it did not tend either to increase his responsibility or to benefit the plaintiff. The consequences were exclusively ruinous to defendants. Two adjudications were cited by Mr. Cuyler, which, under analogous principles, gave the fee to the sheriff; one of these cases occurred in the mayor's court, (which, however, is no precedent for this court,) and another in the Superior Court, in support of the allegation, that the sheriff considered himself responsible for the delivery of the slaves on the day of \*sale, and for all other consequences which attach themselves to his official station.

An affidavit of John Eppinger, late sheriff, was made and submitted, which states in substance: "That he made no agreement for the relinquishment of his charge for subsistence: that he applied for indemnity to relieve him from the custody of the negroes, which was refused by the agent of the defendants: that he always considered them in custody upon his official responsibility, and that he had appointed a Mr. Spencer and a Mr. Thiess to take care of them upon the plantation." The present sheriff John Eppinger, junior, deposes nearly the same facts. On the part of the purchasers of these slaves, it is contended by their counsel, Harris and Woodruff, that the fee for subsistence, under the circumstances of this case, is not allowed by law, and if not allowed by the law, it cannot be sanctioned by usage; and that the charge for subsistence cannot be admitted, unless there is an actual and literal furnishing of provisions of the kind and quality prescribed by the act of assembly. Mr. Harris denied that the sheriff could charge the fee for subsistence, because the statute had expressly given it as a part of the emolument of the jailer. And it was farther urged, that if the responsibility of the sheriff for the safe keeping of the slaves, whether they were confined in jail, or left upon the farm, entitled him to the fee for subsistence, yet that, even upon that ground, the charge must be considered inadmissible; for, from the depositions submitted by the purchasers, it appeared that no responsibility was considered as attached to the sheriff, either for the delivery of the negroes on the day of sale, or for any losses which might occur in the mean time. In support of these suggestions the joint affidavit of the plaintiffs and the defendant was read, which in substance states, "that they, the deponents, never considered the slaves, after the levy, as at the risk of the sheriff; that when he made the levy, he was directed to leave them on the plantation in the custody of Spencer, the overseer; that if the sheriff had attempted to remove them

\*without the consent of plaintiffs or defendant, he would have been prevented; and that the slaves, during the time they remained upon the plantation, were supported at the expense of the estate of Livingston." Mr. Richardson, in his affidavit, states: "that the sheriff was not held responsible for the negroes; that he acted as the



agent of the plaintiffs and defendants, and that he never considered the sheriff as farther responsible, than merely to prevent the negroes being taken away, upon being notified of such intention by Spencer, the overseer, who had the negroes under his charge by the direction and appointment of the deponent; that he does not recollect any demand of the sheriff for a bond of indemnity; and that no agreement was made between himself and the sheriff for the subsistence fee." Mr. Lawson states, in his affidavit, that he believes, he expressly informed and directed Mr. Eppinger, the sheriff, that the levy was made by consent of all the parties, and that it was not intended the property should be removed from the plantation, and Mr. Lawson adds, in his deposition, that he, in giving these directions acted as agent for Mr. Woodruff, who was the attorney for the plaintiffs, Hopkins and Odingsell. Spencer, in his affidavit, states, "that he was appointed by Richardson, and not by the sheriff, to take care of the negroes, and that he never considered himself accountable to the sheriff, that the sheriff after the levy never came himself upon the plantation, or any other person authorized by him, during the time the deponent had the negroes under his protection; that he never understood the sheriff was to receive any compensation for the subsistence of the negroes, and that they were supplied out of the provisions of the plantation."

Jacob Theiss states, in his affidavit, "that he never conceived himself deputized by the sheriff, that the sheriff did not interfere with the slaves to his knowledge, after the levy; that he, the deponent, brought in the negroes on the day of sale; and that he considered himself so much under the authority of Mr.

Bolton, one of the defendants, that he would not have delivered the negroes without orders from him, to whom he supposed all the responsibility for their safe custody attached."

Upon this statement of the arguments of counsel, and of the testimony, it remains for me to decide:

1. Whether the fee for subsistence is allowed by the law.

2. If allowed, whether the sheriff can demand it under any circumstances, which show that provisions were not actually furnished.

1. The fees of all public officers are ascertained in the act of the general assembly entitled, "an act to revise and amend an act for ascertaining the fees of the public officers of this state,"—passed December 18, 1792.

Under the title "jailer's fees," there is this section: "Dieting negroes, allowing one quart of rice or corn meal per day, seven pence." Marb. and Crawford, Digest, p. 229. It then appears, that the fee for subsistence is allowed by the law, but whether it is allowed to the sheriff, or jailer, is the point made by my brother Harris. On this point I shall decide very laconically. The act of November 30, 1801, which vests the government, and regulation of the jail of Chatham county in the mayor and aldermen of the city of Savannah, and appointing them commissioners of the court house and jail, delegates

only a police authority to the mayor and aldermen; it merely relates to the internal management of the prison, and does not interfere with the responsibility which the sheriff may assume, if he thinks proper to do so. Upon mesne process he may make any house his prison; and it has been so decided in this state. In criminal cases the court designates the common prison; and then the sheriff is bound to observe the ordinances and resolutions of the city council; this responsibility ceases, as soon as he delivers over the prisoner to the jailer of this county. His responsibility will cease also, if he places slaves in the common prison, for the law transfers it immediately to the shoulders of the jailer appointed by the corporation. So long, therefore, as slaves levied upon by the sheriff remain in his custody, \*and under the guarantee of his official responsibility, he is jailer quo ad hoc, and entitled to the fees which he charges for subsistence; but these fees he will not be entitled to unless the subsistence is actually furnished, or there is a contract which dispenses with it; as soon as the levy is made, the slaves are in the possession and legal custody of the sheriff; and he may consider the farm, or plantation of the defendant, as his prison.

2. Has a responsibility attached to the sheriff in this case? The plaintiff and defendant state very explicitly, in their affidavit, that they did not consider the slaves as levied upon under the usual and rigorous principles of an execution; that he was directed by them to leave the slaves upon the plantation, and that they would not have permitted him to use any authority over the slaves, contrary to their wishes and directions.

This is the testimony, and this was the understanding of the plaintiffs and defendant. The same impressions were entertained by Mr. Richardson and Mr. Lawson, by Spencer and by Theiss. The sheriffs, have consequently misconceived the compact between them and all the other parties; and I am therefore of opinion, that the fee for subsistence under the particular circumstances of this case, ought to be deducted.

Let a peremptory mandamus issue.

Woodruff, for the rule.

Bullock and Cuyler, against it.

Minutes of Superior Court, letter G. p. 288.

April Term, 1810.

### 300 \*The State v. John Pettibone, Esq.

Chatham County, April 1810.

**Trials—Postponement—Affidavit.**—The affidavit asking the postponement of a trial, on the grounds that sufficient time has not been allowed the defendant to procure the attendance of his witnesses, must further state that the witnesses are material, and if the nature of the case requires it, the court must be satisfied also of the materiality of their testimony.

By CHARLTON, Judge.

Mr. Solicitor was presenting a bill of in-

dictment against John Pettibone, Esq. a justice of the peace, for malpractice in office, when Leake, for defendant, moved for a postponement of the prosecution, and in support of his motion exhibited an affidavit of the defendant, containing grounds and assertions for putting off a trial.

Mr. Solicitor opposed the motion upon the grounds: that the court could not control him in the exercise of the discretionary power, (which he conceived was one of the incidents of his office) of determining when it would, or would not be proper to prefer his bills of indictment to the grand jury; and that if such a discretion did not fall within the scope of his legitimate rights, it would be still necessary in all cases circumstanced like this, for the defendant to satisfy the court, that the persons named in the affidavit are material witnesses.

This case is founded upon the 31st section of the judicial act of 1797, which after enacting, that the justices of the peace of the several counties are liable to prosecution and trial by indictment for malpractice in office, concludes with these words: "which indictment, if found by the grand jury, after hearing the parties, and their evidences, shall be tried by a jury, and if convicted on such indictment the judgment of the court may extend to fine, or removal from office, or either at discretion." *Marb. and Crawford Dig.* 290.

In common cases, Mr. Solicitor has an undoubted right to withhold, or to prefer his bills of indictment, as may be in his opinion, the most conducive to the ends of public justice, and  
301 \*the reason is obvious. In common cases the evidence is *ex parte*, and it must consequently be left to the sound discretion of the Solicitor, whether it would be most expedient at this or that time to prefer his bill of indictment: but, as I suggested yesterday, the evidence allowed by our judicial act is *sui generis*. The justice indicted has not only the right of having his witnesses sworn and heard before the grand jury, but he may be sworn and heard himself. The words of the statute are, "after hearing the parties and their evidences." It results, therefore, that as the justice and his witnesses may be sworn, he may solicit a postponement of the prosecution, if time has not been allowed him to procure the attendance of material witnesses. At the period of prosecution, he stands in the same situation as a defendant against whom a bill has been found, and the practice and rules as they apply to a motion to put off a trial will apply to a motion to postpone a prosecution. If the court can then put off a trial upon the usual allegations of the common and formal affidavit, it can surely, without usurping Mr. Solicitor's prerogatives, postpone a prosecution against a justice, the reason for both being the same, *eadem est ratio, eadem est lex*.

In the case of the *King v. Le Chevalier D'Eon*, M'Nally Evid. 662, the court granted, "that in all cases, whether criminal or civil, a trial should not be hurried on as to do injustice to the defendant; an affidavit in com-

mon form may be sufficient where no cause of suspicion appears, but men take such a latitude to swear in common form, that where a suspicion arises from the nature of the question, or from contrary affidavits, the court will examine into the ground upon which the delay is asked, and have in criminal as well as civil cases, refused to put off a trial, notwithstanding an affidavit in common form. It is necessary therefore in such cases as this, First, to satisfy the court, that the persons are material witnesses, Second, to show that the party applying had been guilty of no laches or neglect in omitting to apply to them, and endeavoring to procure their attendance; and Third, to satisfy the court,

that there is a reasonable expectation  
302 \*of his being able to procure their attendance at the future time, to which he prays the trial to be put off." The same rules and doctrines are advanced in the case of the *King v. Finney* in Ridgeway's Report of Finney's trial, p. 73. In this case it is also said by the Irish Bench, "that motions of this sort are always addressed to the sound discretion of the court." As we have no rules or practice of our own, on this subject, I must adopt those laid down by foreign tribunals, so far as they appear to be just and reasonable.

Justice Pettibone has not been allowed sufficient time to procure the attendance of one of his witnesses, the governor of the state, who resides at the seat of government, 180 miles from this city. If I am not mistaken, he has not had more than three days' notice of this prosecution, and for that he is indebted to the politeness of Mr. Solicitor, who was not legally obliged to give that notice. This part of the affidavit is therefore, unquestionably supported; but this of itself is not sufficient to put off a trial, and therefore, from the analogy I have traced, it is not sufficient to postpone a prosecution of this description. The affidavit must further assert, that the witnesses are material, and if the nature of the case requires it, the court must be satisfied also of the materiality of their testimony. If I consider the fact proposed to be proven by the absent witnesses material, I shall grant a postponement, because if those facts are material, they terminate my discretion.

Let the affidavit be amended, so that the facts may be incorporated which the absent witnesses may prove. (a)

Mr. Solicitor, for the State.  
Harris and Leake, for defendant.

Minutes of Superior Court, letter G. p. 327.

May 15. 1810.

303 \*Hunter and Minis v. Hunter.

Chatham County, May 1810.

1. *Certiorari—Affidavit*.—To obtain the writ of certiorari.

(a) Some parts of this decision, which were not deemed important, have been omitted. The reporter has confined himself to the opinion of the court on the points of practice, not conceiving the observations of the court which had been omitted, as essentially connected with the grounds of the motion for a postponement.



orari an affidavit is required if the facts and errors do not appear upon the record or proceedings of the court below.

2. **Same—Recognisance.**—In such case a recognisance is only necessary where danger would probably result from insolvency or departure beyond the jurisdiction of the court of the defendants below.

By CHARLTON, Judge.

A certiorari issued in this case to remove proceedings in the Mayor's court, and the error assigned is, that John Hunter was permitted, in the court below, to be a witness in his own cause. This appears, upon the transcript of the record from the court below, and upon the exhibition of this transcript, the certiorari was awarded. It is now moved to quash the writ of certiorari, no affidavit having been taken or recognisance given. An affidavit is required by our practice, if the facts and errors do not appear upon the proceedings, or record of the court below.

In this case the error is intrinsic, and therefore the defendants below could not have sworn to that error. A recognisance is not required by the order of the court directing certiorari to issue, and a recognisance is only necessary where danger would probably result from insolvency or departure beyond the jurisdiction of the court, of the defendants below. The certiorari cannot, therefore, be quashed upon the exceptions taken. The error assigned is, that the plaintiff below was permitted to be sworn, and to give evidence to a fact in his own cause. This error must be so obvious, that it supercedes the necessity of the court's saying any thing more than that it must be sustained.

It is ordered, that the cause be remanded to the mayor's court, and that that jurisdiction be directed, and it is hereby directed not to receive the testimony of the plaintiff.

Lawson, for the certiorari.

Minutes of Superior Court, letter G. p. 329.

May 16, 1810.

304 \***William Smith v. Edward Lloyd.**

Chatham County, May 1810.

**Notes—Indorsement—Liability—Injunctions.**

By CHARLTON, Judge.

The bill in this case, was directed to be amended, in order, that it might be ascertained, from the answer of Lloyd, whether he had any knowledge of the original transactions between Smith, Roe and Davis, or of the circumstances which induced Roe to deposit the note for 2040 dollars, as a collateral security or indemnity for his (Lloyd's) indorsement. The additional answer of Lloyd, is rather more argumentative than is usual in chancery pleadings: but it denies all knowledge of the then tottering commercial situation of Roe and Davis; that the note was received as a collateral security under the impression, that it was a matter of immateriality whether it was so received, or whether Lloyd added his indorsement to that

of Smith's; the responsibility being the same. As circumstances developed themselves afterwards, the indorsement of Lloyd would have made a very essential difference in the responsibility of Smith, for taken as a collateral security it enabled Lloyd to accommodate the house of Roe and Davis, without incurring any loss himself, whereas if he had added his indorsement to that of Smith's, as between them, this jurisdiction would have compelled a contribution under the particular circumstances of this case.

The defendant, Lloyd, has answered as far as the amended bill requires of him, and as the injunction was founded upon a supposed knowledge on his part of the facts and circumstances disclosed in the bill, the injunction must be dissolved.

305 \*It is now at the option of the complainant to dismiss the bill or to carry it to the special jury, according to the principles of our judicial system. In the present stage of the proceedings, the facts in the answer stand confessed, a replication traverses them, and the scale which now preponderates in favour of Mr. Lloyd, may, by farther proofs of the complainant, shift the weight into his.

The execution at law, is, however, put into operation; the money will of course be collected, and a jury must determine whether, under all the circumstances of this case, as blended with the doctrines of equity, Mr. Lloyd shall refund, or share the loss.

Injunction dissolved.

Noel and Stites, for plaintiff.

Davis and Berrien, for defendant.

Minutes of Superior Court, letter G. p. 343.

Chambers, June 14, 1810.

306 \***The State v. John Couper.**

Chatham County, June 1810.

**Act to Prevent Importation of Slaves—Jurisdiction of Court.**—A proceeding against a person for an infraction of the act to prohibit the farther importation of slaves in this state is a criminal one, and the scire facias was correctly made returnable to the Superior Court of the county where the offence was committed.

CHARLTON, Judge.

On the 13th June, 1799, John Couper, by his bond or recognisance acknowledged himself indebted to the governor of the state in the sum of £5000 sterling, the condition of which is in the following words, viz. "Whereas fifty-two negro slaves have been imported into this state, in the schooner Liberty, captain Beldon, from North Carolina, the property of persons immigrating from thence and addressed to the care of the said John Couper: the conditions of this obligation is such, that if the said John Couper, or the proprietors of the said negroes shall produce such documents as the law requires in such cases, or otherwise to deliver up the said negroes, on or before the sitting of the next Superior Court, then and in that

case this obligation to be void, otherwise to remain in full force and virtue."

Upon the non-performance, or the supposed non-performance, of the terms stipulated in the condition of this bond, a scire facias was brought by Mr. Bulloch, the then attorney general. To this scire facias a plea was filed to the jurisdiction of the Superior Court of Chatham county, to which the writ was made returnable. This plea was founded upon the supposition, that the scire facias upon this bond was a civil action, and therefore should be tried in the county where the defendant resides. The investigation then must turn upon the question, whether this is a civil or criminal proceeding?

307 \*The condition of the bond alleges, that these fifty-two negroes were imported into the state by persons emigrating from North Carolina. This scire facias is, therefore, founded upon the infraction of the second section of the act to prohibit the farther importation of slaves into this state, which section is in these words: "that three months from and after the passing of this act, if any person or persons shall bring into this state, from any other state in the United States, any mullato, mustigoe, or negro slave, or slaves of any age and sex, or make sale, or other disposition thereof to any of the inhabitants of this state, all and every person or persons so offending, shall forfeit and pay for the first offence, the sum of five hundred dollars, and for the second and every subsequent offence, one thousand dollars, for every mullato, mustigoe, or negro slave, brought into this state, sold or otherwise disposed of, to be recovered in the Superior Court of the county where the offence shall happen, by bill, plaint, or indictment, one half to the use of any informer, who shall prosecute the defendant to conviction, the other half to the use of the state."

There are two methods designated in this section for the recovery of the penalty; by action, and by indictment; and whether the one, or the other of these remedies is pursued, this act calls the defendant an offender, and directs the penalty to be recovered in the Superior Court of the county, where the offence shall happen. But if an action of debt is brought for that penalty, the language and mandate of the act cannot convert it into a criminal proceeding. It must in that shape be considered as a civil proceeding, and the defendant possesses a constitutional and legal right of demanding a trial in the county where he resides. Is the form of the remedy pursued by the then attorney general, therefore, a civil or criminal proceeding? A person removing into this state, with a view of settlement and permanent residence, may bring his slaves with him, having conformed with the requisites pointed out in the third section of the act.

308 \*These requisites, Mr. Couper binds himself to prove, had been complied with, or to deliver up the negroes.

This bond, therefore, is a recognisance, or it is in the nature of a recognisance to

appear at the next Superior Court, and to repel by the production of certain documents, any prosecution which might be commenced against him for an infraction of the law. Mr. Couper, did by his own act, compel Mr. Attorney to abandon the civil remedy by action, and to pursue the remedy by indictment. If this is a recognisance, and I can view it in no other light, it is a preliminary step to a prosecution by indictment. The proceeding therefore being a criminal one, the scire facias was correctly made returnable to the Superior court of the county where the offence was committed, and to which jurisdiction Mr. Couper had consented to render himself amenable.

If Mr. Couper's bond, however, is to be considered as a recognisance, it should have been regularly forfeited according to the form prescribed by the practice of the Superior Courts. This forfeiture being entered and noted on the minutes of the court, is the authority for issuing the scire facias. Whether the omission of this form heretofore adhered to, can produce any serious effect upon this scire facias, is a question I am not now called upon to decide. I have it as a subject for ulterior investigation.

Anticipating the result of my opinion on the plea to the jurisdiction of the Superior Court of Camden, I find the plea of nul fiet record has been filed at the last term. The record is before me, and I cannot, therefore, conjecture what is intended to be effected by that plea, unless it is intended to apply to the omission of entering, upon the minutes, the forfeiture of the recognisance, which the counsel for Mr. Couper may consider as essential to the establishment of the sci. fa. as a record.

I have given a decision in this case, with great reluctance, having before conducted the suit in the capacity of attorney general; and I have used all the means in my power to obtain a delay, for the purpose of having 309 ing the case submitted to \*the determination of another judge, but the case having been pending for ten years, and the maxim pressed upon me, "that a delay of justice was equal to a denial of it;" and a decision being demanded as a legal right, I have, at length, given an opinion, which, I hope, is supported by the principles of law. The plea to the jurisdiction overruled.

Miller, for the State.

Davis and Berrien, for the Defendant.

Minutes of Superior Court, letter G. p. 355.

Chambers, June 16, 1811.

310 \*Ex Parte James M'Annully, Esq.  
Coroner.

Chatham County, June 1811.

Inquest—Refusal of Juror to Serve—Fine.—A defaulting juror, summoned on an inquest, is subject to a fine.

CHARLTON, Judge.

Mr. Oliver Sturges was summoned to attend as one of the jury of inquest. Not



having obeyed this summons, and his excuse being deemed insufficient, an execution issued to collect the fine for his default, and I am now applied to, to set aside the execution, upon the ground, that the laws of this state do not impose a fine on a defaulting juror, summoned on an inquest. The act of assembly of December 18th, 1792, gives the following fees to the coroner: "For summoning an inquest on a dead body, and returning the inquisition, forty-six shillings and eight pence." Marb. and Crawford, Dig. 229.

Now it would be absurd to give the coroner the power of summoning an inquest, unless it is understood that all the incidental means of rendering that power efficient, were also at the same time delegated to him.

The power of summoning an inquest would indeed be nugatory, unless a fine could be imposed on the defaulting jurors. It results, therefore, that the defaulting jurors are subject to a fine. Our own statute being silent as to the amount of fine, we must, as in analogous cases, resort to the laws of England; and, after consulting, I find, that the coroners of this county have conformed thereto.

Motion to set aside the execution overruled.

Minutes of Superior Court, letter G. p. 361.

Chambers, August 13, 1810.

### 311 \*The State v. Alexander Patterson.

Chatham County, August 1810.

**Habeas Corpus—Imprisonment of Seamen.**—Under the act of congress allowing the imprisonment of seamen, who refuse to comply with their contract, until the vessel is ready to proceed on her voyage, such seamen are entitled to their discharge after the vessel has proceeded to sea.

CHARLTON, Judge.

The prisoner shipped himself as an articulated seaman, on board the brig John, captain John Davidson, on the 4th June, 1810, for the term of one year. On the 30th of July last, John Pooler, Esq. a justice of the peace, by his warrant, directed the jailer to detain, and safely keep, in the common prison of this county, the prisoner and two other seamen, "until they are legally demanded by captain John Davidson, they having deserted from the said brig John." Mr. Cuyler, his counsel, moved for his discharge upon two grounds.

1. Because the commitment is variant from the act of congress, as it does not state, that it appeared, "by due proof, that the prisoner had signed a contract within the intent and meaning of the act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved;" and,

2. Because the vessel has proceeded to sea.

1. The proof, upon which the justice founded his commitment, has not been exhibited; but if the motion of the prisoner's counsel, have turned exclusively upon this point, I should have required the production

of the captain's affidavit, or other proof submitted to the magistrate, to ascertain whether the requisites of the act had been complied with, I cannot travel out of the commitment, and the ex parte depositions taken before the justice, and if it appeared, from those depositions, that proof had not been exhibited as is detailed in the act of congress, and which is designated in this ground of the counsel's motion, I should consider myself bound to discharge 312 \*the prisoner. The second ground being, however, sufficient, I shall waive a further consideration of this.

2. The act of congress authorizes a commitment "to the house of correction, or common jail of the city, town, or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or until the master shall require his discharge." Laws of U. S., vol. 1, p. 42. The act of congress, as was observed by Mr. Cuyler, could not contemplate perpetual imprisonment, which, however, would be the effect, if the discretionary power delegated to the master, was not defined and explained by the intention of the act, and its preceding expressions. He contended, (and to this I assent,) that the act had sufficiently and explicitly declared, that the seamen should remain in confinement, "until the ship was ready to proceed on her voyage;" and that, consequently, the discretion given to the master, in requiring his discharge, must be exercised previous to that time, to the sailing of the vessel. *Ut res magis valeat quam pereat*. I sanction this construction, for otherwise, one part of the statute would be in direct hostility with the other. This is a case *prima impressionis*; but I think there can be no doubt, that, upon this ground, the prisoner is entitled to his discharge.

Prisoner discharged.

Cuyler, for the prisoner.

Minutes of Superior Court, letter G. p. 363.

Chambers, August 23, 1811.

### 313 \*Carnochan v. Abrahams.

Chatham County, August 1811.

1. **Administrators—Security.**—Security offered by an administrator must be approved by the justices.
2. **Same—Escheat.**—The principle of escheat, under the act of 1801, does not impair the administration until the jury make the inquest, and return the verdict on the report submitted to them by the escheator.

By CHARLTON, Judge.

In June last I gave a decision in this case, which the justices of the court of ordinary of Glynn, were directed to commit the administration of the estate and effects of Thomas B. McKinnon to the appellant, John Carnochan. This mandate ought to have been obeyed as soon as the appellant was prepared to give the security which might be deemed sufficient by the justices. It appears from the affidavits before me, that applica-

tion was made to their clerk, Mr. Abrahams, for administration, which he under various pretexts refused to grant. The first impression of the court was, that the granting of final administration, was a duty which the law devolved upon the clerk; and I was therefore disposed to award an attachment for the contemptuous manner, in which the authority and legitimate functions of this jurisdiction had been treated. But I am satisfied after a diligent investigation of the statutes, that the security offered by the administrator, must be approved of by the justices. After the delay which has taken place, and the apparent disrespect which has been paid to the decision of this court, I cannot expect that the justices will convene, upon the bare solicitation of the administrator. Mr. Bulloch may therefore take his motion for a mandamus, requiring the justices to convene for the purpose of approving the security which may be required, or which the administrator may offer; and for the purpose of granting the administration, and of delivering over the effects of the intestate, Thomas B. M'Kinnon, to \*John Carnochan in conformity to the former judgment, and mandate of the court. And it is ordered, that for these purposes the peremptory mandamus do issue. And it is further ordered, that the said justices of the court of ordinary of Glynn do meet for the purposes aforesaid, at the court house in Brunswick, at 10 o'clock, A. M. of the first Monday of September next, being the third day of said month, which service the sheriff of the county of Glynn is charged to make without delay, on the receipt of said writ.

Yesterday, and subsequent to the motion of Bulloch for a mandamus, I received a notification, under the second sect. of escheat act of 1801, from the escheator, and clerk of the court of ordinary of Glynn, in which is stated, that Thomas B. M'Kinnon died without will and without heirs, leaving a considerable property behind, which the notification enumerated.

If I permit this notification to impede the administration, I should indirectly give weight to the suggestion of the escheator, which, according to the act of 1801, it can only receive from the investigation of a jury; and in the mean time the evil of leaving the property afloat, would result; which would be protected in the hands of an administrator who had given security commensurate with the value of that property.

The principle of escheat, if it applies, does not under the act of 1801 (different proceedings are directed, if the intestate was an alien by the act of 1805) impair the right to administration until the jury make the inquest, and return the verdict on the report submitted to them, by the escheator and the judge. In the mean time, the supposed escheated property remains in the possession of those whose rights are ostensibly perfect, and such rights can only be divested by the verdict of a jury. Such is the effect and

operation, as I conceive, of the act of 1801.

These being my impressions, the notification of the escheator will be submitted, as the law directs, to a jury at the next term.

Minutes of Superior Court, letter G. p. 368.

Chambers, October 12, 1810.

315 \*Ex Parte John Carnochan, Administrator, &c.

Chatham County, October 1810.

Superior Court—Contempt—Attachment\*—Case at Bar.

By CHARLTON, Judge.

On the 27th day of August a peremptory mandamus was issued by the court, by which John Couper, William Page, George Baillee, L. Wilson and John Gigmilliat, Esqrs. justices of the inferior court of the county of Glynn, and of the court of ordinary of the same county, and Isaac Abrahams, Esq. clerk of said court of ordinary, were commanded to convene on the first Monday in September, at Brunswick, (the place for holding the courts of the county of Glynn,) for the purpose of approving and taking security from and of administering the oath, prescribed by law for administrators, to John Carnochan, to whom this court had upon an appeal, granted the administration of the estate of one Thomas B. M'Kinnon; and the above justices and clerk were farther commanded by the said mandamus, to issue letters of administration to the said John Carnochan, and to deliver to him all the monies and effects of the intestate, which were in either of their hands, custody, or possession.

On the day appointed for their convention in the mandamus, the court of ordinary met, and passed an order, in which it is declared, that the court did not meet in obedience to the peremptory mandamus, because this tribunal had no right, as it asserts, to command them; but that the meeting was held in the regular course of the sessions of that court.

Notwithstanding the denial of the authority of this jurisdiction to enforce an obedience to its orders and decrees by \*the interposition of the writ of mandamus, the justices, however, did in the same order, direct every thing to be done, which they were commanded to do, by the writ of mandamus. In compliance with my judgment on the appeal, and the mandates, of the mandamus, they "ordered, the administration to be granted to John Carnochan, upon his giving sufficient security to double the value of the estate," and they farther directed their clerk, "to all monies in his hands, or by him lodged in the bank, conformably to a former order, the property of said estate, and all the other property of said estate, now in his hands, to deliver to

\*See foot-note to State v. Noel, T. U. P. Charlton 43; Pittman v. Hagins, 91 Ga. 107, 16 S. E. Rep. 659.



John Carnochan." This order is dated on the third of September. On the same day, and almost in the same breath, their honors, the justices, pass another order, by which their clerk is directed to cause an inventory and appraisement to be taken of the estate and effects of Thomas B. M'Kinnon, and then to sell and deposit the proceeds in the manner prescribed by the escheat act of assembly of the 5th December, 1805. The clerk of the court of ordinary and escheator of Glynn county had in August transmitted me a notification, directed to be given to the Superior Court, by the escheat act of 1801. Which notification, and the principles connected with it, were disposed of in the opinion (23 August) on the motion for the peremptory writ of mandamus, and of which the justices have been fully apprised. The justice of the court of ordinary have, therefore, not only, by their first order of the third September contemptuously oppugned the legitimate and necessary authority of this jurisdiction, an authority too, expressly delegated to the Superior Court by the 7th section of the third art. of the constitution, but they have as con-

temptuously by their second order of the same date, disobeyed and evaded the mandates of the writ of mandamus, and thereby rendered inefficient the superintendency which this court possesses over inferior jurisdictions. Under all these circumstances it is a duty I owe to the constitution, to the law, and the dignity of this court, to grant a rule, which Mr. Bulloch now moves for, to  
317 show cause why \*an attachment for contempt should not issue, against the justices who presided and passed the orders of the third September. And it is accordingly "ordered that George Baillee, John Couper, and William Page, Esqrs. three of the justices of the Inferior Court and of the Court of Ordinary of Glynn county, do, on the first day of the next Superior Court of Glynn county, show cause why an attachment for contempt should not issue against them for a disobedience to the writ of mandamus issued by this court. And it is farther ordered, that the sheriffs of the county of Glynn do serve each of the said justices with a copy of this decision and order.

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# REPORTS OF DECISIONS

MADE IN THE

SUPERIOR COURTS  
OF THE EASTERN DISTRICT .

OF

GEORGIA.

BY JUDGES BERRIEN, T. U. P. CHARLTON, WAYNE, DAVIES, LAW, NICOLL,  
AND ROBT. M. CHARLTON; AND IN THE MIDDLE CIRCUIT,  
BY THOMAS U. P. CHARLTON.

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BY ROBERT M. CHARLTON,

LATE JUDGE OF THE SUPERIOR COURTS OF THE EASTERN DISTRICT.

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ENTERED, according to the Act of Congress, in the year one thousand, eight hundred and thirty eight, by Robert M. Charlton, in the Clerk's Office of the District Court of the United States, for the District of Georgia.





## P R E F A C E .

The definition of a modern preface, should be, "the pages of a book, in which the Author adduces and sets forth in controvertible reasons, why he ought not to have printed his work." As novelty is the order of the day, I trust I may be pardoned for deviating from this well established custom, and devoting these pages to the annunciation of the "divers good and sufficient causes me thereunto moving" to the publication of this volume.

There are ten judicial districts in the State of Georgia. For each, a "Judge of the Superior Courts" is appointed. To this judicial functionary, powers are entrusted, and duties imposed, of no ordinary character. As the presiding officer of a common law tribunal, he is called on to settle the multitude of ever changing questions, that are presented for adjudication; to unite the Gordian knots of assumpsit and case—to thread the intricacies of the ejectment labyrinth—and to make the way straight, for those "good and lawful citizens of the State," who claim the right to recover a chattel from one, into whose possession "it hath come by finding." In this capacity, also, aided by a special Jury, he determines all appeals from the petit Jury of his own tribunal, or of the "Inferior Court." Moreover, he sits in judgment upon all appeals from the "Court of Ordinary," in testamentary matters, &c. Associated with the special Jury, he also acts as a Chancellor, and determines all questions connected with proceedings in Equity. To the same Jury, he expounds the law applicable to the cases of those persons, who seek a release from the silken bands of matrimony. All writs of Certiorari, Prohibition, Mandamus, &c. emanate from, and are heard before him. Upon him too, rest the hopes and fears of the unfortunate individual, charged with the violation of the criminal laws of the country; and by his lips, the sentence of imprisonment, infamy and death is announced. That he is often called upon to perform most of these various and heavy duties within the same week, I may safely testify; that he is not required to perform them all on the same day, is not owing to any courtesy on the part of the Legislature, but because that body has not the power of Joshua of old, "to make the Sun and Moon stand still" long enough. Nor is this all. This legal Hercules is the ultima spes of the desponding suitor—the ne plus ultra of the zealous lawyer. His fiat is conclusive. There exists no tribunal, that can correct his errors, or change his decrees. The Constitution of the State, (as amended a few years ago,) declares, that there shall be "a Supreme Court for the correction of

errors," but the Legislature of Georgia have hitherto disregarded the solemn mandate, and refused to organize such a tribunal.

Such, (amongst others,) are the duties and powers of a Judge of the Superior Courts of the State of Georgia; duties too multifarious, and powers too extensive, to be confided to any man; and powerful indeed must be the physical abilities, and gigantic must be the intellect of that individual, who can discharge them properly. Called upon to decide the most difficult and intricate questions without a moment's time for deliberation; compelled to charge the Jury thereon, as soon as the learned and elaborate arguments of the skilful and opposing Counsel at the Bar have ceased, it would, indeed, be a miracle, if manifold errors were not to be found in such decisions. I have not attempted to collect these hasty and crude opinions. Those that will be found in the succeeding pages, are the written decisions of the Judges of the Eastern Circuit of the State of Georgia, upon cases reserved, or questions of law or equity, which, not requiring the immediate action of a Jury, have been submitted to the Judge for his deliberate opinion. The Constitution does not require him to assign written reasons for his judgments, save on motions for new trial, but the practice in our Circuit, (particularly of late years,) has been, to give written opinions in all matters, to which deliberate investigation has been bestowed. My father, Judge Thomas U. P. Charlton, had collected these opinions pronounced before 1810, and published them in a small volume, in 1824. The present work embraces all given since the former year.

I beg leave to disclaim the title of a regular Reporter. I have called myself the Editor, because there was no other word in the English language, which could exactly express my connection with the work. I have made the "marginal abstracts," formed the index, added few and scattering annotations to some of the decisions, and corrected the proof-sheets. This is all that I have done, and though it may be considered by the reader, as entitling me to but little praise, I can assure him, that when performed under the pressure of more important duties, it has been troublesome enough. The profession in Georgia will understand, why I could not make the volume more perfect, by adding to each case, a statement of facts and the arguments of Counsel. Having no system of special pleading, it would have been in vain to have searched the records (other than the decisions of the Judges), for the points in issue, and I was unwilling to trust to the fading memory of Counsel, en-



gaged in the respective cases. The decisions, generally, contain a sufficient statement of the facts, to enable the reader to ascertain the history of the case. I pray him not to rely too much on my hasty notes or abstracts, but to read, and determine for himself.

There is one matter which requires an explanation. I have inserted decisions in this volume, which affirm principles, long since considered as settled. A good Reporter, in a State or Country, blessed with a Supreme Court and series of Reports, would, of course, omit cases of this character; but on proper reflection, I concluded, that under a system like ours, it was all important to the profession, that principles solemnly adjudicated by our highest tribunal, should be promulgated, without reference to the fact, that they had long since been established in a different State or Country. The proprietors of land which has been long settled, and every foot of ground of which is familiar to them, may, if they please, refuse to set up the marks which designate their well known boundaries or ways, but it would be unwise in the owners of a newly inhabited territory to follow such an example. We have no Supreme Court—Each Judge in each Circuit is independent of the others. With the exception of the volume published by my father, and a work recently given to the profession by George M. Dudley, Esq., we have no Books of Reports. The same law is often differently construed in the different Circuits. I trust, that under all these circumstances, I may be pardoned for disregarding the suggestion of Lord Bacon, “that homonymice be purged away.”

Although I have a mortal antipathy to writing a preface, I could not refrain from saying this much, that the professional reader out of the State, might be enabled to account for the disadvantageous appearance, which both Judge and Reporter are made to assume in the following pages. Nevertheless, and with all these disadvantages, I believe, that some of the opinions of my predecessors herein contained, would do credit to any Bench. I may remark, in passing, that I have added my own decisions, not from any desire to place them in competition with those who have held the office before me, (a competition, vi which, as Sir J. Mackintosh says, “it would be arrogance even to disclaim,”) but, because, after having accepted the station, and made and recorded such opinions, I thought that it would be but an idle affectation to withhold them from a book, professing to contain the decisions of all the Judges of the Eastern Circuit. I confess, that I look back with terror and amazement, at my hardihood, in accepting, at the age of twenty-eight, an office attended with such overwhelming duties and responsibilities. Perhaps, in a few years, I may be still more petrified, at my rashness

in giving to the world the fruits of my temerity. But be that as it may, as at present advised, I think it better, with proper humility, to let them go for what they are worth.

I am afraid, that the reader will begin to believe, that I have not only given an excellent definition of a modern preface, but proved it. I pray his patience for a few more moments, and I will redeem my pledge and take my leave. It is all important to the citizens of a Republic, that they should know the laws which control their property, liberty and lives. A general knowledge of the statutes of the State is essential, and an acquaintance with the construction placed upon such statutes by the proper expositors, is not a whit less necessary. The written decisions of our Courts have been hitherto scattered over the “minutes” of the Court, which are emphatically “sealed books,” even to the profession. I have broken the seals, and trust sincerely that such act may tend, in some slight degree, to bring about that consummation so devoutly to be wished, a Supreme Court. The truth of the matter is, that it is time the attention of every intelligent man in our State, should be directed to the evils of our Judicial system. An independent and wise judiciary is the surest safe-guard to liberty and life—and we must pay our Judges better, and ask less from their bodies and minds, before we can attain to our proper station. Industry and economy are, doubtless, cardinal virtues in a democratic government, but they may, like all other good things, be carried too far. We would smile at the idea of letting out our Judicial stations, per contract, to the lowest bidder, or of placing our Judges upon an inclined plane, (vulgarly called a tread mill,) and making them grind the corn of the State, whilst they administered her justice. Perhaps, after all, we had better not indulge in too boisterous merriment on this subject. We had better remember the old proverb, and keep our gravity.

I have omitted several cases decided by Judge Law, because I found them in Dudley’s Reports, a book, which I presume is, (or, at least, should be,) in the hands of every lawyer in the State.

In conclusion, I remark, that many of my professional brethren have assured vii \*me, that they would consider themselves indebted to me, if I did nothing more than to collect and publish, in a portable form, the decisions made in the Eastern Circuit, even without marginal notes or Index, &c. I trust, therefore, that their kindness will excuse the imperfect manner, in which I have attempted to make this volume, more serviceable to them.

ROBERT M. CHARLTON.

Savannah, May 19th, 1838.

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# THE DECISIONS OF THE Chatham Superior Court,

AT JANUARY TERM, 1811.

## The State v. Doon and Dimond.

January Term, 1811.

**Verdict—Impeachment by Jurors.\***—The affidavits of jurors are not admissible, on the motion for a new trial, to impeach the verdict.

**Nuisance—Common Gaming House.**—A house in which a Faro table is kept for the purpose of common gambling, is per se, a nuisance, and it is not necessary to constitute it such, that there should be proof of frequent frays and disturbances committed there.

**Gaming—Faro Table—Effect of Imposing Tax Thereon.**—The use of a Faro table for the purpose of gambling, is not rendered lawful by the tax imposed on the instrument.

By **BERRIEN**, Judge.

This motion is based on the following grounds.

1st. Because the Jury were not unanimous in their verdict.

2d. Because the verdict was contrary to evidence.

In support of the first ground, the affidavits of two of the jurors are produced, who state that they did not in fact agree to the verdict which was rendered.

2 \*Upon the general question whether affidavits of this kind may be received, I think the case of *Vaise v. Delaval*, (1 Term Rep. 11,) conclusive. Upon a motion to set aside a verdict upon an affidavit of two jurors, who swore that the

\***Verdict—Impeachment by Jurors.**—The modern rule seems clearly to be, that the affidavit of the jurors, in a civil case, cannot be received in evidence before the court, on a motion for a new trial, in order to show what passed in the jury room, calculated to set aside their verdict after having been returned under oath, and received by the court, and they have separated. *Spann v. Fox*, Ga. Dec. pt. 1, p. 19, citing the principal case.

Affidavit of a juror, made after the rendition of his verdict is not admissible to impeach the verdict. This is well settled. *Coleman v. State*, 28 Ga. 84; *O'Barr v. Alexander*, 37 Ga. 203. To the same effect see also, *Monroe v. State*, 5 Ga. 141; *Bishop v. State*, 9 Ga. 121, 127; *Clark v. Carter*, 12 Ga. 500, 503; *Rutland v. Hathorn*, 36 Ga. 380, 386; *Brown v. State*, 28 Ga. 217; *Hoye v. State*, 39 Ga. 718, 723; *Westmoreland v. State*, 45 Ga. 225, 281; *King v. King*, 49 Ga. 622, 624; *Nelling v. Ind. Mfg. Co.*, 78 Ga. 260, 262; *Fulton Co. v. Phillips*, 91 Ga. 65, 16 S. E. Rep. 260; *City Council v. Hudson*, 94 Ga. 135, 21 S. E. Rep. 289, 291; *Bolden v. Georgia R., etc.*, Co., 102 Ga. 558, 27 S. E. Rep. 664; *Southern R. Co. v. Sommer*, 112 Ga. 512, 37 S. E. Rep. 735; *Bowdoin v. State*, 113 Ga. 1150, 39 S. E. Rep. 478; *Sims v. Sims*, 113 Ga. 1083, 1085, 39 S. E. Rep. 435.

Jury being divided in their opinion, tossed up and that the plaintiffs friends won, &c. &c., Lord Mansfield said the Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the Court must derive their knowledge from some other source: such as from some other person having seen the transaction through a window, or by some such other means. But there are other and stronger reasons than that assigned by Lord Mansfield, why in cases like the present, such affidavits should not be received. When the jurors return into Court after deliberating upon a case submitted to them, their names are severally called by the Clerk and they are asked if they are agreed on their verdict. Their written verdict signed by their foreman is then read aloud in their presence, and the Clerk thereupon adds, "so say you all." If the fact which is stated in these affidavits had occurred, this was the proper time to have made it known to the Court. But after having rendered in his verdict, upon oath, shall we permit the juror by oath to deny that such was his verdict, whence it will inevitably result that he must have violated the oath administered to him as a juror in the cause, or that which he has voluntarily taken before the Magistrate. Moreover it would afford such room for the exercise of improper influence, that if this doctrine were once established, few verdicts could stand. The first ground cannot therefore be supported.

It is contended, secondly, that the verdict is contrary to evidence. The question presented to the consideration of the Court on this ground, is whether a house in which a Faro table is kept for the purposes of common gambling is necessarily or per se, a nuisance, or whether it only becomes so incidentally by the frequent occurrence of frays or disturbances among those who resort \*there, to the actual nuisance of persons residing or passing through the neighborhood.

3 In support of the latter branch of the proposition, it is urged that Faro tables are the objects of taxation by our Laws. That their use is thus legalized, and that the use of that which is lawful, cannot be a nuisance, unless from the occurrence of such extrinsic circumstances as are stated above, the existence of which was negatived by the evidence in the cause. This argument is plausible, but not solid. The use of a



Faro table for the purpose of gambling, that is to say, for the purpose of winning and losing money, is not rendered lawful by the tax imposed on the instrument. The instrument so taxed, may be lawfully used for innocent purposes, as in the case of a Billiard table which is similarly taxed, and where the owner lets out his table to those who use it for the mere purpose of amusing themselves at so much for each game. But I think it cannot be doubted that if this table were ordinarily let out to persons who used it for the purposes of gambling, that is to say, for the purpose of winning or losing money, whereby the house in which it was kept, became a common gaming house, it would not be protected by being the object of taxation from being considered as a common nuisance, not only (according to Hawkins), because it would be a great temptation to idleness, but also because it would be apt to draw together a great number of disorderly persons, which could not but be very inconvenient to the neighborhood. Nor can a contrary inference be deduced from the amount of the tax imposed, which, it is supposed, negatives the idea that any person would pay this tax for the mere permission to amuse himself with a Faro table. The Legislature intended to suppress this and similar instruments. They imposed this tax upon every person in whose possession such instruments were found—which was much more effectual than prosecutions before the Court because in the latter case you must prove not only the possession, but the use of these instruments for the purpose of gambling. But what most strongly marks the disposition of the Legislature to suppress these tables and not to render the use of them lawful, is that the act before referred to, makes the holder of such table liable to pay the same tax of One Thousand Dollars in every different county into which he may carry it; a provision which would not only be inconsistent, but iniquitous, if the payment of the tax rendered lawful the unrestrained use of the instrument.

For these reasons the new trial moved for in this case, will not be granted.

#### 5 \*The State v. James Worth.

January Term, 1811.

**Criminal Law—Keeping Gambling House—Presumptive Evidence.**—On an indictment for keeping a common gambling house, presumptive evidence that the defendant is the keeper of the house is sufficient to convict.

By BERRIEN, Judge.

The ground of the motion for a New Trial in this case is, that the verdict is contradictory to evidence.

Under this general notice, two questions were presented to the consideration of the Court; the first of which having been disposed of in deciding on the motion in the preceding case need not here be repeated.

The second point is that the defendant was not proven to be the owner, the occupier or the lessee of the house.

Upon this question I adhere to the opinion given on the trial, that there was sufficient evidence to authorize the Jury to draw the inference which they did, that the defendant was one of the keepers of this house. That independently of the provisions of the Stat. 25, Geo. 2, this must always from the very nature of the thing, have been a question of inference, and one in relation to which positive proof on the part of the State could neither be expected, nor required.

The application for a new trial is therefore refused.

#### 6 \*Welman et ux. v. Ruth Armour, Administrator.\*

January Term, 1811.

**Devastavit—Who May Sue for.**—An administrator cannot be called to account for the alleged waste of his intestate committed on an estate whereof he was executor, by bill brought by a legatee or creditor of such wasted estate. The legal representative of such estate must bring the suit.

By BERRIEN, Judge.

The demurrer in this case must be sustained.

The legatee of Catherine Eirick has no other remedy for the recovery of her legacy, but by bill on the equity side of this Court against the representatives of the testatrix: against the executor John Armour, in his life time, or an administrator, de bonis non, &c. since his death. The administratrix of John Armour is not the representative of the testatrix Catherine Eirick; nor as such administratrix is she liable to be called to account for the alleged waste of the estate of Catherine Eirick committed by her intestate at the instance of a legatee of that estate. If John Armour, the executor has appropriated to his own use, or otherwise wasted the estate of his testatrix, his estate in the hands of his representatives will be answerable to the representatives of Catherine Eirick; and such representation may be procured by the qualification of a surviving executor, if there be one, or by the grant of an administration, de bonis non, &c. on her estate. But his administratrix cannot be so liable at the suit of every separate creditor, legatee or other person claiming to be beneficially interested in, but not pretending legally to represent the estate of Catherine Eirick.

Bill Dismissed.

#### 7 \*Executors Levi Sheftall v. Administrators Joseph Clay.

January Term, 1811.

**Verdict—Setting Aside—Testimony Conflicting.**—A

\*The principal case is cited in *Spann v. Fox*, Ga. Dec. pt. 1, p. 10.

verdict clearly against evidence, may be set aside. But an application for this purpose will not be favorably received, where there has been conflicting testimony.

**Statute of Limitations—Acknowledgment—Sufficiency of a Question of Law.**\*—It is a question of law for the Court to determine, as to what constitutes a sufficient acknowledgment to take a case out of the statute of limitations.

**Same—Same—What Constitutes.**†—An admission from which an existing debt may be necessarily inferred, is sufficient to take the case out of the Statute, though it be accompanied with an express denial of the debt.

**New Trial—Surprise—Lack of Diligence.**—A motion for a new trial on the ground of surprise, will not be sustained, where by the exercise of proper diligence, such surprise might have been guarded against.

By **BERRIEN, Judge.**

The present motion alleges three grounds of New Trial.

1st. Because the verdict is against evidence, and the real justice of the case.

2d. Because the defendants were surprised by the refusal of the plaintiffs to allow a copy of a receipt, dated the 4th of January, 1803, for \$4860, to be given in evidence, though the same copy was furnished by one of the plaintiffs, and admitted as evidence on the first trial.

3d. Because the verdict was against the charge of the Court.

The material question for the consideration of the Court under the first general ground contained in the notice, is how far the letter of defendants intestate under date, of the 3d of February, 1804, can operate to take the claim of the plaintiffs out of the statute of limitations. It is not deemed necessary particularly to consider the other points which have been urged under this general head of the argument. They impute to the Jury who tried this cause, error in the deductions which they have drawn from the \*evidence. On this subject I take the doctrine to be clear. A verdict against evidence

may be set aside. But it is the peculiar province of a Jury to weigh evidence and where there has been evidence on both sides, the Court will not lend an easy ear to an application to set aside a verdict for any imagined error committed by the Jury in deducing inferences of fact from contrariant evidence.

We return to the consideration of the letter, of February, 1804. It must be considered in connection with the letter of the plaintiff, of the 3d January, 1804, whose receipt it acknowledges, and to which it purports to be a reply. Thus considered it admits the payment of the 200 pounds which is the object of the present action in the manner stated by the plaintiffs, but avers that it was justly due, and that plaintiffs very well knew it. I acquiesce in the principle established in the case of *Bicknell v. Keppell*, which, in contradiction to the doctrine of *Lloyd v. Manna*, refers to the Court, the determination of what acts or declarations constitute an acknowledgment. In the practical application of this principle, let us proceed to inquire.

1st. What species of declaration may amount to an acknowledgment.

2d. What is the extent of the declaration in the present case.

The statute of limitations proceeds upon the presumption of payment, and considering the difficulty of proving a natural payment after a considerable lapse of time, makes such lapse of time unexplained by any intervening circumstances a bar to the plaintiffs recovery. Hence it was considered by the Court at the trial, that a declaration which admitted the existence of the original debt, instrument or act, from whence the law would raise a liability, was sufficient without the actual admission of the legal consequence which was the inevitable incident. In the case of *Cowan v.*

*Magauran*, it was contended by the defendants \*counsel, that a bare acknowledgment of the original debt or instrument is not sufficient, but that there must be an acknowledgment of an existing debt, made with some view of payment in whole or in part. But it was ruled that although there are some American authorities which seem to countenance this position, yet the current of English authorities is against it, and in the appendix of *Pothier*, it is said: "a distinction prevails between such an act as shall prevent the operation of the statute of limitations, and such as shall repel the defence of an obligation's being contracted during minority. Though in the former case, the mere admission that a debt remains undischarged, may be sufficient: in the latter there must be an actual promise."

An admission then which supersedes the necessity of proof of those facts from whence an existing debt may be necessarily inferred, must be considered as a sufficient acknowledgment to take the case out of the statute of limitations. It is impossible otherwise to reconcile the decisions on this subject. "I am ready to account with you,

\***Statute of Limitations—Acknowledgment—Sufficiency of a Question of Law.**—It is the province of the court to determine what is, in law, such a promise as will take a case out of the statute of limitations, but it is for the jury to find what promise is in fact made. *Love v. Hackett*, 6 Ga. 486.

†**Same—Same—What Constitutes—Admission of Present Subsisting Debt.**—In *Bulloch v. Smith*, 15 Ga. 398, it is said: "A distinct admission of a present subsisting debt, is such an acknowledgment as will take a case out of the statute of limitations. It is not necessary, that the party should express himself willing and liable to pay. This would be an express promise. A promise is implied, from an acknowledgment that a particular debt is still due. (*Angel on Lim.* 218; *Dickinson v. McCamy*, 5 Ga. 486.) It is true, that the acknowledgment will have no binding efficacy, if it be vague, and go only to the extent of admitting some general indebtedness. There should be an acknowledgment of a particular debt, as then due. From this, as we have said, the law implies a promise to pay. (*Angel on L.* 254, 260; *Martin v. Broach*, 6 Ga. R. 21.)"



but nothing is due." Here is an express negation of an existing debt, and yet it has been held sufficient. Nor is this contradictory to the case cited from Buller. "I acknowledge to have received the money from the testatrix, but she gave it to me." This is in other words to say "I admit that the testatrix gave me so much money." The declaration that it was a gift expressly negatives the idea that a debt ever existed. But suppose the defendant had said: "I admit that I have received this money, but I am not liable to pay it over." If the receipt of the money under the circumstances would have authorized the inference that the defendant was originally liable, would he not have been compelled after such admission to shew how such liability had been subsequently discharged. So where the words were, speaking of a note, "it was at the desire of my mother I gave it: I will not pay it: Rosser ought to pay it, I will speak to him about it." The Court said: the latter part of this conversation admits that the debt has never been paid.

10 The former admits \*defendant's signature. An admission of signature, it is true, is no admission of the debt, for still it may be usurious, a gaming debt, or the money may have been paid; or it may be under some other circumstances which render it not a just debt. But when he says "Rosser ought to pay it, I will speak to him about it," this shews the debt is not paid. And though he says at the same time, I will not pay it, yet being legally due from him, the law will compel him to pay it. What is this but to say that if the facts from whence a liability may be inferred are admitted, the law will annex the legal consequence, will enforce such liability, or in the words of the case just cited, will compel the defendant to pay. Now to apply these principles to the present case. The testator of the plaintiffs in his letter to defendant's intestate, of the 30th January, 1804, says substantially, I have paid to you 200 pounds, on account of a judgment which you had against Mordecai and Levi Sheftall, though it was appealed from; that appeal has been determined in favor of Mordecai and Levi Sheftall. As you must be sensible the money was my own, I hope you will repay it to me. Now leaving out of view for a moment the statute of limitations, let us consider what was necessary to make out the plaintiff's claim: first, that the money should have been paid to Mr. Clay, secondly, that it was not due when so paid. Both these facts are distinctly stated by Mr. Sheftall. I paid you this money. The Court on the trial of the appeal have determined that it was not due. What says Mr. Clay in reply, "that you paid me the sum you mention is true." This is the admission of the fact. "But it was justly due." This is a denial of the inference to be raised from the finding of the Jury on the appeal in favor of Messrs. Sheftall. It is in other words to say—That you paid me this money is true—That the Jury found in your favor

on the appeal, and thereby affirmed that it was not due, is also true. But the money was nevertheless due. That finding was incorrect, and you knew it. That in affirming this money to be due,

Mr. Clay meant to contest the correctness of the verdict of \*the Jury on the appeal is further evidenced by a subsequent passage of his letter, "nothing can extinguish a just debt but payment." In other words, notwithstanding the verdict of the Jury has passed in your favor, and you are thereby relieved from any legal liability to pay this debt, yet in a moral view and as an honest man you are not the less liable, for this was a just debt—and nothing can extinguish a just debt but payment.

Upon the whole I am of opinion that this letter was a sufficient acknowledgment to take the case of the plaintiffs out of the statute of limitations.

In relation to the second ground, it is admitted that the defendant might by a notice to his adversary to produce the original, have succeeded in giving in evidence the copy receipt which was refused. And although that copy was furnished by one of the plaintiffs, and was read on the former trial, yet it is not pretended that there was any agreement that it should stand in place of the original, or be read as a copy on the present trial. Nor was it, as in the case of *Anderson v. George*, a paper which the defendant had a right to expect would have been given in evidence by the plaintiff. The injury sustained by the defendant has not then been the result of stratagem on the part of the plaintiffs; nor has he been surprised in the legal sense of the term. I understand this term surprise in that sense to denote an unforeseen disappointment in some reasonable expectation, against which ordinary prudence would not have afforded protection. But here there was no right to expect an assent, without a stipulation to that effect, and against the consequences of a refusal, the defendant might have shielded himself by a notice to produce the original. However, therefore, I may be disposed to regret that any case should be submitted to a Jury upon partial evidence, yet as the evidence now sought to be introduced, was within the knowledge of the party on the former trial, and might with proper diligence have been produced, I cannot on that ground consent to set aside this verdict.

12 \*The remaining ground of this motion, is that the verdict was against the charge of the Court.

This ground assumes as a fact that the Court charged the Jury generally upon the law and the evidence, which cannot be admitted. The receipt of Mr. Clay, and the testimony of Mr. Mitchell, being apparently contradictory, nothing more was done by the Court than to state the inference which appeared rational from such conflicting evidence. I subscribe to the doctrine that Judges answer to the law, and jurors

to the facts. I am speaking of civil cases; and while I sit here, I will repress any attempt to divest this Court of its constitutional and exclusive powers in matters of law. I admit too, that the Court is authorized to set aside a verdict which is manifestly contrary to evidence; but when evidence is introduced on both sides, and the verdict of the Jury is dependent upon the opinions they may form, or the inferences they may deduce from contradictory evidence, it must be a strong case indeed which would authorize this Court to interfere with the exercise of this the unquestioned prerogative of the Jury. From the evidence introduced in the present case, an inference favorable to the claim of the plaintiffs has been deduced by the special Jury. I cannot consent to disturb the security which their verdict does and ought to afford him.

The motion for a new trial is over-ruled.

13 \*Wakefield, Surv'r, v. William Limbert.

January Term, 1811.

**Promissory Note—Discharge of Indorser.**—The omission by the indorsee and holder of a note to charge in execution a prior indorser, (who had been surrendered by his bail before judgment, and discharged in consequence of such omission,) will not operate to discharge a subsequent indorser from his liability to such holder.

By BERRIEN, Judge.

This was an action founded on a promissory note given by one Pelham to one Fairchild, and endorsed by Fairchild to defendant, and by him to the plaintiffs. Plaintiffs sued bail process against Fairchild, as endorser, under which he was surrendered by his bail, and remained in custody until judgment, when the plaintiffs failing to charge him in execution, he was discharged.

It was contended on the trial, that this discharge of Fairchild by the omission of plaintiffs, to charge him in execution by suing out final process against his body, operated to release from liability the defendant in this action, who was their immediate indorser. Under the direction of the Court, the Jury returned a verdict for the plaintiff, and alleging that this verdict is contrary to law, the counsel for the defendant now moves for a new trial. I have carefully examined the cases cited at the trial, as well as those referred to in the argument of the present motion, and such as my own researches have afforded me. The leading case is that of *English v. Darley*, first ruled at nisi prius, and afterwards argued at the common pleas on a motion for a new trial. This case and those to which it refers, establish two propositions.

1st. If the holder enters into a composition with a previous endorser, he thereby discharges a subsequent one.

2d. If the holder first sue a prior indorser

and discharge him from execution, it will afford a sufficient objection to an action against a subsequent indorser.

14 \*The analogy contended for in the present case, must relate to the last of these propositions; but it fails, because Fairchild, the first indorser, never was charged in execution. Was the failure so to charge him a laches on the part of the holder, which would operate to release the defendant from liability? Certainly not. It is true the indorser is not originally liable; he comes only in aid of the drawer. But his liability commences immediately on demand and notice of non-payment. It was not necessary, in order to fix the liability of the present defendant as an indorser, that actions should have been previously instituted and prosecuted to judgment against the drawer and prior indorsers, and still less was it necessary to proceed to enforce such judgments when obtained by process against the body of the defendants. Such a requisition would completely deprive the holder of the remedy which he has against the different parties to the bill. It would compel him to charge in execution a prior indorser against whom he had obtained judgment, and his discharge in any other way than by an act of insolvency would operate to release from liability every subsequent indorser; a proposition too preposterous to be stated.

The motion for a new trial in this case is therefore over-ruled.

15 \*Executrix Wiggins v. Administrator Norton.

January Term, 1811.

**General Release—Effect of.**—A general release or receipt in full of all demands will not extend to claims held by such releasor, as executor.

By BERRIEN, Judge.

This was an action of debt founded on a judgment obtained by Wiggins in his life time, against Norton in his life time; the plea was payment.

After the death of Wiggins, Mary his widow, made probate of his will and qualified as executrix, Norton the defendant's intestate being still in life. Upon this state of facts, the defendant offered in evidence to support his plea, a receipt given by Mary Wiggins to Thomas Norton, for the sum of five shillings in full of all demands, which was refused by the Court—and alleging that in such refusal there was error; the defendant now moves for a new trial on the ground of such alleged error. In support of the motion, Mr. Lawson, for the defendant has cited an authority to prove, that a release by an executor of all actions indefinitely, operates to discharge not only those which the releasor is entitled to as an executor, but those also which belong to him individually—and he urges that the converse of the proposition must be equally true. But upon looking into *Sheppard*, it appears that he refers to the case of *Hutchinson v. Savage*, as a decided



case on this point. And by a further examination of that case, as reported by Lord Raymond, it appears that it was never decided, but adjourned. The principal proposition cannot therefore be considered as concluded by the authority cited. If it were, the converse would not necessarily be admitted. That a general release

16 by an executor should operate \*to release his individual claims also, might result from the rigid enforcement of the rule, that a deed is always to be taken most strongly against the grantor, and would be confined in its implied operation to the individual who executed it. But that a general release by an individual should extend to claims which that individual had as executor of another, would be to extend the operation of the release by implication, not only against the grantor, but also to the creditors of the testator and those entitled under the will, who certainly never could be considered as parties to the release, which would therefore be most iniquitous and unjust. But the necessity of a resort to general reasoning on this point, is superseded by the express decision of the case of Knight v. Cole, reported in Shower; one of the executors of a creditor by judgment for 6000 pounds, is legatee of the debtor for 5 pounds, and gives a receipt for the legacy, and by it discharged, the executor of the debtor of and from the said legacy, and from all actions, suits and demands whatsoever, which he had against him as executor, to any matter whatsoever, from the beginning of the world, &c. This was adjudged to extend only to the legacy in his own right, and not to the debt which he had as executor. If then we admit the direct proposition urged by the defendant's counsel, reason and authority both concur to prove that its converse is not true. It results that the representatives of Wiggins were not parties to the receipt given by Mary Wiggins, to Thomas Norton; that as to them this was resinter alios acta, and consequently that in the rejection of this receipt there was no error.

The motion for a new trial is therefore over-ruled.

17 \***Oliver Sturges and Theodore A. Schoedde, Appellants, v. Gardner Tufts.**

January Term, 1811.

**Administrators—Appointment—Persons Preferred.\*—**

When an estate is not competent, or barely so, to the payment of debts, in granting administration, a creditor will be preferred to the next of kin.

**Same—Same—Non-Resident Next of Kin.**—Quære, if the non-resident next of kin, who are thereby prohibited from administration, can constitute an agent for that purpose?

By **BERRIEN**, Judge.

The present is a contest for administra-

tion on the estate of John Cutler, deceased.

The respondent Gardner Tufts is the attorney in fact of the next of kin, who are residents of another State. The appellants are principal and resident creditors. From the uncontradicted depositions which have been submitted, it appears that the estate of the deceased is not competent, or barely so, to the payment of its debts. Its insolvency relieves the Court from the necessity of considering how far the next of kin being non-residents and incapable under our law of taking administration themselves, can constitute an agent for that purpose. No principle is better settled than this, that administration is committed to the next of kin, because of the interest which they have in the estate, the statute being founded on the presumption that the intestate would have committed the administration to them, to whom by neglecting to make a will, he suffers his estate to go: whenever this presumption is repelled the claims of the next of kin necessarily cease. Thus administration cum tes: an: is committed to a residuary legatee, in preference to the next of kin, (11 Vin. 93,) because they have in that case no interest. So in the case of an insolvent estate—as the payment of debts must precede distribution, the

18 \*next of kin can have no possible interest and of consequence no claim to administration.

The decision of the Court of Ordinary in this case is, therefore, reversed, and It is ordered, that administration of the goods and effects of John Cutler, deceased, be committed to Oliver Sturges and Theodore A. Schoedde, the appellants.

19 \***John H. Morel v. Walter Roe.**

**P. H. Morel v. Same.**

January Term, 1811.

**Bailments—Negligence—Question of Law.**—In an action against a bailee, the question of negligence, is a question of law for the Court to determine. But the facts from which it is, or is not inferred must be found by the Jury.

**Carrier by Sea—Implied Undertaking.**—In contracts for conveying goods on freight, there is an implied undertaking by the carrier that he has a competent knowledge of the navigation, and he will be liable for a loss occasioned by a want of such knowledge.

By **BERRIEN**, Judge.

These actions were brought to recover the value of a quantity of cotton and rice shipped by plaintiffs on board a vessel belonging to defendant and commanded by one Wilson, to be transported to Savannah from the plantation of one or both of the plaintiffs, in the county of Bryan, upon customary freight and with the usual exception in the bills of lading, of the ordinary dangers of the river.

The two cases were by consent submitted to the Jury at the same time. In point of fact, the rice and some part of the cotton

\*The principal case is cited in Lynch v. Lively. 32 Ga. 579, the court saying that in the principal case, the insolvency of the estate was treated by the court as an undisputed fact.

had been lost by the grounding of the vessel, while taking in the last of her cargo. It appeared from the evidence, that the landing was a good one, and that the damage arose from the vessel not laying abreast of it; but as the witness expressed it, too high up. It was in evidence, that one of the plaintiffs had said, the master had been assured that the landing was a good one, that he arrived at it for the purpose of taking in some cotton to complete his cargo, having previously on board a considerable quantity of rice, that he hauled to the landing without consulting the overseer of the plaintiff; that the tide was already turned and falling before he had done loading, and that when he had taken all the cotton on board and signed his bills of lading, he attempted \*to get under weigh, but found his vessel had grounded astern, notwithstanding every exertion, the damage ensued. Upon this state of facts, under the direction of the Court, the Jury on the first trials rendered verdicts for the plaintiffs. Appeals were entered by defendant, on the trial of which the Special Jury found contrary verdicts, and now the plaintiffs' counsel moves for new trials on the following grounds:

1st. Because the defendant was a common carrier, and the loss was occasioned by a circumstance not within the exceptions attached to that character.

2d. If considered merely as a bailee, he is answerable for negligence, and the loss in this case was owing to the negligence of the master. The case of the Trent navigation company v. Wood, decided in the King's Bench in Easter term, 1785, is a recent affirmation in a case analogous to the present of the liability of a common carrier, subject only to the two exceptions of the act of God and the King's enemies. In the case of Forward v. Pittard, 1 Term Rep. 27, decided in the same Court in the succeeding year, the distinction is taken between the act of God and inevitable necessity. "The act of God," says Lord Mansfield, "means something in opposition to the act of man; for every thing is the act of God, that happens by his permission; every thing by his knowledge. But to prevent litigation, collusion and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempests. Therefore, if robbed by an armed force which it is impossible he should be prepared to resist, as in the riots of 1780, he is still liable. The true reason is to prevent collusion, and for fear the carrier may contrive to be robbed in order to share the spoil." The distinction is very clearly illustrated in the principal case, by fire occasioned by lightning and that produced

21 by human \*means. The effects of both may be equally inevitable, yet in the latter case the carrier is liable. As

it regards the cause from whence the loss arose in the present instance, I retain the opinion expressed at the trial, and I retain this opinion, equally, whether the defendant be considered as a common carrier or as a mere bailee for hire. For in the first character, he would be exempt from liability for a loss not happening by the intervention of man, and against which human skill and prudence were not competent to guard, and in the second from a reference to the facts of the case, it is evident that the circumstances just stated, must concur in his defence. The grounding of this vessel on a concealed shoal or bank was such an occurrence as if inevitable, that is to say, not to be avoided by a competent share of skill and diligence, would certainly excuse the defendant. The Jury had therefore only to inquire under the direction of the Court, if this skill and diligence had been exercised; in other words, whether the master had, or had not been guilty of negligence. This inquiry was to be made under the direction of the Court, because the question of negligence is a question of law, although the facts from which it is, or is not to be inferred are to be found by the Jury. My opinion is that there was a gross negligence in the conduct of the master in this case in the following particulars:

1st. In not ascertaining by inquiry from the overseer Rasco, or otherwise, what was the proper position in which to place his vessel at the landing, before she actually came along side. There was certainly an implied contract on the part of the master for a competent knowledge of the navigation he had undertaken, and common prudence required, when he had got up with the landing, if he did not know its situation or the depth of the water around it, that he should have suffered his vessel to remain in the stream, until he had ascertained them by examination or inquiry. If he had done so, if he had consulted Rasco before the vessel was brought along side the  
22 landing, she would have \*been placed higher up the creek, and thus the consequences, which have resulted, would have been avoided.

2d. But if he was authorized from the assurance of the plaintiff, that the landing was a good one to lay his vessel along side, without either examination or inquiry, ought he not as a prudent man, then to have made that inquiry? The nature of his cargo especially demanded it; the vessel had already on board two thousand bushels of rough rice, and while engaged in taking in the residue of his cargo, which consisted of cotton, and more especially as before he had completed it, the tide had turned, and was falling, he ought to have ascertained if he had a sufficient depth of water, either by soundings, or a pole.

I do not think the state of the case is changed by the plaintiff's declaration to the master, that the landing was a good one. The testimony adduced at the trial



affirms that declaration, and Rasco proves that the loss was incurred, not because the landing was bad, but because the vessel was not properly laid along side of it.

Let new trials be granted.

23 **\*Aaron Forbes v. Executor of P. H. Morel.**

January Term, 1816.

**Sheriffs—Fees—Extraordinary Trouble.**—No private contract, nor extraordinary trouble, can authorize the Sheriff to receive other or higher fees than are prescribed by law.

**Same—Same—Dieting Negroes Levied on under Execution.**—It seems that the Sheriff is entitled to charge the legal fee for dieting negroes, levied on by him under execution, although such negroes were allowed to remain in possession of defendant, and no subsistence was furnished by the Sheriff.

**Same—Attachment against.**—In such case, the Court will not grant an attachment against the Sheriff, to compel him to bring into Court the money retained by him to answer this charge, but will leave the party to the prosecution of his ordinary remedy, by action.

By **BERRIEN**, Judge.

The present motion on the part of the defendant, presents for consideration two objections to the account of sales rendered by the Sheriff under the above execution.

These objections are made to the two following charges: first, extra charge for the trouble of the Sheriff and his Deputy in going to Bryan; second, to subsistence of the negroes from the levy until the sale. The first of these objections must be sustained, the law and the Sheriff's oath, both inhibit him from receiving more than his lawful fees, and no private contract can dispense with the obligations which they impose, much less can the Court be called upon to lend its sanction to the enforcement of an agreement which violates the mandates of the one, or the injunctions of the other. Upon the fullest consideration I entertain a different view of the second objection. It is not denied that the charge to which this objection applies is provided for and allowed by the Fee Bill. But it is contended, that for as much as these negroes were not actually in the custody of the Sheriff during the period intervening between the levy and sale, but were by him permitted to remain in the possession

24 of the defendant, that \*the Sheriff has therefore no right to subsistence money. Upon this subject I find a decision in point by my immediate predecessor on this bench.† That decision does indeed negative the claim of the Sheriff in the particular case then under consideration, but it expressly affirms that right; in cases analogous to that which is now submitted for adjudication. I shall depart with extreme reluctance from a precedent deliberately established, and supported by so many

considerations of humanity and of equity. The decision of the present motion does not necessarily involve the final determination of the rights of these parties. The object of the motion is to obtain the interposition of this Court in the exercise of its extraordinary powers by the summary process of attachment. The claim of the defendant in this case is stricti juris, and the refusal to acquiesce in it, does not necessarily decide the question of right. The extraordinary powers of the Court are committed to its discretion. If their exercise be withheld, the party is left to the prosecution of his ordinary remedy. In refusing to sustain this objection for the purposes of the present motion, therefore I decide only, that the defendant has not presented such a case as entitles him to claim from this Court the exercise of its extraordinary powers by awarding against the plaintiff the process of attachment. If that claim be founded in right, the ordinary remedy by action for a right withheld, is still open to him. The considerations which lead to this refusal, present themselves to my mind with a force which is irresistible. The property seized is in consideration of law in the custody of the Sheriff from the moment of the levy, and the necessary consequence of this principle, is, that he is responsible for its forthcoming at the day of sale. He is entitled to retain the possession for the purpose of securing him, under the responsibility to which he is subjected. If the property is permitted to remain in the possession of the defendant, it is an indulgence to

25 him, at the risk \*of the Sheriff and his securities. And surely such a defendant comes with an ill grace before the Court to ask its assistance in resisting a claim to which a more rigorous execution of the Sheriff's power which has been dispensed with for his benefit would have subjected him. Finally, there are strong considerations of humanity which array themselves in opposition to the motion of the defendant. If the principle which it seeks to establish were affirmed, the consequences which would result are obvious to the most casual observation. It cannot be required that the Sheriff should be subject to the responsibility which the law imposes, without security against the risk, or compensation for incurring it. If the latter be withheld, the former will be enforced, and besides the injury to debtors, our jails would be crowded with the miserable victims of the principle which this motion is calculated to establish.

With this view of the subject the motion for an attachment in this case will be discharged upon payment of the sum to which the first objection is applicable, and also of the costs of this motion.

26 **\*Joseph Cumming, Plaintiff, in Certiorari, v. The Mayor and Aldermen of Savannah.**

May Term, 1815.

**Taxation—City Ordinance—Constitutionality—Case at**

\*See *Hopkins v. Bolton*, T. U. P. Charlton 294.

†*Hopkins and Odingsell v. Bolton*, 1 Charlton's Report 294.

**Bar.**—An ordinance of the city council of Savannah, passed under the authority of an Act of the Legislature of Georgia, imposed a tax on all goods, &c. not the produce of the State, sold on commission by any person residing within the city: **HELD**, that such tax was not an impost or duty on imports, but that it was a legitimate exercise of the power of a State to regulate its internal commerce.

**Same—Same—Arbitrary Assessment—Constitutionality.**—The same ordinance required the city Treasurer, in default of any person to make his return of such sales within the time prescribed, to assess the value of goods sold by said defaulter, from the best information he could obtain, and to issue his warrant of distress for the amount of such assessment; **HELD**, that such arbitrary assessment was violative of private right, unauthorized by the State law, and unconstitutional.

By **BERRIEN**, Judge.

The object of the present motion is to test the legal validity of an ordinance of the city council of Savannah.

The provisions complained of are substantially as follows: A tax of fifty cents on every hundred dollars shall be levied on all goods, wares and merchandize, not the produce of this State, with the exception of rice, cotton, tobacco, corn, tar and unmanufactured tobacco, the produce of South Carolina, which shall be sold on commission by any person or persons residing within the limits of the city. It shall be the duty of every commission merchant, &c. to make just and true returns on oath to the city Treasurer, on the first day of January, and the first day of May in each year, &c. and within ten days after making such return, to pay the amount of the tax.

And in default of making such return, it shall and may be lawful for the city Treasurer, within twenty days thereafter from the best information which he can obtain, to assess the value of all goods, &c. &c., sold as aforesaid by any such person in default, and a warrant of distress and sale for the amount of tax, conformably

27 \*to such assessment shall forthwith be issued by the Treasurer, directed to the city Sheriff against the goods and chattels of every such defaulter, and such other proceedings may be had as in the said ordinance are directed.

Joseph Cumming, a commission merchant of the city, having failed to make the return required by this ordinance, the Treasurer proceeded to make an assessment and a warrant of distress issued thereon, has been levied upon his goods and chattels in pursuance of its provisions. A rule to shew cause why a certiorari to remove the proceedings before this Court, should not issue, was granted at the instance of the defendant in execution. The cause shewn having been deemed insufficient, that rule was made absolute. A certiorari was issued returnable by consent of parties at a short day, and the proceedings are now judicially before this Court.

To these proceedings three objections are presented in behalf of the plaintiff in cer-

tiorari. I shall reverse the order of their statement and consideration.

The objections are:

1st. That the ordinance is not warranted by the Legislative act, under the authority of which it purports to have been made, because the object of taxation in this instance is not liable for taxes to the State.

2d. Because the tax so imposed, is in violation of the Constitution of the United States.

3d. Because the means by which the amount of tax is ascertained and its collection enforced, are illegal, unconstitutional and unjust.

I am of opinion that the first and second of these exceptions cannot be sustained.

The provisions of the ordinance so far as they regard the tax imposed, appear to 28 me to be authorized by \*the act of the Legislature under which it purports to have been made.

I do not consider the tax in question as an impost or duty on imports, the right to impose which, belongs exclusively to the Congress of the United States; but as a mere internal regulation, which, whether imposed by the Legislature of the State, or by a corporate body, deriving a competent authority from such Legislature, is a legitimate exercise of the power to regulate their own internal commerce which is reserved to the States respectively.

But upon the third objection, I am of opinion that the means adopted for the enforcement of the tax by an arbitrary assessment at the mere will and discretion of the city Treasurer, without revision or control, is a mode of procedure which is violative of the private right of the citizen, not authorized by the laws of the State, nor consonant to the Constitution.

The execution in this case must therefore be superseded; and a writ of prohibition is awarded.

29 \*Planters' Bank of the State of Georgia v. Griffin L. Lamkin, and Others.

May Term, 1816.

**Banks—Bond of Bookkeeper—Conformity to Charter.**—

A Bank was incorporated, with the power to appoint necessary officers, to take bonds from them, and to make all necessary by-laws, rules and regulations. By one of the by-laws of such corporation it was provided, that it should be the duty of every other officer of the Bank, to perform such services as might be required of them, by the President and Cashier. In an action against principal and sureties, on a bond given by a bookkeeper of said Bank, conditioned for the faithful performance of the duties of his office, and all other duties required of him in said Bank, &c., **HELD**, that the bond was taken in conformity to, and authorized by the charter.

**Same—Same—Liability of Sureties.**—And where such bookkeeper, whilst in the discharge of "other duties in said Bank," fraudulently took large sums of money therefrom; **HELD**, that the securities on his official bond, were liable to the amount of their bond.

**Same—Same—Same.**—The failure of obligee to notify



to the securities of the obligor, the delinquency of their principal as soon as discovered, will not relieve them from their obligation.

By BERRIEN, Judge.

The facts of this case appear from the following verdict.

"We find that by acts of the Legislature, certain persons were incorporated as a Body Politic, under the name and style of the Planters' Bank of the State of Georgia; that by the said acts of incorporation 'the Directors for the time being shall have power to appoint such officers and clerks under them, as shall be necessary for conducting the business of the said corporation, and to allow them such compensation for their services as shall be reasonable.' Also, that the said Planters' Bank of the State of Georgia, may 'ordain, establish and put in execution such by-laws, rules and regulations as shall seem necessary and convenient for the government of the said corporation. Also, that the Cashier or Treasurer of the Bank for the time being, and all other officers appointed by the Directors (except the President,) before he or they enter upon the duties of his or their office, shall give bond with two or more securities to the satisfaction of the Directors in sum or sums as shall be required by

the said Directors, with condition  
30 \*for his or their good behaviour and a faithful discharge of duty." That by the thirty-fourth clause of the "rules and regulations of the Planters' Bank of the State of Georgia," It is ordered, that it shall be the duty of every other officer, clerk or servant of the Bank to do and perform such duties and services as may be required of them respectively from time to time by the President or Cashier; that before the election of officers for the said Bank, it was resolved by the said Planters' Bank of the State of Georgia, "that the bookkeeper give two securities, to be bound jointly and severally in the sum of five thousand dollars to be approved of;" that the defendant, Griffin L. Lamkin, was duly appointed bookkeeper to the said Bank, and gave bond with the other defendants, as securities, in the said sum of five thousand dollars, and which bond is now the subject of this suit, and contains the following condition, to wit: "that if the said Griffin L. Lamkin, shall well and truly execute, and faithfully discharge the duties of the said office, and all other duties required of him in the said Bank, and in all things relating to the same, shall well and faithfully behave, then the obligation to be void." We do further find that the said Griffin L. Lamkin, entered on the duties of bookkeeper on the seventeenth day of January, in the year of our Lord one thousand eight hundred and twelve, that from time to time orders are given by the Cashier or President, for officers of the said Bank to perform the duties of other officers of the Bank when either of them is sick or absent, pursuant to the aforesaid thirty-fourth rule and regulation of the Planters' Bank of the State of

Georgia, that in conformity with the said rule and regulation, the said Griffin L. Lamkin, did occasionally act for and in behalf of the Teller of the said Planters' Bank of the State of Georgia, when such Teller was absent or sick. We further find that certain sums of money were at various times taken by the said Griffin L. Lamkin, from the said Bank and of the moneys of the said Planters' Bank of the State of Georgia, amounting in the whole, to the sum of thirty thousand, three hundred  
31 and seventy \*dollars, whilst he was acting as bookkeeper, as aforesaid, and also as Teller, in the absence or sickness of the actual Teller: that whenever the Teller was about to be absent, he named the officer who would officiate for him in his absence, and that the said Teller having great confidence in the said Griffin L. Lamkin, he generally named and called on him to discharge the duties of Teller in his absence, the Cashier or President consenting to such nomination: that in one instance in which a deficiency arose from an error committed by the said Griffin L. Lamkin, when acting for the Teller, amounting to about one hundred dollars, that deficiency was made up by the Cashier. We further find that by the twenty-ninth rule of the Planters' Bank, it is provided that the books of the Bank shall be regularly balanced and the statement of the affairs of the corporation shall be laid before the Directors on the first Monday in June, and the first Monday in December in every year, and examined by a committee of the whole Board: that in the first half yearly settlement after the commencement of said embezzlement, there appeared to be more due to individuals on the private ledgers than the general statement of the Cashier called for. We further find that each sum taken from the funds of the Planters' Bank of the State of Georgia, by Griffin L. Lamkin, whilst bookkeeper, as aforesaid, was entered in his check book in the names of persons who had before drawn such checks, but which checks had been paid, so as to enable the defendant, Griffin L. Lamkin, as bookkeeper, as aforesaid, to balance the amount so taken, but such pretended checks were not posted in the ledger kept by the said Griffin L. Lamkin, as other checks fairly drawn were, at the debit of the individuals drawing such checks. We further find that the duties of the Teller's office, consists in receiving and paying money, that at the close of each day, he settles the cash account for the day, that this settlement is made by charging himself with the amount on hand or received from the Cashier at the commencement of the day,  
and the amount of all moneys re-  
32 ceived in the course of \*the day, and crediting himself with the amount of checks paid, entered and reported to him by the bookkeeper; and the balance of money and bank notes on hand, and if there be any deficiency after crediting the amount of checks entered and reported by the bookkeeper, the Teller is accountable. That the

sums so taken from the money of the Planters' Bank of the State of Georgia, by the said Griffin L. Lamkin, were taken from the ninth day of May, in the year of our Lord, one thousand eight hundred and twelve, to the twenty seventh day of October, in the year of our Lord, one thousand eight hundred and fourteen, inclusive: that the taking of the several sums of money, as aforesaid, by the said Griffin L. Lamkin, was first discovered by officers of the said Bank in the beginning of the month of November, in the year last mentioned, and that notice thereof was given to the defendants as soon as the same was fully ascertained, to wit, on the eighth day of December following. That a suit was instituted by the said Planters' Bank of the State of Georgia, against the said Griffin L. Lamkin for part of said sums, to wit, for the sums of sixteen thousand, four hundred and twenty dollars. That the suit was brought on the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and fourteen, and the said Griffin L. Lamkin, held to bail for the said amount, upon which suit a verdict was found at the present term against the said Griffin L. Lamkin, for the said sum of sixteen thousand four hundred and twenty dollars, and upon the evidence of facts as stated in this verdict. If therefore, upon this statement the Court is of opinion, that the said bond is forfeited and the defendants liable, we then find for the plaintiffs the sum of five thousand dollars and costs.

If the Court is of opinion that the bond is not forfeited, and the defendants are not liable, then we find for the defendant without costs.

JOS. BACON, Foreman."

33 \*The following questions have been raised upon the special verdict in this case.

Is the bond of the defendants taken in conformity to the act of incorporation? If not so taken, can it be maintained at common law?

If either of these questions be answered affirmatively, have the plaintiffs forfeited their right to recover by their laches in failing at an earlier period to notify to the securities the delinquency of their principal?

It was indeed also further argued, that the facts found by the special verdict did not shew a breach of the condition of the bond, admitting it to have been valid, because the words "other duties" must be limited to extra duties belonging to the particular office of the principal, and not extended to duties attached to other offices in the Bank. But upon this it seems to me sufficient to remark that the words of the condition are too plain to admit of controversy, and expressly negative this idea. The defendants stipulate that their principal shall faithfully discharge the duties of his said office, and all other duties required of him in said Bank. Now these last mentioned duties, may be duties attached to some other office in the Bank, or

general duties not specially assigned to any particular office, if there be any such unappropriated duties. But most clearly they cannot be said to be duties belonging to the defendants particular office, for these are expressly excluded by the term "other duties," which means duties in addition to and exclusive of the duties of his office. I return, therefore, to the questions proposed—and of these I shall consider only the first and third, because, if the view which I have taken of this subject be correct, they embrace the whole merits of the present controversy.

I am of opinion that the bond of the defendants is taken in conformity to the act of incorporation. I extract from the special verdict the following propositions:

34 \*The Bank had power by charter to appoint the necessary officers, and were authorized to take bonds from all other officers, except the President.

They were empowered to ordain, establish, and put in execution such by-laws, rules and regulations, as should seem necessary for the government of the corporation.

One of their by-laws expressly provides, that it shall be the duty of every other officer of the Bank, to perform such services as may be required of them, respectively, from time to time, by the President or Cashier.

The services contemplated by this by-law are obviously in addition to those which result from the duties specifically appropriated to each particular office, those "other duties" of which we have before spoken. The effect of the regulation is to produce, under the direction of the President and Cashier, an interchange of office, a substitution of one officer for another, as the necessity of the corporation should require. The provisions of this by-law are clearly co-extensive with the conditions of the bond, and there is no pretence to say that the limits of the charter are transcended by these provisions. If the discretion given to the Directors were invested in this Court, I should unhesitatingly affirm that the regulation in question universally prevalent in similar institutions, is necessary and convenient for the government of the corporation. The conclusion is unavoidable. The condition of the bond is pursuant to the regulation before referred to. The by-law which prescribes that regulation is authorized by the charter—and thus the condition of the bond is conformable to the charter. I am equally clear, that the plaintiffs' right of action has not been forfeited by their failure at an earlier period to notify to the securities the delinquency of their principal. The case cited from East, establishes the principle, that laches in not properly examining the accounts of the obligor for eight or nine years, and in not

calling upon him as soon as might have been done for the sum unaccounted for, is no estoppel at law in an action against the securities. But apart from the doctrines of this case, it may be safely denied that there has been any laches



on the part of the plaintiffs in the case at bar. The delinquency of the principal defendant was first discovered in the beginning of November, 1814, and the Jury have found that notice was given to his securities as soon as the sum was fully ascertained, to wit, on the eighth day of December following. In this particular, then the finding of the Jury expressly negatives the imputation of laches. And at what earlier period could notice have been given? The existence of an error in the monied operations of the institution was indeed ascertained in 1812—but the cause to which it was to be ascribed, remained enveloped in mystery. The error in question did not necessarily involve the idea of an actual deficit. If it had done so, the Bank were still without evidence as to the particular delinquent. To impose upon them the obligation to give notice under such circumstances, would be to require that such notice should have been general to the securities of all the officers of the Bank; the effect of which would have been to excite an unwarrantable suspicion against persons innocent of the fraud, and to render its detection more difficult by putting its perpetrator upon his guard.

As little aid can be derived to the defendants from the time occupied by the plaintiffs in tracing the fraud to its source. Want of diligence is not to be presumed in a case where vigilance is enforced by every motive of feeling and of interest. The arrangement of the principal defendant was ingenious, and would probably much longer have escaped the most vigilant scrutiny if he had remained at his post, personally performing the duties of his own particular office. It suffices that notice was given, as soon as the delinquent was in fact discovered; any requisition beyond this, would operate as a premium to fraud, graduated by the successful ingenuity of its perpetration. Let the *postea* be delivered to the plaintiffs.

36 \*John H. Deubell v. C. H. Fisher,  
Administrator.

March Term, 1819.

**Postnuptial Marriage Settlement—Effect as to Prior Creditors.**—A settlement made by the husband on the wife, after marriage, without valuable consideration, and not executed in pursuance of any agreement entered into before marriage, is a mere voluntary conveyance, and void as against prior creditors of husband.

By **BERRIEN**, Judge.

There is a single question presented to the consideration of the Court in this case; It is this:

Whether the conveyance made by C. H. Fisher, on the seventh of March, eighteen hundred and eleven, of the property levied on, can be considered as a conveyance made upon good consideration and bona fide, and therefore may be maintained against creditors, or is merely voluntary and conse-

quently operative only in subordination to their claims. The case has been made up by consent—and I state this as the question, which I presume it was the intention of the parties to present for decision—because the detail of facts which is contained in the verdict would otherwise have been useless. So considering it, I have no hesitation to say that this conveyance must be postponed to the claims of creditors. An almost uniform series of decisions seems to have settled the law as to conveyances from husband to wife after marriage, where they have been dictated only by a spontaneous movement of affection or of prudence. The Courts have indeed always lent a willing ear to the suggestion of circumstances, calculated to bring these settlements within the support of a valuable consideration. An agreement before marriage—the surrender by the wife of any valuable interest in consideration of the settlement, are circumstances of which, the Courts have studiously availed themselves to support such conveyances, when not open

37 \*to the imputation of fraud, and resting upon the respectable motive of making provision for a family. But this latter fact cannot alone sustain such a conveyance. The moral exigency for such provision arising from the destitute condition of the wife and children has not yet been considered by the Courts, as furnishing a consideration sufficient to take a case out of the statute of Elizabeth. It must bend to the claims of a general creditor, that is of a creditor whose debt had existence before the voluntary settlement. Such is the present case. The debt of the plaintiff in execution existed anterior to the settlement. No agreement before marriage is set up. The settlement purports to create a trust for the wife merely, and no suggestion is made of her having parted with any interest in consequence of it, which might in the most favourable view of her rights, have given to it the character of a conveyance upon valuable consideration.

I am constrained to declare that this conveyance is merely voluntary, and therefore void as against general creditors within the statute of Elizabeth. The *postea* must consequently be awarded to the plaintiff in execution.

38, \*Simon Jackson v. Joseph Soude, by  
P. P. Thomasson, His Guardian.

March, 1819.

**Evidence—Testimony in Former Action—Witness Dead—Proof by Another.\***—What a witness who is since dead, testified in a former action between the same parties, when the same point was in

\***Evidence—Testimony in Former Action—Witness Dead—Proof by Another.**—The testimony of a deceased witness given in a former action between the same parties may be proven by any one who heard it. But the parties as well as the subject-matter of the former trial must be substantially the same, before the testimony of a witness since deceased, had on the first, can be used on the sec-

issue, may be proved in a second action by one who heard him give evidence.

**Same-Same-Same-Same.**—But the witness must be competent to speak to the whole, and not to a part only of the testimony of deceased witness.

**Same-Same-Same-Same.**†—*Quære*, If the second witness must be required to repeat the very words or the substance only of such testimony?

By **BERRIEN**, Judge.

This is an application to reverse a judgment rendered in the Mayor's Court of the city of Savannah.

In the progress of the cause before that Court, two trials were had. On the first trial, John Lawson Esquire, late a counselor of this Court, was sworn as a witness for the plaintiff, and testified to certain facts material to his recovery. In the interval between this and the second trial, Mr. Lawson died—and upon this last trial, the plaintiff offered a witness to prove the facts sworn to by Mr. Lawson on the first trial, which evidence was rejected by the Mayor upon the grounds,

1st. That the testimony given by Mr. Lawson, was not reduced to writing at the time it was delivered.

2d. That the witness tendered, offered to prove the substance of the direct testimony only, and not of that delivered on the cross examination.

It has been long settled, that what a witness who is since dead testified on former action between the same parties, when the same point was in issue, may be proved in a second action by one who heard him give evidence. But evidence of this sort is received from necessity. It is a departure from general law of evidence, which requires the *viva voce* examination of witnesses, and must be re-

ond trial. *Walker v. Walker*, 14 Ga. 242; *Haslam v. Campbell*, 60 Ga. 650; *Riggins v. Brown*, 12 Ga. 271; *Eagle, etc., Co. v. Welch*, 61 Ga. 448; *Hughes v. Clark*, 67 Ga. 19; *Mitchell v. State*, 71 Ga. 129, 155 (the last three cases citing Code, § 3782); *Whitaker v. Arnold*, 110 Ga. 857, 36 S. E. Rep. 231, citing Code, § 5186.

The rule allowing such testimony to be proven in this way is *permissive* only, and must yield to the paramount rule which requires the best evidence to be adduced which the nature of the case will admit of. Thus, if the testimony of the deceased witness, given in the former action, has been reduced to writing and agreed upon as correct by the parties, and filed under the sanction and approval of the court, it not only *may* be, but *must* be adduced. *Walker v. Walker*, 14 Ga. 242.

†**Same-Same-Same—Same—Substance of Testimony Sufficient.**—But the person called to prove what a deceased witness testified on a former trial need not give the exact words of the deceased witness, it is sufficient if he can give the substance of the testimony. *Trammell v. Hemphill*, 27 Ga. 525, 527. In delivering the opinion of the court, **BENNING**, J., said: "The exclusion of the testimony of A. J. Hansell, was put on the ground, that he could not give the very words of the deceased witness, Smith, although he could give their substance. We think it sufficient, in such a case, that a witness can give the substance of the words. Few persons have memories to enable them, to give the exact words;

strained within the limits prescribed for it by authority and precedent. The principal difficulty which arises in the practical application of this rule of evidence, does not occur here; it results from the question whether the second witness may be permitted to speak to the substance of what was sworn to by the first, or shall be required to recollect and repeat his very words. The latter proposition is supported with much plausibility by the argument, that the Jury alone can judge of the effect of the words—and that they might attach to the words of the first witness a very different interpretation from that which is given to them by the second. But it is opposed by the consideration, that such a limitation of the rule would render it almost wholly inoperative, since even in the case of contemporaneous written notes of evidence, few persons would consent to swear that such notes contained the very words of the witnesses. And still less, would a conscientious man, relying upon memory merely, undertake to repeat precisely the words of a witness. What further embarrasses the question, is, that the rule has been so limited in the only cases with which I have been enabled to meet, in which this particular point came under consideration. While on the other hand, the substance and effect of what was sworn to by a witness, has been testified by succeeding witnesses in various cases in which this particular objection has not been raised.‡

and when a person professes to do that, he subjects himself to some degree of suspicion. If the substance is not receivable, it is plain, that the evidence, in most of the cases, will be wholly lost."

And, in *Mitchell v. State*, 71 Ga. 155, it is said: "The Code (§ 3782) prescribes these conditions as the foundation for admitting the testimony of a deceased witness; the testimony must have been given on a former trial upon substantially the same issues, and between substantially the same parties; then any one who heard it, and who professes to remember the substance of the entire testimony as to the particular matter about which he is called to testify, is for this purpose a competent witness, as was held by this court in *Eagle, etc., Co. v. Welch*, 61 Ga. 444, 448; *Georgia Southern R. R. v. Reeves*, 61 Ga. 492, 493. \* \* \* A substantial and not a literal compliance with these conditions is all that we think is required. To insist upon a literal compliance would be to subject the person professing an ability to swear to all that was testified to in a case, instead of the substance of the entire testimony upon a particular matter, to much suspicion. Few, if any, scrupulously exact persons could be found to place themselves in such a position, and the result would be that parties would have to resort to those less honest and conscientious, or lose entirely the right thus accorded them. *Trammell v. Hemphill*, 27 Ga. 527, 528." See also, *Puryear v. State*, 63 Ga. 693.

‡The very words of the witness must be sworn to. *Lord Palmerston's case*, cited by Lord Kenyon in *Rex v. Jolliffe*, 4 Term Rep. 290; *Ennis v. Donisthorpe*, Corn. Sum. Ass. 1789; *Ms. 1 Ph. Ev. 274*; *U. S. v. Wood*, 3 Wash. C. C. Rep. 440; *Wilbur v. Selden*, 6 Cowen 162; *Ballenger v. Barnes*, 3



But this difficulty does not occur here, the Mayor was willing to receive the substance of what was sworn to by Mr. Lawson on \*the former trial—but required the substance of his whole testimony—that given under the cross as well as the direct examination. Now whatever opinion may be entertained upon the first point, this requisition was certainly a correct one. The answers given by the witness under his cross examination, constitute a part of his evidence as much as those extracted from him by the direct interrogatories—and are frequently indispensable to the perfect apprehension of that evidence. The Jury were entitled to judge upon the whole evidence. Suppose the witness tendered had offered to prove a single fact sworn to by Mr. Lawson, without being enabled to recollect the residue of his direct examination, would not such witness have been obviously incompetent, and since the answers given under the direct and cross examination together constitute the evidence of the witness, of what importance is it whether the defect of recollection relates to the one or to the other? The importance of the cross examination will further appear from the consideration that cross interrogatories are framed for the purpose of testing the correctness of the direct narration, or to shew the existence of circumstances, calculated to defeat or avoid the effect of such representation. Suppose a witness on his direct examination to prove the execution of a bond—and when cross examined to state that execution under such circumstances as would in law amount to duress, and would therefore operate an avoidance of the deed—and the importance of requiring from one who should thereafter undertake to detail the testimony of such witness, the substance of his cross as well as of his direct examination, will appear to be as it is, really absolute and indispensable. It would of course be a sufficient answer to this objection to prove that the party having the right to cross examine declined exercising it, so that in fact the witness was not cross examined,—but in the absence of such proof, and the transcript does not shew that any such proof was tendered for aught that appears to the Court, the testimony offered, was part, not the whole of the evidence delivered by the first witness, and was therefore \*very properly rejected.\* The result of this opinion is that upon the certiorari granted in this case, judgment must be for the defendant and a procedendo be awarded, all which the Clerk will certify accordingly.

For the application—Myers and Nicoll.

Devereux 460; Bowir v. O'neal, et al., 5 Harr. & Johns. 266. And see Bliss v. Long, 357; Smith v. Smith, Wright's (Ohio) Rep. 643. But contra. Caton, et al. v. Lennox, et al., 5 Rand. 31; Cornell v. Green, 10 Serg. & Rawl. 14 and see note 1 to Am. Ed. of Roscoe's Crim. Ev. p. 50. Ed. of Original Edition.

\*The whole examination in chief and in cross must be given. Wolf v. Wyeth, 11 Serg. and R. 149. Ed. of Original Edition.

March, 1819.

**Debt on Penal Bond—Recovery.**—In an action of debt on a penal bond, conditional for the payment of a lesser specified sum of money on a day certain, the sum mentioned in the condition, and all interest due thereon may be recovered, without reference to, and though it exceed the penalty of the bond.

**Common and Statute Law of England—How Far Adopted in Georgia.**—The common and statute law of Great Britain, as it prevailed in this province, on the 10th of May, 1776, has been adopted in Georgia.

**Decisions of English Courts—Effect in Georgia.**—And decisions of the English Courts of Justice made after that date, contravening decisions made prior to that period, are wholly inoperative in Georgia.

By **BERRIEN**, Judge.

Verdicts were taken in these cases for the amount of principal and interest of the condition which exceeded the penalty, with an agreement to reduce the same, if in the opinion of the Court, the penalty could not be exceeded.

My opinion is, that the right of the plaintiff is not limited by the penalty of the bond. I will briefly state the reasons upon which it is founded. These are actions upon penal bonds for the payment of lesser specified sums of money at a day certain. However ingenious the argument by which the proposition has been supported, they are clearly not within the statute of William, so as to conclude the plaintiff from a recovery beyond the penalty, by force of the consequence resulting from his having elected to bring debt instead of covenant. Considered as money bonds, I think it is obvious that the plaintiff cannot be so limited. The statute of Anne was passed for the benefit of the obligor—to afford to him that relief which previously to its enactment he was compelled to seek in chancery. The relief afforded consisted in discharging him from the penalty of the bond after it had become forfeited by a breach of the condition, upon payment of principal, interest and costs thereof. This was in

effect to consider the \*sum specified in the condition as the debt, instead of the penalty, which was the debt according to the legal operation of the instrument at common law. If by force of this statute, the condition was the debt, and so continued until with the accumulating interest, it equalled the penalty, why should it cease to be so after that period? Speaking with reference to our own particular rate of interest, why should the Court be required to consider the conditions as the debt, notwithstanding the forfeiture, for twelve years and an half after the breach, and then to reinstate the penalty? The answer to these question is sought for in the assertion, that the statute of Anne having been passed for the benefit of the obligor, the substitute which it provides, viz. the condition and accumulating interest can never

exceed that for which it was substituted, the penalty of the bond—and to render this answer effectual, it is necessary further to assert that the naked penalty was alone recoverable at common law—but the fact is not so either upon principle or authority. At common law and apart from the statute of Anne, the penalty of the bond was the debt, which became absolutely payable upon failure to perform the condition. Upon such failure, the instrument purported to be (and such was its legal effect) an unconditional obligation to pay a specified sum (the amount of the penalty) at a day certain. To state the nature of such a debt, is to show that interest was due for withholding it. It was a liquidated demand payable at a day certain. Considering the condition of the bond as the debt under the statute of Anne, B. R. have decided that interest is due thereon, although no interest be in terms reserved, and no day of payment specified. (*Farquhar v. Morris*, 7 Tm. R. 120.) When before the statute of Anne, the penalty was the debt after a breach of the condition, upon what principle would the same Court have refused the allowance of interest upon the penalty? If the penalty were due by a breach of the condition on the first of January, eighteen hundred and ten—it became on that day at common law, a debt which the obligee was

then entitled to receive—and the payment  
44 with its accumulating interest on the first of January, eighteen hundred and nineteen, would be no more than the payment of the principal alone, on the day at which it became due—besides the principle under consideration has been distinctly affirmed in the United States by various State tribunals, as well as by those of the Union—and their opinions although not obligatory upon this Court, are nevertheless entitled to be received, and are received with the utmost respect. But if it be true that interest on the penalty is recoverable at common law, there seems to me to be no pretence for limiting the right of the obligee to the principal of the penalty under the statute, by saying that interest on the condition can only be calculated until it equals the penalty—because if he is allowed to exceed it, the statute still operates beneficially to the obligor. Since the amount of the penalty and interest thereon from the breach which was the right of the obligee at common law, will be greater than the amount of the condition, and its accumulating interest by the payment of which under the statute, the obligor is allowed to discharge it—and this difference is the measure of the benefit which the obligor derives from the operation of the statute. I have not, in forming this opinion, been unmindful of the series of decisions upon this subject in the English Courts of Justice. But the decisions of those Courts are received here not as constituting the law, but only as evidence of what it is. When they conflict, the evidence which they afford is necessarily

weakened—and it becomes the duty of a Court constituted, as this is, to look to the reasons on which they are founded. Now that the penalty of a bond for the performance of covenants, conditioned to do a collateral act, a bond of indemnity or the like, should be the measure of the obligee's right in an action of debt on such bond since it is the stipulated and the only stipulated quantum which the instrument furnishes, is perhaps in perfect consonance with the contract of the parties, and consistent with the relief which a Court of Justice ought to

afford upon the violation of such a  
45 contract, \*the more especially as in cases where the damages sustained, have in fact exceeded the penalty, a co-extensive relief is afforded by a different remedy. But that in the case of a mere money bond, of a bond with a penalty conditioned for the payment of a lesser specified sum at a day certain, the payment of any less sum than the principal of such debt and interest thereon from the time when it became due, and during which it has been withheld, should be considered as a compliance with the contract of the parties, or as the measure of the relief which the Court ought to afford, is to me utterly inconceivable, and seems to be ethically absurd, because the moral guilt which attends a violated contract, and which is increased by a continued neglect to fulfill its stipulations, would upon this principle be diminished by the very cause by which in fact it is obviously aggravated, and legally so, because in the case stated, interest is a necessary incident to the principal debt, and its continued accumulation can therefore be limited only by the existence of the debt. These are some of the considerations which have influenced me to adhere to those decisions which allow to the obligee the principal and interest of the sum specified in the condition, without regard to the question whether it exceeds or falls short of the penalty of the bond. Indeed the opposing decisions were in their origin confined to bonds conditioned to do some collateral act, to bonds of indemnity or the like—and their subsequent extension to money bonds, is neither obligatory upon this Court on the score of precedent, nor consistent in my humble apprehension, with the terms of the contract which they profess to interpret. I speak of the decision at law—whose Courts are limited by the terms of the contract, and have no concern with the fund out of which satisfaction is to be made. I know that the case of *Lord Lonsdale v. Church*, (2 Term, Rep. 388,) is said to be overruled by that of *Wilde v. Clarkson*, (6 Term, Rep. 303). But this was a bond of indemnity, and in the recent case of *McClure v. Dunkin*, (1 East's Rep. 436,) which was debt on a judgment recovered on a money bond,

46 interest was allowed on \*the judgment beyond the penalty of the bond upon the ground that the original demand was merged in the judgment. The position that interest beyond the penalty could not



have been allowed in the original action, though conceded by the counsel and reiterated from the bench, was in fact neither discussed at the bar, nor decided by the Court. But considering this and the contemporaneous decision of the master of the Rolls in the case of *Clark v. Seton*, (6 Ves. Ch. Rep. 411,) as judicial evidence of what the law was in England in the year eighteen hundred and one, they cannot operate to change the pre-existing law of this tribunal. There the maxim *leges posteriores, priores, contrarias abrogant*, which is resorted to for the purpose of settling the pretensions of conflicting statutes, would probably be applied to those judicial decisions, and inferior tribunals at least would find themselves bound by the more recent annunciations of the law. But a different course must be pursued here. We have adopted the common and statute law of Great Britain, such as it prevailed in this province on the tenth of May, seventeen hundred and seventy six. The posterior decisions of English Courts of Justice are highly respectable evidence of what the law is now, and except when opposed by anterior decisions of what it was at that period. But when so opposed, they are in fact, innovations, in that system of English law which we have adopted, and whether properly or improperly introduced there, are no more operative here than statutes which have been passed there since the period to which I have referred. Now I take the case of *Lord Lonsdale v. Church*, decided in seventeen hundred and seventy eight, and the series of cases therein adduced, to be evidence of what the law of England was in this regard at the period when it was adopted by our Legislature, and I am bound to consider this the law of this tribunal, until the same legislative wisdom shall otherwise direct. I could fortify this opinion by a reference to the decisions of other American tribunals. In Connecticut, Massachusetts, New York and Pennsylvania, the State Courts have

47 allowed interest \*beyond the penalty.

In the Circuit Court of Massachusetts, in the case of *United States v. Arnold*, (1 Gallison 348,) Judge Story, after looking into all the cases, declares the better opinion to be, that the Court may give judgment for the penalty and interest from the first breach, and this judgment was affirmed in the Supreme Court. In the Circuit Court of Georgia, Ch. J. Ellsworth directed the Jury in the case of *Abendanon v. Putnam*, that they might give interest by way of damages beyond the penalty, which was accordingly done. In an action of debt on bond in the Superior Court of the county of Washington, I remember when at the bar, to have obtained upon argument a judgment for the principal and twenty years interest; and I have once before had occasion incidentally to express in this tribunal the same opinion which I am now called upon more deliberately to pronounce.

The *postea* must therefore be awarded to

the plaintiff, with leave to take out execution in each case for the principal and interest due upon the bond on which his action is founded.

48 \*The State v. John C. Helvenston, et al.

May Term, 1820.

Contempt—Jurors—Communication with Outsiders.—

It is contempt of Court, if the jurors after they have retired to decide on a criminal case, hold communication with persons other than the officers of the Court.

Same—Same—Separation from Associates.—So, if one juror separates himself from his associates, and mingles with the community at large.

By BERRIEN, Judge.

It is to me personally a subject of very sincere regret, that the sittings of this Court have not been permitted to terminate without being marked by an act of insubordination to the laws, and contempt of the public justice on the part of those who have been associated with me in the discharge of the duties of this tribunal.

The task in which we have been engaged has been more than usually laborious, and I have had much reason to be satisfied in other particulars with the conduct of those whose malfeasance in the single instance under consideration has occasioned their arraignment on the criminal side of this Court. Under the influence of these feelings, it would have been infinitely more acceptable to me to have offered to every juror who has taken part in the duties of the term, the expression of my individual thanks for his good conduct, than to have been constrained by the requirements of the law, to announce to him its censure. The duties of this tribunal are however, of that kind which do not always afford pleasure in their performance, nay, they are too frequently unattended by any one gratifying feeling, except that which arises from the consciousness of having endeavoured to discharge them with fidelity. The offence which is imputed to the defendants in attachment, is of a character which is aggravated, not so much by the moral

guilt which attends its commission

49 as by a consideration \*of the injurious consequences to which it must inevitably lead; consequences which may affect the dearest rights of every individual in this community, because calculated to impair the great, perhaps the only efficient safe-guard of those rights. The defendants are arraigned on occasions of this sort, not for a contempt offered to the individual whom the Legislative will may have called to a seat on this bench, nor merely for want of proper respect for this tribunal, although as the depository of an important portion of the constitutional power, it has many claims to the respect and support of every well disposed citizen. The offence

imputed to them, considered with reference to its consequences is of a much more aggravated character. It is a contempt of the laws which regard the administration of the public justice; a disregard of those regulations for the security and preservation of individual right and social happiness, which have been consecrated by the wisdom of ages, as alone calculated for the attainment of these important ends. It will be readily understood that I refer to the trial by Jury. We justly boast of this important privilege. Under its protecting ægis, we enjoy, and have long enjoyed, all the rights and privileges which are secured to us by our free and happy constitution. Destroy it, and we are at the mercy of some individual to whom its powers will be transferred. Impair it, corrupt its exercise, diminish its strength—and though we may retain the forms of our present free institutions, their efficiency to the preservation of social happiness is a phantom which will live only in the remembrance of those who have witnessed the operations of the system in its purity and vigor. The unlawful indulgence which is imputed to the defendants on these attachments, it will be observed, involves in it a communication with persons other than the officers of this Court, after, in their capacity as jurors, they had retired to decide between the State and an individual. If these communications may be permitted, who shall prescribe and limit their character? Who does not perceive that they may be employed to the total

50 perversion of the public \*justice?

Again, if one juror dissatisfied with the conduct of his associates may forcibly separate himself from them and mingle with the community, is it not obvious that there is an end of the regular administration of the public justice? Such are my views of this unfortunate case; I should deeply deplore its occurrence and the duties it would impose upon me, if upon a careful examination of the answers and acknowledgments of the defendants, I had not persuaded myself to believe that their transgression was rather ignorant than wilful, and consequently in a matter of mere discretion, that the requirements of the law might be satisfied without resorting to all the severity which it authorizes. I content myself, therefore, with pronouncing a pro forma sentence, merely because I hope that the object of this proceeding may in this way be attained. It is my duty, however, to distinguish between the case of James H. Walter and his associates, because his was a positive transgression, which could only have been palliated by the proof of a fact that is contradicted by all the evidence before me.

It is ordered, that James H. Walter do pay a fine of ten dollars, and John C. Helvenston, E. Hughes, junr., Peter Schenk, John Collins, Elijah H. Lane, Peter Morin, B. N. Douglass, L. Thompson, C. Patterson, D. Stewart, J. Harrison, each a fine of five dollars and the costs of this rule, and be thereafter discharged.

51 \*John G. Wendell v. Joseph George.

June, 1820.

**Evidence—Witness—Party to Negotiable Instrument.\***

—A party to a negotiable instrument may testify facts which do not prove it to have been originally void; as payment, &c.

**Same—Same—When Competent—Test.**—If the witness can neither gain nor lose by the event of the suit, and the verdict in the case, cannot be given in evidence either for or against him, he is competent to testify. All other objections go to his credibility.

By BERRIEN, Judge.

The present action was founded upon a bill of exchange drawn by defendant upon one John K. Goodman, in favor of John F. Oldershaw & Co., and endorsed by them and by Messrs. Oldershaw & Phillips.

The defendant offered to prove that after the maturity of the bill, the plaintiff had received from the acceptor a part payment, and extended to him with the knowledge and assent of the indorsers, time for the payment of the residue. He proposed to prove these facts by the testimony of John H. Oldershaw, one of the indorsers, which was objected to by the plaintiff, and the proceeding assumed the present form in order that the question raised might be more deliberately considered. The objection is founded on the two following considerations: 1st. That the witness is an indorser of the bill; 2d. That he is interested. The first objection seeks support from the rule laid down in the case of Walton and Shelly, (1 Term, Rep. 295). Without considering the authority of that case in the Courts of the State of Georgia, which would necessarily involve a comparison of it, with the subsequent case of Jordaine and Lashbrooke, (7 Term, Rep. 597,) and render proper an examination of the various decisions upon the point to which those cases refer, in the American Courts of Justice, it suffices to say, that the present objec-

52 tion does not fall within the rule \*as originally laid down. The principle there decided is, that, he who has signed a paper, shall not be permitted to give evidence to invalidate it, not that he may not be permitted to prove facts which have occurred after he has signed the bill, as payment, or those circumstances which will operate as a constructive release to the other parties. On the contrary it has been

**\*Evidence—Witness—When Competent—Test.**—A

witness is competent to testify, who has no certain interest in the event of the suit, and where the judgment in the case cannot be given in evidence, either for or against him, in a subsequent suit against himself. *Edwards v. McKinnon*, 25 Ga. 337. See also, *Central R., etc., Co. v. Hines*, 19 Ga. 203; *Adams v. Sandig*, 29 Ga. 564.

Under the evidence act of 1889, a witness not a party to the case who is liable to the plaintiff if the action fails and is equally liable to the defendant if it succeeds, is competent to testify in behalf of either party. His interest is balanced. *Hidell v. Dwinell*, 89 Ga. 532, 16 S. E. Rep. 79.



repeatedly ruled that a party to a negotiable instrument may testify to facts, which do not prove it originally void, as payment, &c. The first objection to this evidence cannot therefore be sustained. I am equally clear, that the second must also be overruled. The witness can neither gain nor lose by the event of this suit; whatever may be its result, his liability will remain the same, nor can the verdict in this case ever be given in evidence either for or against him. These are the only true criteria of the interest which excludes a witness from testifying. All beyond this amounts only to an interest in the question, a mere bias, which may affect the credit, but cannot destroy the competency of a witness. But the witness in this case has not even an interest in the question. The testimony offered, was, that the arrangement made by the holder with the acceptor, was with the assent of the indorsers, of whom the witness was one. He is, therefore, by such assent deprived of the benefit of the constructive release, which such arrangement may operate in favor of the non-assenting drawer, and consequently has no interest, even, in the question. I speak hypothetically of the effect of this arrangement even in relation to the drawer, for whether it shall operate a release to him cannot be decided, until the whole evidence is adduced, but as the evidence to this particular point may be material, as that which would have gone to prove a part payment, would certainly have been so, and as it has been shewn not to be incompetent on the ground of public policy, or of the individual interest of the witness, it ought to have been admitted. A *venire facias de novo* must therefore be awarded.

For the plaintiff, Geo. Glen—defendant, Morrison & Nicoll.

53 \*Richardson and Bolton v. Joshua E. White.

June, 1830.

**Bill of Exchange—Non-Resident Drawer—Attachment against.**—J. E. W., one of the mercantile firm, of J. E. W. & Co. of Savannah—(whose commercial house was in Liverpool.) whilst in the latter place, drew his individual bill in favor of the Plaintiffs on his house in Savannah, who accepted the same; but afterwards suffered it to be protested for non-payment: HELD, that the payees of said bill were entitled to take out process of attachment, against the individual estate of the non-resident drawer, as drawer, in addition to the remedy by action against the firm of J. E. W. & Co. as acceptors.

**Same—Action against One Party Thereto—Effect.**—The payee or endorsee of a bill of exchange, may in default of payment, sue all the parties to it at the same time, and an action against one, will not debar his remedy against the others.

**Same—Action against Drawer.**—And such payee or indorsee may maintain his action against the drawer, without previously suing the acceptor.

By BERRIEN, Judge.

This case comes up upon exceptions taken

in the Inferior Court of the county of Chatham under the provisions of the judicial statute.

The transcript of the record discloses the following facts. The plaintiffs sued out in the Inferior Court process under the attachment law, against the defendant, and declared against him as drawer of three several bills of exchange. These bills appear to have been drawn under the following circumstances, viz.: The defendant is one of the mercantile house of Joshua E. White & Co. of Savannah; whose commercial house is in Liverpool. The defendant being in Liverpool drew the bills in question upon his house in Savannah, in favor of the plaintiffs, and they credited the account of Joshua E. White & Co. with the amount of such bills, deducting the discount which had been agreed upon. The bills were presented for acceptance, and accepted; then presented for payment, and protested for non-payment. An action was then commenced against defendant, as drawer of these bills,

and he being absent from the State, it was commenced by process of attachment, which was of course levied upon the private property of the defendant. He appeared, pleaded to the attachment, and moved for its dismissal, which was ordered accordingly. To the decision of this motion, the plaintiff excepted, and thus the case comes up for revision before the Superior Court. This decision was founded on the following grounds: 1st. That the parties who ought to have been defendants, viz: Joshua E. White & Co. were present and represented by Steele White, one of the said firm, upon whom process could have been served: 2d. Because by the acceptance of the bills declared on, J. E. White & Co. the acceptors, ought to have been sued, not J. E. White by process of attachment. I am entirely at a loss to discover in the statement that has been made, any thing that will authorize the decision which has been pronounced. The grounds taken by the defendant's counsel assert the proposition, that the drawer of a bill of exchange is not liable to suit until the acceptor has been previously sued, a proposition which is contradicted by every elementary writer, by every adjudged case upon the point, and by the very nature of the transaction between the parties. According to the authorities upon this subject, the payee of a bill of exchange, may in a default of payment, sue the acceptor and drawer, and in addition to this, an indorser may sue all prior indorsers. The same authorities teach us that whenever the holder of a bill has a remedy against several parties to it, he may commence and proceed in several actions against each of these parties, at the same time, and an action against one will not preclude any other remedy against the others. The plaintiffs in this case were therefore, authorized to proceed against the drawer or acceptors or both. They were entitled to sue the defendant as drawer, and to proceed

against his mercantile house as acceptors, and against either or both, by the ordinary process of law, or the extraordinary processes of attachment, according to the fact of the presence or absence of the party or parties defendant, or defendants in either case. There is no doubt that a judgment against this defendant \*would have bound his private property, and that a judgment against the acceptors would have bound the property of the concern. To both these remedies the plaintiffs are unquestionably entitled, and the nature of the transaction, I think, serves to show that they were in the contemplation of the parties at the time it was entered into. At any rate the law is most clearly with the plaintiffs.

The judgment of their Honors the justices of the Inferior Court must therefore be reversed, the attachment of the plaintiffs must be re-instated on the docket of that Court, and a procedendo awarded. All which is ordered accordingly—Judgment reversed.

56 \*THOMAS U. P. CHARLTON,  
Appointed Judge, February, 1821.

G. F. and O. Palmes v. William Stephens—  
F. Densler v. Same.

Joshua E. White & Co. v. William Stephens.  
March, 1821.

Debts of Decedent—Funeral Expenses—Priority.\*—  
Funeral expenses, regulated by the circumstances of the deceased, and the usage of the country, constitute a lien or debt on the estate of the deceased, superior to all other claims.

By CHARLTON, Judge.

The Sheriff of Chatham county having collected the sum of four hundred and fifty dollars under an execution issued from the Superior Court against the estate of the defendant, and that amount remaining in his hands, a notice was served by the attorney for the plaintiffs in executions issued from the Mayor's Court, requiring him to retain in his hands, the amount so collected, subject to the said executions; and he has also been notified by the administrator of the defendant, not to pay over the amount to the said plaintiffs in execution—because there being no assets in the hands of the administrator, the funeral, and other expenses of the intestate in his last sickness, raise a lien on the funds so collected by the Sheriff, which, by the law of the State, has a preference and a priority of payment to all other liens and de-

\*Debts of Decedent—Priorities.—In *Simmons v. Latimer*, 37 Ga. 490, 496, WALKER, J., in discussing the order of priority of a decedent's debts cites the principal case. In this case (*Simmons v. Latimer*), it is said that the assets of an intestate are to be applied according to the law for the administration of estates; and the rights of claimants to such assets are very different from what they were during the life of the intestate.

mands. The case thus stated and agreed to, by the attorneys on both sides is submitted to the decision of the Court.

The order, in which debts due by any testator or intestate, as directed by our statute, shall be paid by executors or administrators is as follows:

57 \*1st. Funeral and other expenses of the last sickness: 2ly. Charges of probate and will, or of the letters of administration: 3ly. Debts due to the public: 4ly. Judgments, mortgages and executions, the eldest first: 5ly. Rents: 6ly. Bonds or other obligations: 7ly. Debts due on open accounts, "but (says the Act) no preference shall be given to creditors in equal degree, when there is a deficiency of assets, except in the cases of judgments, mortgages, that shall be recorded, from the time of recording, and executions lodged in the Sheriff's office—the eldest of which shall be first paid; or in those cases where the creditor may have a lien on any part of the estate." (Marb. and Crawford's Dig. p. 223.) This classification is sufficiently unambiguous to supersede many illustrations from English jurisprudence. In the most important respects however, the two systems agree, and in this particularly: "that funeral, and testamentary charges are to be first paid." Off: of executors 137, 2 Bl. Com. 511.

The *Lex domicilii*, our own act, gives a priority to these expenses, over all other liens—even those of that specific character, which in the language, and according to the definition of Lord Ellenborough, "import an authority either to possess or retain"—Starkie's Repts. p. 144. These specific liens are placed upon an equality with judgments and executions, and mortgages, where there appears a sufficiency of assets; and a preference is only given them on a deficiency of assets. The contest can only exist in that case between judgments, mortgages first recorded, and the eldest executions lodged in the Sheriff's office. Funeral and expenses of last sickness, and charges of probate and will, and letters of administration, still under all embarrassment of the testator or intestate's estate, retain their place at the head of the order, in which the law of Georgia directs the debts to be paid. It is a lien paramount to, and rides over all others; and an equal energy and priority is given it, by the English law. "An executor may lay out so

much of the testator's assets as are necessary \*for defraying his funeral expenses, before he has paid any of his debts and legacies." (2 Bac. Ab. 436, cites Rol. Abr. 926,) "and herein, (continues the same authority,) the executor is to be careful that the expenses be moderate, and not exceeding the degree and circumstances of the deceased; otherwise he may be guilty of a devastavit." (Ibid, cites Off. of Execut. 129.)

According to British adjudications (for in the absence of our own, they must be permitted to have their due weight of authority,) the degree or rank of the deceased



is not to be considered the insulated fact directory of the amount of funeral expenses and those of his last sickness. The law which feels only for justice, and the claims of creditors—looks with perfect apathy, upon the domestic liberality which honors the respected and lamented dead with obsequies, dictated, and due to departed goodness and virtue. The expensiveness of these obsequies must also, and principally be regulated by the circumstances of the deceased. It has therefore been decided that not more than forty shillings would be allowed for the burial of one dying insolvent. (3 Atk. 249,) and in an old authority it is stated as the decision of Ch. J. Holt, that "10 pounds is enough for the funeral of one in debt." (Comb. 342, referred to in 6 Bac. Abr. 436.) In another case the expenses of pall and ornaments have been rejected, and only those allowed for the "coffin, ringing of the bell, parson, clerk and bearers fees." (Salk. 296, p. 3.)

In the case before me the administrator represents, that save this fund in the hands of the Sheriff, there are no assets at his disposal to meet the funeral and expenses of last sickness. Without, therefore, advertent to the rank and character which the deceased sustained in society, these expenses must be regulated by the circumstances of the deceased, connected with the usage of the country, even when insolvency has been established. All accounts in relation to the estate must pass through the examination and receive the sanction

59 of the Court of Ordinary; and \*this account for funeral expenses, &c. is not exempted from the scrutiny of that tribunal. With the law before it, and the amount which custom has allowed in analogous cases, that Court must direct me as to the ulterior order I may give on the Sheriff of this county. I can only now decide, that these expenses constitute a lien which supersedes all others, and that when ascertained, is the first debt due, and to be paid out of the assets of the intestate.

It is therefore ordered and adjudged, that the Sheriff retain in his hands the moneys collected as aforesaid, to abide the further order of this Court upon the account which may be submitted to, and passed by the Court of Ordinary of Chatham County.

Habersham & D'Lyon, for plaintiffs in execution—Stephens, administrator in pro. per.

60 \*William Rabun, Governor, for the Use of Taylor, Tax Collector, v. Fowler and Others.

April Term, 1821.

**Sheriffs—Action on Official Bond—Death of Governor Pending Action—Effect.**—Where an action is brought on the official bond of a Sheriff in the name of the Governor of Georgia, in being, who is individually designated, and such Governor dies pending the action, it is not necessary to amend the suit, by the substitution of the name of his successor.

**Same—Same—Quære.**—Can such bond be put in suit

without the previous order of the Judge of the Superior Court—Quære.

By CHARLTON, Judge.

The facts and circumstances of this case, are substantially these:

Fowler, the defendant, being elected Sheriff of McIntosh county, executed a bond with sureties, (before the Justices of the Inferior Court of that county, which bond in its original shape appears on the minutes of that Court, or some other book in which its proceedings and acts are recorded,) to Peter Early, then Governor of the State of Georgia, for the faithful performance of official duty, and in such terms, as will appear by a reference to the said bond. Whilst discharging the duties of Sheriff, — Taylor, the plaintiff, who sues under the protection of the then Governor of this State, delivered to the Sheriff sundry tax executions to a considerable amount, taking his receipt therefor. The Sheriff, Fowler, failing to collect the sums specified in the executions, or having collected, to pay them over, this action was instituted against him and his sureties on his official bond, executed and recorded before mentioned. On the demise of Peter Early and the subsequent accession to the Government Department, of William Rabun, the action was brought in his name as "Governor of Georgia."

A verdict at this term was rendered for the plaintiff, for the full 61 \*amount of the Sheriff's receipt to the Tax Collector, with leave given to the defendant's counsel, to move to set it aside and enter a nonsuit.

Davies and Berrien now support the motion upon these grounds: 1st. That the demise of William Rabun, since the institution of the action, rendered it necessary to substitute by proper process the name and style of the Governor of Georgia, in office after such demise, and in office at the trial of the cause: 2ly. That without this substitution, the action must abate, the physical character and legal style of the Executive Department, as a sole corporation, or analogous to it, not being otherwise preserved, and the style known to the constitution and the law, must be preserved in suits, where it is necessary to be used.

It was urged as illustrative of the objections thus assumed, that in the nature of things there could be no material difference in a suit of this character, and one between individuals, A. and B.; and that official actions or suits, brought in the name of a public functionary, were subject and liable to simple principles, incidents and mutations. On the death of a plaintiff, a new party must be made, for the purpose of maintaining consistency in the record. It is equally proper and important, in the present case; for if the judgment is sufficient to be entered up, and execution issued, in the name of William Rabun—his physical and official demise being a fact of notoriety, and which this Court is bound to notice ex officio, an absurd and incongruous

variation would present itself between the declaration, the verdict, judgment, and execution, falsifying the whole record, particularly in the execution, which could not issue, in the name of William Rabun.

Wayne and Pelot of counsel for the plaintiff contended, that "William Rabun" might be rejected as surplusage, and then the words "Governor of Georgia," which immediately follow, complied with all the requisites urged as necessary, on the 62 other \*side. The action might then proceed to its consummation, very legally and properly, in the style of the moral personage, or corporation, lending its aid, as in this instance, to a public officer. It was also added, that it was always usual to take official bonds in the name of the then acting and existing Governor, and not required afterwards, upon his natural and political demise, to amend the writ, according to the matter of fact, at the period of issue and trial. By one of the counsel it was further urged, that the Executive Department as a sole corporation was immortal—something like the perpetuity given to the British King, and therefore there was no rational necessity for the mutations alluded to in the argument of the counsel for the defendants. At all events, the objection of defendant's counsel, had no connexion with the real merits and substantial justice of the case.

Upon the points involved in this case, I have no local adjudications to direct me, at least they have not been communicated. I must, therefore, decide this motion, upon such lights as a reference to our statutes, and the arguments of counsel have afforded me.

The objections in support of the motion, may be jointly considered; for, if the name of the Governor in being is a necessary and component part of the legal style, to be used in an action of this nature, the motion must be sustained—there appearing then a radical, incurable variation, between the writ and the bond sued; and besides, all the consequences would follow, in relation to the subsequent record, as mentioned by the defendant's counsel.

I shall refer first to our constitution and statutes, which have a direct bearing on the points made, and 2ly, apply the doctrines and principles of cases, as I find them in English authorities.

1st. The 11th Sect. of the Constitution of Georgia, Art. III. directs, that "Sheriffs shall be appointed in such manner as the General Assembly may by law direct," and designates the tenure of office.

63 \*The Act of the General Assembly appoints Sheriffs through an election of the people. The Judiciary Act of 1799, tit. Sheriff, Sect. 46, declares, "that before any Sheriff shall enter upon the duty of his appointment, and being commissioned by the Governor, he shall be bound for the faithful performance of his duty by himself and his deputies, before any of the said judges, (meaning by said judges as explained by Act May 11, 1803, Clayton's

Dig. 112, "every Judge of the Superior or a majority of the justices of the Inferior Courts") to the Governor of the State for the time being, and to his successors in office jointly and severally, with two good and sufficient securities, inhabitants and freeholders of the county, to be approved of by the justices of the Inferior Court or any three of them, in the sum of 20,000 dollars." There is here no ambiguity. The bond must be taken in the name of the Governor then in being, and is transmitted to his successors, for the benefit of all persons aggrieved by the misfeasances of the Sheriff.

There may be some analogy, between the King's prerogative of immortality, and that existence given to the Executive Department by the will of the people, as promulgated in the Constitution. The Governor cannot die, so long as we retain the Executive, as a co-equal, and co-ordinate department of the government, within the limits prescribed by the Constitution. I am not disposed, however, to consider the Executive Department, as a "sole corporation" in the sense and with all the incidents and attributes given to that class of corporations, by the English law. Except the King, who derives his station and powers from any other source perhaps than that of the governed, all other corporations sole or aggregate, (generally speaking) are created by him. In the acceptance of British jurisprudence, the King is a sole corporation, by virtue of hereditary descent, or title to the throne. That title is derived from his race, and dynasty, and with the prerogatives which encompass him, ren-

64 der him something more than \*a co-equal branch of the monarchy. His impeccability and other attributes, place him according to my view of the English government, above the level of parliament, clothed even as it is said to be, with its boasted omnipotence. It is different with our Executive Department. It was called into existence by the voice of the sovereign people, with powers so limited and clearly defined as not to be misunderstood, powers, which may be restricted or enlarged by constitutional amendments—powers, which may be annihilated, and the Department with them, without subverting republican institutions. These revolutions, fluctuations and vicissitudes, to which the Executive Department may be subjected, without totally disorganizing the nature, genius and principle of our system of liberty, show that a department thus created, is essentially variant from that theoretical or practical corporation, denominated "sole" by British jurisprudence. It would be possible for us to breathe freely in our political atmosphere, without it; but diminish the established and antiquated prerogatives of Majesty, or render them subservient to the purposes of mere pageantry, and you tumble into ruins the whole British monarchical fabric. Really, or technically, I cannot therefore attach the idea of a "sole corporation," to the Executive functions.



The only analogy between that department, and the Kingly authority is, that neither expires by the natural dissolution of the person filling the one, and exercising the other. The question then recurs, whether the death or demise of the person, discontinues suits, or renders necessary some process for their recommencement, or continuation, under the British or our system of laws. The common law, did require a recommencement of actions in the King's Courts upon the death of the King. To that extent were blended his physical and political existence. But the inconveniences resulting from this construction of the legal effects of the King's demise, produced the statutes of Ed. vi. c. 7, 7 and 8 vo., 3, cap. 27, sec. 21 and 1, Ann st. 1, cap. 8, sect. 5th.

65 \*If this case should again present itself, under any other aspect, these statutes will occupy my particular attention. It is sufficient on this occasion to observe, that by these statutes the death of the King would not give birth to the effects as have been attempted to be applied to the demise of William Rabun. Our law directs that the bond shall be given, (or which is the same thing) that the Sheriff "shall be bound for the faithful performance of his duty to the Governor for the time being, and to his successors in office." It was then necessary, that the bond should be taken in the name of Peter Early, the "Governor in being," and his successors in office. The insertion of the name of the "Governor in being," can be considered, as directed for no other purpose than the ascertainment of an epoch from which the Sheriff dates the official investiture. The adjunct "Governor of Georgia" separates the natural, and moral personage, and complies with both the Legislative and Constitutional requisitions, for, the judicial act, only requires that the Sheriff should be bound to the "Governor in being, and his successors in office," and the Constitution requires, no other style than "Governor." Upon this ground, therefore, the name of William Rabun may be either rejected as surplusage, or more correctly retained as a mere designation of the "Governor in being," transmitting to any successor, the character of plaintiff as Governor of the State of Georgia. With these impressions, my opinion is, that this case may advance to judgment, and execution, without amendment of the writ, and substitution by any species of order, or process, of the name of the now Governor in being.

This case involves other points, I feel it my duty to dispose of, because they were deemed important by counsel. It was objected that there could be no nonsuit in this case, because there was not that discrepancy between the declaration and the evidence, which would warrant it. *Prima facie*, there certainly appeared a sufficient variance between the allegata and  
66 probata to justify my \*allowance of the rule to shew cause, and I readily

availed myself of it, for the purpose of giving that deliberate opinion, which could not be expected in a *nisi prius* adjudication—for, almost every decision of the Court, must partake of that character, amid the hurried business of the circuit. I will never compel a plaintiff to suffer a nonsuit, who has offered proofs in support of his action. If he, answers upon being called, I agree with the Court, in the case of *Irving v. Taggart*, 1st Sergt. and Rawl. Reports 360—that the Clerk is not authorized to record a nonappearance, nor can the plaintiff be considered in contempt. He may insist on the verdict. This American decision is supported by English authorities. *Pochin v. Powley*, 1 Blk. Rep. 670, 2 Term Rep. 275, 1 Term Rep. 176, (see also the allusion to Judge Buller's opinion by Tilghman, C. J., in the above case of *Irving v. Taggart*, and by another American case cited by Yates, J., *Girard v. Gettig*, 2 Binn. 234, in the same case of *Irving v. Taggart*).

In the present case, a verdict was rendered for the plaintiff, and the rule to shew cause, why it should not be set aside, and a nonsuit entered, acquiesced in by counsel, as the best arrangement for a deliberate decision upon its important principles. This case was also assimilated to an information *qui tam*—William Rabun, the then Governor in being, suing for the satisfaction of Taylor, the Tax Collector.

The rule is that the "King cannot be nonsuit in any action or information, in which he is sole plaintiff." "But it seems (continues the same authority) that any informer *qui tam*, or plaintiff, in a popular action, may be nonsuit, and thereby wholly determine the suit, as well in respect of the King, as himself"—*Abr. Bac.* p. 202, 203, and the cases or authorities there cited.

The plaintiff in this case does not resemble a relator, prosecuting as he does, for indemnity under the wings and auspices of the Governor. Still the analogy of  
67 principle would hold me out in \*directing (if a verdict is not insisted upon) a nonsuit against him; because, the suit is for his benefit—(the individual plaintiff)—and destroys the idea of that ubiquity, or always presence of the Executive, presumed on the demand of a public right, in its capacity, as sole plaintiff. And this analogy would further warrant a nonsuit against the plaintiff in this cause, did not the judicial and statutory regulation, prescribing the manner in which the Sheriff's official bond should be taken, render unnecessary the insertion of the name of every new Governor, brought into office, by death, resignation or election, from the commencement, to the period of trial, to consummation of the suit. But for this regulation, and the reasons before assigned, that form of proceeding would be required. The Governor of Georgia, though not, as before observed, strictly or technically, a sole corporation, yet in the absence of such regulation by statute, in relation to suits,

would be considered quasi a sole corporation, and the death of the individual filling and representing that corporation has been ruled: "a good plea in abatement, for a new successor comes in his place, that was not party to the former writ"—The result would be the same, upon the death of an individual of an aggregate corporation (invisible as it is) whose christian and surname have been used in the writ, and therefore, none of the individuals composing the aggregate corporation are thus designated in suits. The proper and safest course is to sue in the style given by the charter to the aggregate corporation, (2 Inst. 666, Skin. 2, pl. 2, cited in 1 Bac. Abr. 503, title corporation.)

In this view, without a reference to the Judicial Act of 1799, the objection of the defendant's counsel assailed me with great force, and occasioned the hesitancy, which has furnished leisure for this investigation.

Another difficulty not suggested by counsel pressed itself upon my mind, and of

68 which I must confess it is not divested. I mean \*the order of the Judge of the Superior Court to put this bond in suit, for the satisfaction of the public, or persons aggrieved by the misconduct of the Sheriff. Without such order can a suit of this nature be instituted? Did not the Legislature intend, that the expediency of it, should rest upon the exercise of a sound discretion of the Judge—he being satisfied as a pre-requisite, that the public or a citizen, had been aggrieved by the misconduct of the Sheriff? The propriety, if not the necessity of this order must appear extremely obvious, for the purpose of designating the aggrieved party. If I mistake not, it is the duty of the Sheriff, to receive from the tax collectors, "all executions which may be tendered to him," and to make returns of his proceedings and levies within specified periods, according as these levies may affect personal or real estate. If such is his duty, does the Tax Collector become responsible for the Sheriff's delinquency, when he merely complies with the law in tendering or delivering to him the tax executions? Under such circumstances can the State look exclusively to the Tax Collector for the defalcation, leaving him to seek indemnity, and to obtain it as well as he can (under executive patronage,) against the Sheriff and his securities? These questions might have presented themselves to the mind of the Judge on the application for the order to put the official bond in suit: and is it not possible, that the Judge considering the Sheriff exclusively responsible might also have ordered this suit in the name of his Excellency for the satisfaction of the public? This order was not exhibited to me, and the cause must of course progress under the expression of these doubts, and these embarrassments. The objection, however, has not been made by counsel, but I feel it a duty, as a requisite of law to state it now, as it may probably have some bearing upon an ulterior discussion.

It is ordered, that this motion to set aside the verdict, with leave to enter a nonsuit, be, and is hereby over ruled, and that the defendants, nunc pro tunc, have 69 leave to appeal within fifteen \*days from this date: or, to move within that time, to set aside the verdict, giving three days notice to the opposite counsel, upon such other legal and sufficient grounds as may be sustained by the Court. And it is further ordered, that execution be stayed for that period.

Davies and Berrien for the motion—Wayne and Pelot against it.

70 \*Peter F. Winn v. Jesse Ham, and Morgan Mara.

April, 1821.

**Equitable Relief—Mortgage—Usurious Contract.**—The equitable powers of the Superior Courts of Georgia in surpressing frauds, will be exercised in aid of a mortgagor, seeking to be relieved from a usurious contract, notwithstanding that the judiciary act points out a method by which he may, at common law, dispute the sum due.

**Chancery Practice—Injunction—Consideration of Merits on Application for.**—On the application for an injunction, a Chancellor may go into the consideration of the merits as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges.

**Same—Mortgage—Assignment with Notice of Usury—Injunction.**—Though a bond and mortgage have been assigned, if the bill alleges that such assignment was colorable, and that the assignee had notice of the usury prevailing the original contract, in the absence of a specific reputation of such allegations, the Court will grant an injunction.

By CHARLTON, Judge.

This bill in its application for relief, prays for an injunction, upon the following allegations.

That sometime, and perhaps, at the commencement of the year 1818, the complainant's affairs were so embarrassed, that without a sacrifice of property he could make no payments: that under the pressure of such necessitous circumstances, the complainant "thinks," on the suggestion of Mara, was induced to enter into an agreement with him for a loan of money—or as is charged in the bill, "for the advance of such sum of money as would enable your orator to relieve himself from his embarrassed situation." That according to the terms of such agreement, and in "consequence of it" the complainant on or about the 2nd of March, 1818, gave, or executed a bond to Mara in the penal sum of \$3750, conditioned for the payment of \$1875, payable in the ensuing February, with legal interest from its date: That a mortgage of personal property was contemporaneously executed, the better to secure the payment of the money in the bond. That afterwards, but the precise time not recollected, Mara obtained from complainant the assignment or transfer of an instrument in writ-



ing, purporting to be a contract between the complainant, \*and one Virgil H. Vivion, for the hire of certain slaves of the complainant to Vivion, by which the latter was bound to pay to complainant \$1200, for the services of said slaves at the expiration of one year: That the sum advanced on the security of the bond and mortgage, and that secured by Vivion's contract and assigned to Mara, by no means amounted together with lawful interest thereon to the sum of three thousand and seventy-five dollars, the aggregate amount of the sums due by the said bond and contract: that on the contrary, the securities united, not only covered the demand, for which the complainant was liable, but gave to "Mara exorbitant usurious interest," upon the amount actually advanced to complainant: that on the 16th of November, 1819, the bond and mortgage thus obtained from the complainant was assigned, or pretended to be assigned by Mara to Jesse Ham: that at the epoch of this assignment, the complainant believes Ham had a knowledge or notice of the usury connected with the circumstances of the transaction of the loan or advance of money for which the bond was given, and was equally cognizant of the fact, that the Vivion contract was transferred for the express purpose of securing usurious interest on the money actually advanced by Mara: that the complainant neither knows nor admits, that Ham gave any consideration or equivalent for the property he acquired in the bond and mortgage by the assignment: that in the transfer of the agreement between the complainant and Vivion to Mara, Ham acted as the friend and agent of complainant, and that complainant believes received from Mara a written acknowledgment to pay over to complainant any surplus of said contract, after discharging the usurious interest: that complainant believes Ham is now in possession of such receipt or stipulation; and complainant thinks if such receipt were produced, it would appear that the complainant had engaged to pay 25, or 33 per centum on the money borrowed from Mara: that on the 25th of January, 1820, the complainant paid on the bond \$1350: that \*on the 23d of March, of the same year, Ham proceeded to foreclose the mortgage—the negroes levied upon, are advertised for sale by the Sheriff: and that the complainant is ready and willing to pay Mara or Ham the sum borrowed with legal interest. The bill prays specific and general relief, and for the writ of injunction to stay proceedings on the execution issued by virtue of the foreclosure of the mortgage, until the further order of this Court. A rule was granted by my predecessor to shew cause why an injunction should not be granted. Much learning and great ability have been displayed in support and against the rule, and upon the foregoing synopsis of the allegations of the bill, it is now my duty to discharge the rule or make it absolute. When on a former occasion this bill was submitted to my ex-

amination, I entertained scarcely a doubt of the course I should take, or that which would be prescribed to the mind of any Chancellor. The discussion before me by the counsel of the defendants, and the suggestion of extrinsic matter, if I may so express, produced an embarrassment which required this short delay for reflection, and to afford to the argument the deliberate attention to which it became entitled.

Mr. Wayne contended, that every relief the complainant now seeks to obtain by a chancery investigation, he could have obtained at common law, under that equitable remedy and form of proceeding, designated in our Judicial Act, in relation to the foreclosure of this species of mortgage—and that if he neglected to avail himself of that proceeding, he could not now convert his laches into an excuse for an application to this Forum. This is a difficulty which exhibits itself in limine, and stands with a formidable aspect, in the very threshold of the case. But my mind has conquered it, and in sustaining the jurisdiction, I am about to exercise, I can perceive no hostility between the statutory remedy and those general powers which a Court of Chancery assumes, in suppressing frauds beyond the control of a common law proceeding. It is

true you must pursue the remedy pointed out \*by statute in foreclosing a mortgage, and you can pursue no other. But does that form of remedy under our statute offer to the mortgagor every equitable relief to which he may be entitled? It certainly does not, nor could the Legislature have intended the forms of the statutory foreclosure, as adequate to the fulfillment of all the justice a mortgagor might righteously claim. The statutory remedy can only afford relief on a dispute as to the sum due, by the exhibition of such proofs and evidence, as are admissible before a common law tribunal on a trial by Jury. The affidavit and bond of the mortgagor are mere bases for the order of postponement of sale, without giving to such affidavit the attributes of an answer in chancery. It only discloses facts, the mortgagor must subsequently establish, through those media recognized by a common law investigation. But if payments have been made, resting upon the exclusive knowledge of the mortgagee—if by withholding accounts, he has fraudulently violated any confidence reposed in his integrity by the mortgagor—If there has been any breach of trust confided to the honor and conscience of the mortgagee—if by associating with the sums actually lent, to the mortgagor, an iniquitous and ruinous interest, manifestly the base triumph of avarice over the miseries and necessities of the borrower—a transaction assuming any of these aspects, leaves the party remediless at common law, and therefore our Judicial Act, independent of the general powers incidental to, and inseparably amalgamated with the functions of a Chancellor, expressly delegates to the Superior Court opened in its Equity side, the "powers of a

Court of Equity in all cases where a common law remedy is not adequate."

It must be obvious from the allegations of the bill, now under discussion, that the common law remedy of our Judicial Act, cannot reach and probe the distresses and exigencies of the complainant's case.

74 \*With these impressions, which I hope the learned gentlemen will believe have been very sincerely imbibed, I am of the opinion, the complainant has resorted to the proper jurisdiction.

In support of the rule, two grounds have been assumed:

1st. That the contract is usurious, and

2d. That the bond and mortgage have been actually paid.

It is not necessary for me, on the application for the writ of injunction, to notice any other objection than the alleged usury of the transaction.

Mr. Law, laid the principle down, as the foundation of his argument, that it is competent for a Chancellor to go into the merits of a bill on the application for an injunction. (*Rose v. Hamilton*, 1 Dess. Eq. Rep. 137.)

If by merits are here understood, a full and connected consideration of the facts and circumstances disclosed in the bill, uncontradicted by an answer, I acquiesce in the decision; but it cannot be contended that we may travel dehors the bill and exhibits, for merits; for these merits must be intrinsic and dependent upon the express allegations and charges of the bill. Do the allegations of this bill charge the usury and fraud, which would justify the interposition of this Court's enjoining authority? I never entertained a doubt but that they were sufficient; all circumstances united, point to an intimate connexion between the bond and mortgage, and what has been denominated the Vivion contract, and the bill alleges the illicit intercourse;—it charges, that the union and association of those different securities, gave to Mara an exorbitant and usurious interest. It charges, according to the belief of complainant, that the assignment to Ham of the bond and mortgage, was colorable—and under the influence of fraudulent combination. It charges too, that Ham, under the mask of friendly agency, directed the transfer

75 to Mara of the Vivion contract, \*and obtained, as the complainant believes, a written acknowledgment from Mara of the purposes for which the transfer was made, and which would also disclose the usurious interest pervading the whole connected transaction. For aught that appears upon the face of the bill, no dealing, or borrowing took place between the complainant and Mara, inducing the necessity of an additional agreement and settlement, by the transfer of Vivion's contract. In the absence then of a specific refutation of the usury, thus charged to have been accumulated, by this transfer, under the auspices of pretended friendship, I am compelled to consider this transfer as an appendix to, or rather, to use the language of one of the

counsel, a continuity of the security by bond and mortgage.

This is my answer to the law and the argument of the counsel, for the defendants, founded on that distinctiveness of contract, for the payment of usurious interest, which cannot be immediately connected with the impure source of the original security. Such distinct contract in the hands of an innocent holder, without notice or suspicion of its wicked relation, (the security for the sum borrowed)—might, upon the footing of authority, find protection under the ægis of a Chancellor.

But, Ham is charged with notice of the fraud—with a knowledge of all the circumstances creating the usury, and with that knowledge of circumstances, influenced by suspension, which would put a man on his guard, not actuated by mala fides. Mr. Ham, may repel those charges, insinuations, and beliefs of notice and combination: but as they present themselves upon the bill they are too prominent for a Chancellor to disregard. They oblige me to connect this transfer with the original security, by bond and mortgage, and until better informed, to consider the whole as a transaction bearing the figure and complexion of usury, and therefore to be restrained in its progress, as prayed for in the bill. Mr.

Habersham brought to my notice the 76 case of *Hansen v. \*Gardiner*, (7 Ves. 307,) referred to by Maddock, to shew "that of late years injunctions have been much more liberally allowed, than formerly." In reference to any case however ancient or modern, there is matter enough in this bill to allow a writ, which it is conceded is discretionary, and granted upon the circumstances of the case. (*Potter v. Chapman*, Amb. 99.) It is sufficient for me to know that enough has been suggested which affects the equitable rights of the complainant in the proceedings of the Court. (1 Maddock. 105.) But I shall endeavour to prevent its being made a handle to delay the obtaining justice at law.

It is ordered, that a writ of injunction do issue, commanding the Sheriff of Liberty county, to stay further proceedings on the execution issued on the foreclosure of the mortgage assigned to the defendant Jesse Ham, until the coming in of the answers to the bill of complainant, by Morgan Mara, and Jesse Ham, when a motion may be made to dissolve the injunction upon ten days notice given to complainant, or his counsel: and that on the hearing of said motion, the defendants to this bill may also require of complainant, to exhibit his affidavit (to be filed in the Court below nunc pro tunc) in the form required by the judicial Act, on the order for a postponement of a sale of personal property levied upon on the foreclosure of a mortgage, and to give the bond and security required by said Judicial Act, on which this Court can direct an issue to ascertain the damages incurred by the conduct and delay of the complainant; and it is further ordered, that



previous to the issuing of the writ of injunction, within fifteen days from this date, the complainant do give good and sufficient security for the full amount of the execution, to be certified by the Clerk to the Sheriff, on deposit with said Clerk, the amount acknowledged to be due by complainant on said mortgage, giving good and sufficient security for the balance which may appear on the execution.

# 77 \*Ex Parte, Stebbins & Mason.

April Term, 1821.

**Partnership—Judgment against Partner Individually before Partnership—Effect.**—A creditor who had obtained judgment against one co-partner in his individual capacity, which judgment was anterior to the co-partnership, has the right to levy on the partnership effects, and to sell his debtor's interest therein, without reference to the claims of the creditors of the firm.

**Same—Same—Same.**—Such judgment being a lien on all the property of the debtor, which he had at the time of the signing thereof, or which he might thereafter acquire, supersedes the claims of all subsequent creditors.

By CHARLTON, Judge.

This is an execution issued on a judgment, obtained against Stebbins in his individual capacity, who afterwards entered into a commercial partnership with Lowell Mason, which firm becoming insolvent, their books and effects were assigned for the benefit of their creditors. The question (as I understand it) for decision, is, can the partnership property be resorted to for the payment of this separate debt, of the partner Stebbins?

I must lay it down as the established law of this State, that notwithstanding the insolvency of the debtor, his future acquisitions, through whatever channels they may have been obtained are subject to his antecedent liabilities. A judgment lien, cannot discriminate between the property which may be designated as his, at the epoch of that lien, or, that which he may legally claim, at any subsequent period—got in any relation, or by any efforts of talents, or industry. This is certainly the operation of law, in every case of insolvency, declared by the proceeding, the statute directs for its establishment. But, whether in a case of solvency, or insolvency, an execution issued for the satisfaction of a separate debt of one partner, may seize the partnership effects. (1 Show, 137; Heydon v. Heydon, 1 Salk. 392; 1 Comyns, Rep. 277; 3 Pr. Wms. 25; 2 Mod. 280; Leach's edit. 793; Ld. Raym. 871.)

78 \*The Sheriff can, however, only dispose of the interest, which "such partner has in the partnership property," after an ascertainment of such interest by the form prescribed, or, the mode of reference directed, by a Court of common law or equity. In the absence of local adjudications, fixing the practice in this State, I

feel myself bound in any conflicts, which may be perceived between the ancient and modern decisions of the English Courts of law and chancery, to adhere to those cases, which were adopted as parts of our system of jurisprudence, on the change of our political connexion with Great Britain. These cases announce the doctrine, that the partnership property is liable to, and may be taken under execution for the separate debt of one partner. But the case of Fox v. Hanbury, (Cowper's Rep. 445,) without controverting this liability of the partnership effects, confines it to the interest, which may appear after the ascertainment and settlement of partnership debts and accounts.

An American decision, which cites all the cases, declares, that the separate creditor takes the interest of the partner, subject to the rights of the other partners. Matter of Smith, (16 John's Rep. 106). Our statute declares, that the property shall be bound from the signing of the judgment. What property? I answer property not incumbered by any previous lien, of a dignity affecting the preference given to a judgment. Can that dignity be given to any commercial transaction not operating as a specific lien? A bill of exchange, a promissory note or any other mode of payment cannot interfere with the jurisprudence of this State, which fixes the lien from the signing of the judgment. It rides over all other contracts, no matter what may be their character subsequent to that signing, and supersedes the claims of creditors not holding its very discriminating authority. It in short, ascertains the property the debtor had, at the date of the judgment, and that which he may have afterwards acquired—without reference to the embarrassments he may have placed

79 it \*under by any business, or distinct capacity of life. This is the law of the State of Georgia, and if I mistake not, was the law of England, at the time we adopted and incorporated into our jurisprudence the decisions of their Courts—I mean, as to the liability of the partnership effects without any reference to their priority, and the rights of a separate creditor. The articles of co-partnership, will designate the interest of the separate partner, and upon a proper application to me as Judge or Chancellor, I will deliver that interest, at the disposal of the execution; but in the absence of that contract, I must consider an undivided moiety, subject to the execution; if other interest, than an undivided moiety, is the matter of fact, I will refer it, (if solicited so to do) for ascertainment to the proper officer, and that officer is, I think, the clerk of the Court.

It is, therefore, ordered, that one moiety of the partnership effects of Stebbins and Mason be subject to the execution of this judgment creditor: and that the assignees of Stebbins and Mason, have leave to file in the office of the clerk of this Court exceptions to his report, of the partnership interest of Stebbins, within twenty days

from this date, to await the further order of the Court at the expiration of that time: and that if no exceptions are filed, that the amount levied upon be paid over to the separate judgment creditor.

Habersham for Creditors.

80 \*The State v. John Thompson.

June, 1821.

**Burglary--Verdict**—"Stealing from Dwelling."\*—If on an indictment for Burglary, the Jury find the prisoner "guilty of stealing from the dwelling house," the verdict will be set aside, and a new trial awarded.

By CHARLTON, Judge.

A new trial is moved for in this case, by Pelot, assigned counsel for the prisoner, upon these grounds:

1st. That the Jury by their verdict, have found the prisoner guilty of an offence, contrary to the 35th Sect. of the 6th Div. of the penal code of this State, which declares and defines larceny from the house to be "the entering or breaking any house, other than a dwelling house, or its appurtenances, with an intent to steal, or after entering or breaking said house, stealing therefrom any money, goods, chattels, wares, merchandise, or any thing, or things of value whatever."

2ly. That the Jury have found the prisoner guilty of an offence, not punishable by the penal code, and upon which the Court, cannot pass its judgment.

The prisoner was indicted for Burglary, and the indictment contains no other count. The conviction is "larceny from the dwelling house." The question for the consideration of the Court is, can this insulated accusation receive the aspect given it by the Jury? Burglary, as defined by the penal code of this State, is the breaking or entering into the dwelling or mansion house, with intent to commit a felony—It may be committed in the day or night. The definition of the offence by the English law is somewhat variant. It is—"a break-

81 ing and entering the \*mansion house of another, in the night, with intent to commit some felony, within the same whether such intent be executed or not"—(2 East. C. L. 484). The variances between the two systems are—breaking, or entering, in the night or day, with intent to commit a felony, according to the penal code of Georgia—a breaking and entering, with a similar intent, in the night, according to the law of England.

Subject to these variances and distinctions, the acts which constitute entering or breaking, or either, and all the incidents of the offence, are to be sought for in English law, as explained in English adjudications.

\*See State v. Malowy, *post*, p. 84, where principal case is cited.

\*By the existing law of Georgia there must be a breaking and entering.—(Ed. of Original Edition.)

We have adopted the offence and all the ideas, (with the differences as designated) from the criminal code of England, and when our own system is silent beyond the definition of the crime and its appellation, it follows, that we have consented to adopt the superstructure of our ancestors, erected upon a similar foundation, provided there is no interference with our statutory regulations.

The next question which therefore presents itself for consideration, is, whether English law and English precedents support this verdict of the Jury.

The Solicitor General, referred to the case of the King v. Comer, (1 Leach. C. L. p. 36)—and the King v. Withal and Overend, (*ibid* 88). In the first case, Comer was indicted, as in the case before us, singly for burglary. The verdict of the Jury was: "Guilty of felony only, in stealing goods, &c.—not guilty of the burglary."

The point being reserved, it was unanimously agreed by nine Judges, who met at the Chambers of the Chief Justice, that

82 this verdict, for the reasons assigned in the case, and \*particularly for

this specific acquittal of the burglary, was an acquittal of stealing in the dwelling house; but if the phraseology of the verdict had been: not guilty of entering and breaking the house in the night time, but guilty of the rest of the indictment, he then would have been convicted of stealing 40s., (though no count for that offence) in the dwelling house, contrary to Stat. 12 Ann, c. 7; such finding would not negative the felony as in the verdict rendered by the words not guilty of the burglary. In the case of the King v. Withal and Overend, the verdict was entered in these words: "not guilty of entering and breaking the dwelling house in the night, but guilty of stealing the box and money in the dwelling house." There was no separate count on the Stat. 12 Ann. The judges were of opinion, that the prisoners were by this finding, ousted of their clergy, for that the indictment contained every charge that was necessary in an indictment upon that statute, viz: stealing in a dwelling house—to the amount of forty shillings. The 12 Ann, declares: "that if any person, shall enter into the mansion or dwelling house of another, by day or by night, without breaking the same, with an intent to commit felony, or being in such house, shall commit any felony, and shall in the night time break the said house to get out of the same, such person, is, and shall be taken to be guilty of burglary, and shall be ousted of his or her benefit of clergy, in the same manner as if such person had broke and entered the said house in the night time, with intent to commit felony there. (Tomlins' Digest, p. 89; 12 Ann, Stat. 1, c. 7, s. 3.)

It must be observed, that this statute innovates upon the common law burglary, in these particulars. 1st. That there must be a breaking out in the night time. 2d. An entry with intent to commit a felony in the day or night. The essential constitu-



ent of the common law offence, a dwelling or mansion house, is preserved. This being the consanguinity, (if I may so express it)

83 between the common law and statute burglaries, a breaking out \*being proved, a verdict might be sustained for this offence on an indictment for burglary, in its original character. But the cases from Leach, have reference to another section of this statute of Ann:—It declares any larceny in a dwelling house or its out houses to the value of forty shillings, to be debarred the benefit of clergy, though the house is not broken open. (Tomlins' Digest, 428, 429.) A conviction of this offence, according to the cases cited by Mr. Solicitor, is deemed sufficient, though no distinct count in the indictment on the statute, for say the English judges, the indictment for burglary contains every charge that is necessary in an indictment upon that statute. This offence must be committed in a dwelling house, or a house under its protection. This brings us at length to the objection taken in this case by the counsel for the prisoner. It is contended, that no section of 12 Ann, will apply, 1st. Because no breaking out was in evidence, and 2d. That the verdict cannot be supported on the ground that the larceny is of the value of forty shillings, because that species of larceny must be committed in a dwelling house, or a house within its curtilage: and under our penal code, to constitute a larceny from the house, there must be an entry or breaking, (as contemplated in the crime of burglary) either in a dwelling house, or, its appurtenances, with intent to steal, or stealing therefrom. This indictment cannot, therefore, (in the face of proof that the larceny was committed in a dwelling house, without illegal entry, or breaking,) and does not contain "every charge necessary in an indictment" upon this section of the penal code of Georgia. To this construction of our code, with all my impressions of the guilt of the prisoner, my conscience and duty compel me to assent: and though required by the code to give a liberal exposition to its language and sentiments, I cannot recognize a verdict like this, in opposition to its plain, intelligible and unambiguous letter. Upon the whole, I am of the opinion, that the prisoner is entitled to a new trial, and it is ordered accordingly. Pelot—for the motion.

84 \*The State v. John Maloney.

June, 1821.

**Burglary\*—Verdict**—"Larceny by Privately Stealing in House."—An indictment for Burglary will not authorize a verdict of "larceny, by privately stealing in the house." The offences under the

\***Burglary—Verdict**—"Receiving Stolen Goods."—On a trial for burglary, it is not error to refuse to receive a verdict of "guilty of receiving stolen goods," and to direct the jury that they would have to find a verdict of guilty or not guilty. Mangham v. State, 87 Ga. 549, 13 S. E. Rep. 558.

penal code of Georgia are distinct in all their properties. Burglary must be committed in a dwelling house, and "larceny from the house," in a house "other than the dwelling house."

**Penal Code—Effect on Criminal Law of England in Force at Its Passage.**—It seems, that the penal code of Georgia does not abrogate all the criminal law of England in force anterior to its passage, but leaves it as it was, with a restriction only as to any punishment which may be incompatible with the nature and purposes of a penitentiary system.

By CHARLTON, Judge.

A new trial is moved for in this case upon the following grounds:

1st. The verdict of the Jury is contrary to law, because the evidence established the fact, that the dwelling house from which the articles were taken, was the dwelling house of Matthew Dowling.

2d. Because none of the witnesses prove any private or felonious stealing. The objection just sustained in the case of the State v. Thompson, will apply to this case. The larceny having been proved in a dwelling house excludes the possibility of a conviction under the 36th section of the penal code in an indictment for Burglary. The offences in the penal code of Georgia being distinct in all their properties, one cannot therefore be the foundation of a conviction for the other. There is not that resemblance in features which designate them as the same family of crimes, and upon the proof of the innocence of one, would justify the inflictions of punishment upon another. An indictment for larceny from the house would draw after it different consequences. It pre-supposes the break-

85 ing or entering any house, \*other than a dwelling house\* with intent to steal, or stealing therefrom. By analogy, therefore, in reference to English precedents, this offence may be the substratum of a verdict for privately stealing from a house, under the 36th section, other than a dwelling house. But every difficulty might be obviated by an indictment under the Stat. 12 Ann, for stealing to the value of forty shillings in a dwelling house, computing the value of the goods, according to American calculation. That statute as far as it can operate is in force in this State, because it is not in hostility with any similar section of the penal code, there being no section providing for the offence of larceny from the dwelling house. The penal code of Georgia does not abrogate all the criminal law of England in force anterior to its passage, but leaves it as it was, with a restriction, only as to any punishment which may be incompatible with the nature and purposes of a penitentiary system. But if the capital punishment inflicted by the Stat. of Ann, cannot be modified by an adaption of punishment to the penal code, then it is a casus omissus, and until fresh legislation is not punishable at all.

New trial granted.

\*In the penal code of Georgia, that went into operation 1st June, 1824, the words "other than a dwelling house" are omitted.—(Ed. of Original Edition.)

86 \*P. J. Valloton v. John Gardner.

June, 1821.

**Offer of Guarantee—Necessity of Notice of Acceptance.\***

—Where an offer of guarantee is made, accompanied with a request for an answer, in order to make it binding upon the individual offering, it is necessary that he be informed by the person to whom it is offered, of his assent to such offer.

**Same—Waiver of.**—Where no such assent is signified, and the note of the individual for whose benefit the guarantee was offered, is taken by the creditor after the debt or liability which formed the subject matter of the offer, has been incurred, it is a complete waiver of the guarantee.

By CHARLTON, Judge.

This case presents itself on a transcript of proceedings in a Justice's Court, removed to this jurisdiction in obedience to a writ of Certiorari, issued upon the exceptions and grounds, contained in the statement signed by the officer of the Inferior Judicatory.

"P. J. Valloton v. John Gardner.

To the term of February, 1821, an action was brought by P. J. Valloton against John Gardner, in the Court of Isaac Russell, Esq., Justice of the Peace for the city of Savannah, for the sum of thirty dollars, being the amount of rent reserved upon the lease of a house to one Samuel Roe by the said plaintiff, the payment of which rent the said defendant was alleged to have guaranteed. In the term of March, of the year aforesaid, upon the trial of said case,

**\*Offer of Guarantee—Necessity of Notice of Acceptance.**

—Where the defendant by letter to the plaintiff offers to indorse for a certain person, desirous of purchasing goods from plaintiff, to a specified amount, and the latter sells goods on the faith of such letter, the defendant will not be liable thereon unless the plaintiffs, within a reasonable time, give him notice that they have accepted his offered guaranty or have acted upon it. *Clafin v. Briant*, 58 Ga. 414.

In *Sanders v. Etcherson*, 36 Ga. 405, certain stockholders of the company, under their hands and seals, guaranteed the payment of all debts of said company then outstanding, and bound themselves to pay all of said debts to the creditors, who would indulge the company upon their claims, for ten months from that date. It was held that a creditor of the company at the time, who indulged the company ten months was entitled to recover the amount of his debt against the company, from said stockholders, without having notified them he would so indulge the company; that by complying with the terms prescribed, the creditor entitled himself to the benefit of the provisions of the guaranty or obligation. *WALKER, J.*, who delivered the opinion of the court, said: "From an examination of the decisions for the purpose of determining in what classes of cases notice of an intention to act under a guaranty must be given to a guarantor, in order to bind him; and in what classes of cases a guaranty will take effect on the doing, or forbearing, some definite thing as its consideration, perhaps the following general rule may fairly be deduced; whenever this guaranty is not positive, but amounts to a mere offer to guaranty, if the other party will agree

the said Justice gave judgment for the defendant, upon which the plaintiff entered an appeal. In the ensuing term of April, the said appeal came on to be tried by a Jury, in the Court aforesaid. On the part of the plaintiff the only evidence adduced was, first, a letter dated 22d September, 1818, written by the defendant \*to the plaintiff, in which the defendant states that if the plaintiff will allow the said Samuel Roe to occupy his, the plaintiff's house, for another year, he, the said defendant, would be accountable for the rent of the same; but in the same letter the defendant requires an answer from the plaintiff, either by letter or by personal communication, which answer was never proved or pretended to have been given. In addition to the evidence of this letter, the plaintiff introduced a note given by the said Samuel to him, the plaintiff, for one year's rent of the house aforesaid—to wit, for the sum of \$31, (one dollar credit, dated on the fifth day of November, 1819,) on which note the name of the defendant did not appear. Upon which evidence alone, the Jury aforesaid rendered a verdict for the plaintiff for thirty dollars, with interest and costs: to which verdict the counsel of the defendant did then and there except: 1st. Because there never was a contract between P. J. Valloton and John Gardner, inasmuch as the said P. J. never manifested to the said John, the acquiescence of him, the said P. J., in the proposal of the said John: 2d. Because if there was a contract, that con-

to accept it; or where the credit to be given, or other action, which is to be the consideration of the guaranty, is executory and uncertain as to the amount for which, or the time at which, the guarantor is to become liable—as for instance, an offer to guarantee payment for goods of uncertain kind, value or amount, to be sold at a future time—then notice of acceptance must be given to the guarantor in order to bind him. But where the undertaking of the guarantor is positive, and the amount he agrees to guaranty is fixed, and the guaranty is to take effect on the doing or forbearing some definite thing as its consideration, then no notice of acceptance is necessary; but the liability of the guarantor is fixed as soon as the consideration is completed. This is substantially the rule deduced by our brother Hull from the authorities, and we are disposed to adopt it as a correct deduction from the numerous decisions made on the subject of guaranty. In 2 *Bouv. Ins.* 56, the rule is laid down thus: 'If the instrument does not express an absolute engagement, but a proposal or offer to guaranty, the contract is not complete until the party to whom the proposal has been made, has signified his acceptance of it. A distinction must be made between an offer to guaranty at a future time, and an absolute present guaranty. The former is not binding till accepted; the latter takes effect as soon as made. An example or two will explain this difference: "I guaranty the payment of any goods which A. B. delivers to C. D." is a present guaranty, and the party to whom it is given may act upon it without further communication. On the other hand, "I have no objection to guaranty you against any loss for giving them this credit;" "I have no objection



tract was annulled and destroyed by the note given to the plaintiff by Samuel Roe, or by the new contract between the last mentioned parties. And inasmuch as the said several matters do not appear upon the record, the counsel of the said John Gardner did then and there require the said Justice to sign this bill of exceptions, whereupon the said Justice did sign the same.

ISAAC RUSSELL, J. P.\*

Gordon and Stiles in support of the certiorari, have argued before this Court upon the grounds assumed in the Justice's Court. These reasons are deemed insufficient by Mr. D'Lyon, because the note given by the tenant Roe, was a mere ascertainment of the debt, due by him for rent, the payment of which was secured by Gardner's guarantee, whenever it becomes due, and could not therefore be considered as an absorption of that guarantee. It was in short, analogous

to a collateral undertaking, or promise  
88 \*which was always based upon the previous liability of the person from whom such promise was made. If this were strictly true, the landlord would have his election against the tenant or the party undertaking to pay his rent. The distinction between an original or collateral undertaking is the then liability of the person for whose benefit the promise is made; if liable at the time of the promise it is a collateral undertaking. Rob. on frauds, 216. In this case the undertaking of Mr. Gardner, contained in his letter, speaks of the re-

newal of the lease for another year. It is in these words: "Mr. Roe, who is in my employ, and now lives in your house, has requested me to say to you, he will take the house for another year. If you will let him have it, I will be accountable to you for the rent." It is, therefore, an original undertaking, because no liability had attached to Roe—or more properly, a guarantee, the character and intended effect of which is, to visit the person so tendering it, if accepted, with exclusive responsibility—if such should be the election of the other person in possession of it. This may depend, however, upon the expressions of the guarantee which render it obligatory only when assented to, or permanent and continuing.\* The case of *McIver v. Richardson*, (in 1 Maule & Selwyn's Rep. 557,) is illustrative of that guarantee, which requires notification of acceptance and assent; and *Merle v. Wells*, (2 Campbell, N. P. R. 413,) *Kirby v. Duke of Marlborough*, (2 Maule & Selwyn, 18,) of the continuing guarantee. Without adverting to all the cases, there is a much stronger reason, for requiring the assent and acquiescence in this case before us of the person to whom the guarantee was offered, than in *McIver* and *Richardson*, or any other case within my recollection, for Gardner explicitly requires it, in the conclusion of his letter which is

89 in these words: "your answer, \*or please call on me at my Tanyard:"—no answer was given, or other notification of assent to the liability of Gardner. I am

to be answerable as far as £50. For any reference, apply to Messrs. B. & Co., of this place," have been held as mere proposals to guaranty, and that the party to whom they were severally made, ought to have given notice to the makee of his acceptance.' Apply these tests to this contract, and we are very clear that it is a present absolute guaranty, and the defendants are liable."

In *Manry v. Waxelbaum Co.*, 108 Ga. 14. 33 S. E. Rep. 702, the defendant made the following contract with the plaintiff: "For and in consideration of the sum of one dollar in hand paid, and the receipt of which is hereby acknowledged, I, J. H. Manry, do hereby guaranty the prompt payment of all accounts and notes given in settlement for goods purchased by G. W. Grubbs of Bethel, Georgia, from the Waxelbaum Company, of Macon, Georgia, to the extent of four hundred dollars. Be it further understood that I, J. H. Manry shall be at liberty to withdraw this guaranty at any time, provided that the account of G. W. Grubbs is paid." It was held that it was not necessary for the creditor, before extending credit to the principal debtor on the faith of such a guaranty, to notify the guarantor of the acceptance of his undertaking. *COBB, J.*, who delivered the opinion of the court, after giving the facts and decision in *Sanders v. Etcherson*, 36 Ga. 404, and quoting from the opinion of *WALKER, J.*, therein, said: "We think this case (*Sanders v. Etcherson*) is controlling in the present one, and it will be found to be in harmony with the great weight of authority. See 2 Pars. Cont. p. 14, 9 Am. & Eng. Enc. Law, pp. 79, 80, and numerous cases cited in each. It is true that a contrary ruling was made in the case of *Claffin v. Briant*, 58 Ga. 414; but that

case may be distinguished on its peculiar facts, and, if not, the ruling made in 36 Ga. (*Sanders v. Etcherson*), antedating that made in 58 Ga., is controlling." But there seems to be no conflict between *Manry v. Waxelbaum Co.*, 108 Ga. 14. 33 S. E. Rep. 702; *Sanders v. Etcherson*, 36 Ga. 405, and *Claffin v. Briant*, 58 Ga. 414: for the test laid down in *Sanders v. Etcherson*, 36 Ga. 405, being applied the first two cases were cases in which the guaranty was a present absolute guaranty and therefore no notice of acceptance was necessary; but, in the last case, the decision was based on the ground that there was a mere offer of guaranty, and therefore notice of acceptance had to be given to the guarantor in order to bind him. Again, in *Manry v. Waxelbaum Co.*, 108 Ga. 14. 33 S. E. Rep. 700, the guaranty was supported by a consideration (one dollar), distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor, the receipt of which was therein acknowledged, and therefore according to *Davis v. Wells Fargo & Co.*, 104 U. S. 159, 26 L. Ed. 689, it was not an *unaccepted proposal*, and thus required no notice of acceptance in order to bind the guarantor; but without such notice became binding on delivery.

The rule laid down in *Sanders v. Etcherson*, 36 Ga. 405, as to when notice of an intention to act

\*A party giving a letter of guarantee, has a right to know whether it is accepted, and whether the person to whom it is addressed, means to give credit on the footing of it or not. *Douglass v. Reynolds*, 7 Peters' S. C. Rep. 125; *Sollee et al. v. Mengy*, 1 Bailey's S. C. Rep. 620; *Lee v. Dick*, 10 Peters' S. C. Rep. 482, S. P.—(Ed. of Original Edition.)

therefore of the opinion, that the note of Roe, given and taken by Valloton, was a waiver of the guarantee, and that such is its legal operation. The following order will be entered and transmitted to the Court below.

This case was argued by counsel on the transcript of the proceedings below, whereupon it is adjudged, considered and ordered: That it be remanded to said Inferior Judicatory, with directions to award a new trial, and that the Jury in said Justice's Court be instructed, that the said John Gardner, is not liable upon his guarantee, in which matter by the verdict of the Jury on the appeal in the said Justice's Court, there is manifest error.

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## \*Simons v. Sheftall.

June, 1821.

**Continuance—Motives of Delicacy.**—A defendant has a right to demand the trial of the cause, unless it can be continued on legal grounds, and the Court will not continue the cause from motives of delicacy, in opposition to such right.

under a guaranty must be given to a guarantor in order to bind him, seems to be the rule adopted by the supreme court of the United States.

In *Adams, etc., Co. v. Jones*, 12 Peters 207, 212, 9 L. Ed. 1058, 1060, it is said: "And the question which, under this view, is presented, is, whether upon a letter of guaranty addressed to a particular person, or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor, that the person giving the credit has accepted or acted upon the guaranty, and given the credit on the faith of it. We are all of opinion that it is necessary; and that this is not now an open question in this court, after the decisions which have been made in *Russell v. Clarke* (7 Cranch 69); *Edmondston v. Drake* (5 Peters Rep. 624); *Douglass v. Reynolds* (7 Peters Rep. 113); *Lee v. Dick* (10 Peters, 482), and again recognized at the present term in the case of *Reynolds v. Douglass* (12 Pet. 497, 9 L. Ed. 1171)." To the same effect, see *Louisville Mfg. Co. v. Welch*, 10 How. 461, 475, 13 Law Ed. 497, 503.

In *Davis v. Wells Fargo & Co.*, 104 U. S. 159, 26 Law Ed. 689, MR. JUSTICE MATHEWS, who delivered the opinion of the court, reviews at some length the decisions of the supreme court of the United States above cited and deduces from them the proposition that the rule requiring notice of acceptance of a guaranty, and of an intention to act under it applies only in those cases where, in legal effect, the instrument is merely an offer or proposal, acceptance of which by the guarantee is necessary to that mutual assent without which there can be no contract.

And in *Davis, etc., Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. Rep. 173, 175, it was held that if a guaranty is assigned by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

**Same—Opinion Expressed by Judge.**—It is not a sufficient ground for continuance of a cause, that the presiding Judge had in another capacity, expressed an opinion on one of the points involved.

By CHARLTON, Judge.

This case being called, the attorney of record moved for a continuance, upon the ground that he understood the Court had in another capacity, formed an opinion upon the merits or some prominent points of the case, which might, on its trial now, leave such a bias as to deprive the plaintiff of that impartial, unprejudiced investigation, essential to the advancement of justice in every cause. If not in the words, this may be considered as substantially urged by Mr. Habersham, in support of the motion.

Mr. Wayne, associate counsel, argued on the same side.

The motion for a continuance of this case, is not—cannot be pressed as a matter *ex debito justitiæ*. It is bottomed upon the delicacy of my situation, and the apprehension that justice cannot be impartially administered, in this contest about an inconsiderable property, from the bias my mind must have imbibed, in favor of the defendants. I was in the office of Mayor of this city, when this action was instituted. The defendant derived his title from the corporation, and it became my duty—at least I thought it so, to aid the defendant with my occasional advice. On the trial below, the Jury gave a verdict for defendant, in opposition to the opinion of my predecessor,

and as Mayor, I expressed my satisfaction \*at the verdict, because I thought the Judge erred in that point of his opinion, which required in and of the defendant's title a more formal entry than the Marshal had made: and in all probability, I gave this opinion because the Judge's exposition, of the city ordinance, designating the mode of entry, seriously affected the interests of a corporation, over which I then presided. It may have been an opinion emanating from *esprit de corps*—for most certainly, since the translation of this cause to the appeal docket—I have not given the subject any deliberate reflection, and as the opinion of my predecessor was delivered in an oral charge to the Jury, I do not recollect the special grounds upon which he considered the Marshal's entry at variance with that prescribed in the ordinance. I am confident that any re-sale of the property, under any other form of entry, was not at my suggestion. I did not aid, (to the best of my recollection,) in the fabrication of any plea on the appeal. I received no fee from the defendant, and when he could have employed me as one of his counsel, he resorted to other gentlemen better acquainted with all the merits and difficulties of his cause, and I presume, of supposed superior capability to defend him. Save the entry, I have adverted to, I am profoundly ignorant of the bases upon which the defence will be rested in this trial, and a prominent difficulty cannot be the first entry, because the learned Judge,



who gave an opinion adverse to it, is now of counsel for the defendant.

Such has been my agency in this cause, upon which this imputation of bias is alleged. I disclaim it, as well as the influence of any feeling or conviction adverse to an impartial or unprejudiced examination of the respective rights of these parties, or any parties. The defendant possesses the right to demand the trial of his cause, unless it can be continued upon legal grounds. The appeal of plaintiff's counsel is addressed to the discretion of the Court, which ought, it is contended, to be exercised under these impressions of the bias of the Court—and for this reason,

92 among \*many others, because another Judge may alternate with me at the next term in January. Can this Court exercise a discretion in opposition to an unequivocal legal right, depending upon so precarious an expectation? Ought a Judge to exercise a discretion in a case like this, when conscious that the injuries anticipated cannot result—and therefore a postponement of trial would only have the effect of gratifying feeling which ought not to be accommodated, or giving currency to the imputation of prejudice, bias, and partiality against this Court, which could not be affixed to any other Judge presiding in this cause, and contending with the same objections? I shall, therefore, confront this case, and all the trivial embarrassments which relate to myself. The Jury are judges of the Equity, the law and the facts of the case, and gentlemen may console themselves with the promise, that no attempt will be made on my part to bias them. If on the rendition of their verdict, there should be an ulterior motion or proceeding, the liberal proposition of defendant's counsel will be cheerfully acceded to—by a reference of that motion, or that proceeding, to another Judge. This is the only compromise I can make between my delicacy and my duty.

Motion over-ruled.

Habersham & Wayne, for the motion—  
Berrien & M. Sheftall, Senr., contra.

93 \*Matthew Albritton and Another v. Bird  
Executor of Bulloch.

June, 1821.

**Injunction—To Restrain Proceeding of Law Court.—**

If sufficient grounds are shewn for an injunction, it may be granted to restrain the proceedings of a Court of common law, at any stage of such proceedings.

**Same—Adequate Remedy at Law.\*—**An injunction will not be granted, if the person seeking it, could by proper vigilance, have protected himself from injury, by the ordinary means at law.

\***Injunction—Adequate Remedy at Law.**—It is a well settled proposition of law that an injunction will not be granted, where the person seeking it has a complete and adequate remedy at law. See *Camp v. Matheson*, 30 Ga. 170; *Bagwell v. Head*, 40 Ga. 145; *Seago v. Harrison*, 42 Ga. 189; *Alexander v.*

**Same—Legal Defence Unavailable through Attorney's Misconduct.**—Where the party has been prevented from availing himself of his legal defence, by the irregularity of commissioners nominated by himself to take testimony, or the misconduct of his attorney, he will not be entitled to an injunction.  
**Heir—Possession of Ancestor's Estate—When Entitled to.**—An heir or legatee is not entitled to take possession of any part of the estate of his ancestor or testator, until it be delivered to him by the act of the legal representative, or the law.

By CHARLTON, Judge.

This bill alleges that James Bulloch, of the county of Bryan, died on or about the 20th of December, 1790, seized and possessed of real and personal estates, leaving a widow Dinah, and two daughters, his only heirs, who intermarried with the plaintiffs: that, as complainants believe, he left a will devising his property to his wife, during her life, or during her widowhood, to go over, upon the happening of either contingency, to the wives of the complainants, Ann and Abigail: that upon his death, the widow took possession of his estates, and particularly of a negro woman called Binah, and a considerable stock of cattle: that this will, as complainants have every reason to believe, remained in the possession of the widow, during her life time, and on her decease, came into the hands of her executor, the defendant; that Dinah, the widow of James Bulloch, departed this life some time in May, 1816, having made a will, in which she devised and bequeathed her estates, to one Andrew Bird, and the wives of complainants, equally to be divided between them: that she gave a legacy of \$500, to Alexander Bird, whom, with Andrew and James Bird, she constituted \*her executors: that Alexander Bird, qualified as executor, and proceeded to discharge his duties in that capacity: that the complainants, out of respect to the widow, and desirous of leaving her in possession of every comfort during her life time, and believing, that upon her decease, they would readily obtain the property they were entitled to, as appertaining to the estate of James Bulloch, delayed to assert, or claim their rights: that upon her decease, conceiving the will could only operate upon property, which belonged to her, they took possession of all property

*Biggers*, 43 Ga. 161; *Hart v. Lazaron*, 46 Ga. 396; *Alston v. Wheatley*, 47 Ga. 646; *Russell v. O'Dowd*, 48 Ga. 475; *McKey v. Co. of Fulton*, 73 Ga. 117; *Nicholson v. Cook*, 76 Ga. 24; *Bryan v. Windson*, 99 Ga. 176, 25 S. E. Rep. 268; *Taft v. Booth*, 104 Ga. 590, 30 S. E. Rep. 803; *Moore v. Town of Guyton*, 110 Ga. 330, 35 S. E. Rep. 339; *Beysiegel v. Rome*, etc., Ass'n, 113 Ga. 1071, 39 S. Rep. 405; *Johnson v. Gilmer*, 113 Ga. 1146, 39 S. E. Rep. 469; *Winn v. Pittman*, 114 Ga. 862, 40 S. E. Rep. 993; *Sharpe v. Hodges* (Ga.), 43 S. E. Rep. 48.

But a demurrer to a bill on the ground that the complainant has a complete remedy at law, ought not to be sustained unless it appears that the complainant has a remedy at law that will secure his whole rights in a perfect manner, at the present time, and in the future. *Scott v. Scott*, 33 Ga. 102. See also, *Chappell v. Akin*, 39 Ga. 177, 179.

they could designate and find, which, (under impressions before stated,) belonged to the estate of James Bulloch: that the property so taken possession of by them, consisted of the said negro woman Binah, and her issue of two children, and about sixty head of cattle: that to this act, though present, the executor, Alexander Bird, did not object, and acquiesced in it, for several months: but in March, 1818, brought an action of trover, in the Superior Court of Bulloch county, against complainants, to recover the value of these negroes and cattle, as component parts of the estate of his testatrix, Dinah Bulloch; that contrary to the justice of the case, and in consequence, (as complainants are advised) of the irregularity of the commissioners, appointed to examine a material witness, residing in Bryan county, which precluded the admission of his written testimony, and in consequence of many matters, of great importance to complainants, lying in the exclusive knowledge of defendant, to this bill, a verdict was rendered against complainants, for a return of the negroes and cattle, or, payment of their value, assessed by the Jury, within thirty days.

These are the material allegations, upon which the prayer for injunction can be acceded to—it being applied for, to stay and restrain (until full answer comes in and a plenary investigation takes place), all further proceedings upon this verdict. The bill also prays for an account, co-extensive with all matters alleged in relation to the estates of James and Dinah Bulloch, 95 for a discovery \*particularly as to the will of James Bulloch and for general relief.

My attention is necessarily now confined to the application for the injunction. If this is granted, the complainants profess their willingness, and their ability, to give any security for the ulterior safety and indemnity of the executor, which the Court may require.

The cases, which Law and Jackson cited and adduced, to shew the power of a Chancellor, in granting the writ of injunction, are not doubted. The principles they advance, I readily admit; because the learned research of Mr. Jackson, in the numerous precedents referred to by him, establish the doctrine, that no stage of a common law proceeding, no matter what appellation it may assume, can present an insurmountable barrier to the energies of an injunction. Let the foundation of the application be any species of iniquity, which a Court of common law cannot remedy, and if the party, upon whom it operates, can step forth with clear hands, and exhibit himself the supplicating victim of fraud, oppression, perfidy and injustice, equity will interpose, and take him under the protection of her abstract principles of right. A verdict, a judgment, or an execution, therefore, forms no obstacle to this interposition. This being the law of chancery, I shall, I hope, be excused from noticing the cases adduced by Mr. Jackson, illustrative of it.

Is there in this case, as disclosed by the allegations bearing upon this application, any combination of fraudulent circumstances which could not have been met, and repelled, by a common law investigation? What are the bases of the application? They are these: that the negro Binah and her subsequent issue, and the cattle, are, as the complainants believe, the property of the estate of James Bulloch, and that fact would they think have appeared but for the irregularity of the commissioners, 96 which repudiated \*from the common law trial, the testimony of a material witness; and the concealment of important matters, resting in the exclusive personal knowledge of the executor.

If the establishment of the rights of the complainants depended essentially upon facts within the knowledge of the defendant, the plain, obvious, and perfectly accessible remedy was, a bill for discovery to be used as auxiliary to their legal defence. Not having resorted to this remedy, but suffering a time to elapse, within which they might have resorted to it, is a laches, a crassa negligentia which can never be aided by a Court of chancery. The application for an injunction must derive its main strength from the exhaustion of every vigilant effort, to obtain redress at common law. I shall then unhesitatingly reject this, as a ground upon which, I could be authorized, to restrain the proceedings.

The other basis of the application offers a difficulty, of equal magnitude, to the interference of a chancery jurisdiction. It lays no fraud, no circumstance, no culpability at the door of the executor, but charges mere irregularity or ignorance in the conduct of the commissioners appointed to take testimony, for and at the instance of the complainants. But for this irregularity then, it appears that a Court of law could have compelled the discovery of facts, sought for in the testimony of the alleged material witness—a witness, material only, as the complainants are advised, but whether so or not, this Court cannot ascertain from any special allegation of the bill. The doctrine is, that if such discovery could have been obtained in the progress of a common law investigation, chancery will not bare its arm, and aid the neglect in seeking it. In other words, it is said by an American Chancellor, "if the Court of common law can compel the discovery, a Court of equity will not interfere; and facts which depend upon the testimony of witnesses, can be procured or proved at law, because Courts of law can compel the attendance of witnesses." *Gelston v. Hoyt*, (1 John. Chan.

Chan. Rep. 547). In that case, as 97 well as \*this, every fact in the knowledge of the witness, material to the defence, could have been proved by the ordinary means at law, without resorting to the aid of equity. The complainants in this case, have suffered from the irregularity of persons nominated by themselves, and can urge no imputation against the conduct of the plaintiff at common law. Upon



a similar ground, and with equal propriety, they might resort to a Court of equity, for its interference to remedy injuries inflicted, by the misconduct of an attorney in not complying with rules of Court, and thus draw within the chancery vortex, the attributes, functions and well defined powers of every other jurisdiction. The complainants therefore, must stand the loss, of this non-compliance with the requisites of a Court of common law, attached to the admissibility of testimony, taken by commission. But I am required to go much further. I am called upon to acknowledge the legality of conduct, in these complainants, in taking possession of property, supposed and believed to be theirs, under the will of James Bulloch, or, as having belonged to his estate in the absence of any will, or instrument to direct us in the supposition and belief, and against the legal right of the executor, to retain the property, as ostensibly belonging to the estate of Dinah Bulloch, with all his responsibility to account and amenability to an order for distribution. To admit this, would be in so many words to admit the right of every heir to an estate, to decide for himself, as to what share he was entitled to, under every form of proprietary interest, to seize it, when opportunity offered, and drive the trustee or executor to remedies legal or equitable, for the purpose of re-possessing himself of property which the law had placed in his custody—and of which only the law could divest him. For these reasons the rule and order suspending further proceedings at law, are set aside, and the motion for an injunction dissolved. But the bill is sanctioned and retained for all its other purposes: and it is the only remedy the complainants ever had, or can have, for the ascertainment of rights and interests disclosed in its 98 allegations. The executor, is \*now perhaps the only person who can marshal the assets of the estates, and an appeal to his conscience must lay the foundations of the relief sought for, by the complainants.

Ordered, that the rule in this case to stay proceedings and to shew cause why an injunction should not be granted, be and is hereby set aside and dissolved. And it is further ordered, that a copy of this order be forthwith forwarded to, or served on the Sheriff of Bulloch county, and a copy of the whole decision be sent to the Clerk of the Superior Court of said county, with instructions to place the same on the book of minutes of said Superior Court.

Law & Jackson—for the rule.

99 \*Tupper—Applicant v. Atwood—Respondent.

June, 1821.

Appeals—De Novo Investigation—New Testimony.—

An appeal from the verdict of a petit Jury of the Inferior or Superior Courts to a special Jury of the Superior Court, is considered as a *de novo*

investigation, and new and additional testimony may be admitted upon the trial of such appeal.

**Same—Same—Same.\***—But an appeal from the Court of Ordinary to the Superior Court, is an appeal from the judgment of the former tribunal, founded on the evidence adduced to it, and no other evidence should be received by the appellate jurisdiction.

**Practice of Court of Ordinary—Administration—Application.**—A Court of Ordinary in all applications for probate or administration should conform to the practice of similar jurisdiction in England; at all events to such an extent as to give the appellate jurisdiction, a knowledge of the facts or doctrines, which formed the bases of the judgment of the inferior tribunal.

**Appeal—Prosecution by Agent in His Own Name.**—An agent in fact who had applied for letters of administration, in the name of his principals, a commercial house resident and present, has no right to enter or prosecute an appeal from the judgment of the Court below, in his own name.

By CHARLTON, Judge.

This is an appeal from the Court of Ordinary of Chatham county, and there is no transcript, or proceeding of that Court, to shew the grounds of error, other than a simple order granting administration to the respondent Atwood, as principal creditor. How he appeared as principal creditor, what was the evidence in support of that allegation, or by what law or evidence the Court of ordinary was influenced in neglecting Tupper's application, I am left entirely to collect, from the suggestions of counsel, and the Clerk of the Court of ordinary, who appears before me as a witness, to explain the grounds and the reasons, or, to prove the facts which produced the order of the Court below. I have been also required, to admit evidence in support of the appellant's case, entirely new; and it has been said, that on appeals of this description, the Superior Court has not heretofore considered itself bound to adhere to the evidence, submitted to the Court below.

100 \*It now becomes my duty, to decide upon principles and practice, of great and extensive importance, and which if before discussed or settled, by opinions of my predecessors, these opinions are not of record, and the only repository I can find of

\*Appeals—De Novo Investigation—New Testimony.—By the act of 1821. appeals from the court of ordinary are to be tried by a special jury "in the same way, and under the same regulations as other appeals." This takes up the whole case *de novo* and submits it to the jury upon all the legal evidence which is produced *then*, without regard to what evidence may have been before the Ordinary, on the first trial. *Moody v. Moody*, 29 Ga. 521. By Georgia Code, § 4469, it is provided that "an appeal to the superior court is a *de novo* investigation. It brings up the whole record from the court below, and all competent evidence is admissible on the trial thereof, whether adduced on a former trial or not either party is entitled to be heard on the whole merits of the case." See also, *Lynch v. Pace*, 40 Ga. 173; *Kirtland v. Davis*, 43 Ga. 318; *Watson v. Warnock*, 31 Ga. 718; *Brown v. Wilson*, 59 Ga. 606; *Howard v. Worrill*, 42 Ga. 399.

them, is the memory of a gentleman of the bar. This kind of recollection, is not the "stare decisis," I can ever conclusively respect, and upon the doctrines of this case, that memory cannot be entitled to any authority, destroying, as it does, every landmark, by which I, as a Judge of this tribunal, ought to be guided, in correcting the errors of the Court of ordinary.

This Court exercises an appellate and controlling jurisdiction in three distinct forms, each having its appropriate mode of translating the case; the first, is an appeal from the verdict of a Petit Jury, to a Special Jury, selected from the Grand Inquest. This is an appeal from a verdict of a Petit Jury, to a Special Jury of this Court, or from a verdict of an Inferior Court, and does not prevent the introduction of new, or additional testimony, because it is considered in all material matters, as a de novo investigation, and subject to the incidents of an original proceeding. The bare verdict, is the subject of determination appealed from—and not dependent upon any further transcript, or disclosure by record, of the correctness, or errors of that verdict. The second form, of removing a case to this Court from an inferior jurisdiction is confined to the Court constitutionally and legally denominated the "Inferior Court"—and is effected by a bill of exceptions, as prescribed in the Judicial Act, under this mode of appeal, by certiorari. We are directed by the bill of exceptions and accompanying transcript, as to all the principal facts, and grounds of law, upon which the decision purports to have been founded, and dehors those grounds, and facts, this Court is not expected to advance. The third form of translation, is a direct appeal from the Court of ordinary to this jurisdiction. Analogy then, and the very nature of an appeal, (unless otherwise allowed, as in the case of an appeal from the verdict of a

101 \*Courts,) presuppose some transcript, some written and enlarged statement of the points, and the facts adjudicated in the Court below. A sic jubeo, sic volo—"order and decree that administration, &c. be granted to A. B.," leaves certainly no information, upon which the error of the Court below, can be even conjectured; and consequently, compels the appellate jurisdiction, to resort for all information it may wish to obtain to viva voce testimony of what were the law and the facts which governed the judgment of the Court below. This testimony, must be either the establishment of the precise evidence given in the Court below, or it is any testimony, as to facts, since discovered, or, which the party neglected to adduce, or, did not deem it important to adduce in the Court below. If facts of the latter description are admissible upon the hearing of this appeal, then it follows, that the Court is called upon to affirm or reverse a decision upon facts, which the inferior jurisdiction had no knowledge of, and therefore rendered no judgment from which an appeal could be

entered, to be supported on speculation, in any ulterior examination, before this superintending jurisdiction. The proceedings of a Court of ordinary do not acknowledge the interposition of a Jury, and therefore there is no analogy between an appeal from that tribunal, and the appeal from the verdict of a Jury. It is not, as in the latter case, a proceeding de novo, but a proceeding based upon the disclosure of minutes of evidence, verified by the Court, or its Clerk, illustrative of its order, judgment or decree. In all applications, particularly for probate, or administration, there should be some formal allegations affixed of record, and in a contested suit something more than the nakedness which a caveat usually assumes, should be propounded to throw necessary light upon the darkness of the otherwise unexplained expressions of a general, sweeping decision. There is nothing in our political, judicial or municipal relations, which inhibits, or indeed which does not require a very close adherence, in our Courts of ordinary, to the practice of similar jurisdictions in England. At all

102 \*events, this Court will require an adherence to the extent, which may put it in possession of the doctrines, and the facts, which gave existence to the general order, or sentence of the Court below. I cannot, in future, admit evidence aliunde, or suffer the appeal to be dependent for its ultimate success, upon mere evidence, or suggestions of counsel, as to a practice, putting afloat upon such a sea of uncertainty, the evidence and proceedings of a Court, possessing a controul over the vast interests, confided to its powers and jurisdiction. Without establishing this case as a precedent, or adverting to the evidence as it was submitted to the Court of ordinary, or received by me under any new aspect, I am satisfied, that upon the evidence heard only by the Court of ordinary, there was no error in its decision, awarding administration to the respondent Atwood, as principal creditor. He was, as I am informed, (by viva voce testimony in this Court, as to the evidence before the Court of ordinary,) principal creditor, by sundry notes at the date of his caveat, and his opponent, a minor creditor, on an open unliquidated account. I take leave to observe also, that Tupper now appears, (and also on the application for letters ad colligendum which he obtained,) in the capacity of agent or attorney in fact for Sage & Co., a commercial house resident in this city. He was, therefore, functus officio, in every thing relating to this appeal, and in the presence of his principals, could have had no legal authority, to enter, or to prosecute it. I cannot recognize him as appellant, and if temporary letters have been granted to him, without reference to his principals, in that particular, there has been error and irregularity.

Upon all these grounds, it is ordered, that this appeal be, and is hereby remanded to the Honorable the Court of ordinary of Chatham county, with this certificate, that



there is no error in the order of that Court, awarding administration on the estate and effects of the intestate, to the respondent Atwood, and that administration as decreed be accordingly granted him.

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## \*Kane v. Hills.

June, 1821.

**Verdict—Appeal—Failure to Enter Judgment—Effect.—**

If an appeal be entered from the verdict of the Petit Jury, although it is prudent to enter up final judgment, within the four days after the adjournment of the Court, an omission to do so will not defeat the verdict, upon such appeal being set aside or withdrawn.

**Same—Same—Judgment Nunc Pro Tunc.\*—**The judgment may be filed, *nunc pro tunc*, after the appeal is set aside.

By CHARLTON, Judge.

A motion, being made in this case for judgment against Hills, the bail, it was opposed upon the ground, that final judgment was not entered up within the four days after the adjournment of the Court. This was answered by reference to the records of this Court, which established the fact, that an appeal was entered from the verdict of the Petit Jury, within the four days after the adjournment, which was set aside, for irregularity, at the ensuing term, or some subsequent term of the Superior Court. It was therefore urged, that the entry of the appeal, superseded the necessity of entering up final judgment, within the four days: and whatever irregularity there might appear, in the appeal, which even upon its face proclaimed it a nullity, yet it continued to have a legal existence, and

**\*Verdict—Appeal—Judgment Nunc Pro Tunc.—**

Where no judgment has been signed but a verdict rendered and an appeal taken and withdrawn, the verdict is revived, and judgment may, as matter of right, upon exhibition of the record showing the dismissal or withdrawal of the appeal, be entered *nunc pro tunc*. *Hardee v. Stovall. Simmons & Co.* 1 Ga. 92.

The common-law rule is that all judgments whether interlocutory or final, shall be entered of record, of the day of the month and year *when signed*, and shall not have relation to any day. Still, the discretion is given to the court or judge to order a judgment to be entered *nunc pro tunc*: indeed, it is not only competent to do this, but it seems to be almost a matter of course. By the 66th common-law rule of practice, adopted by the judges of the superior courts in Georgia, it is provided that "in all and every case, when a verdict has been obtained at common law, and an appeal entered without judgment signed upon the said verdict, judgment shall not afterwards be signed further back than the time of disposing said appeal." 2 Kelly 479; *Perdue v. Bradshaw*. 18 Ga. 288. But, in this case (*Perdue v. Bradshaw*), the 66th common-law rule of practice was so far modified as to allow *nunc pro tunc* judgment: but not to prejudice the immediate rights of third persons.

In regard to the entry of judgments *nunc pro tunc*, see also, *Kelsoe v. Hill*. 58 Ga. 364; *Spencer v. Peake*. 73 Ga. 803; *Mayor v. Champion*, 54 Ga. 542.

operated as a supersedeas of all further proceedings upon the verdict, until set aside and vacated by a decision of the Court.

It is prudent to enter up a final judgment within the four days. The Judicial Act allows it, and it is safe and prudent for two reasons, because, it ascertains the epoch, in the absence of an appeal, from which the lien will commence its operation, and because, upon the subversion of the appeal for defects and irregularity, the lien may have a relation back to that epoch, or it may have that relation, upon an agreement to withdraw the appeal, and establish

104 \*the first verdict. But most certainly the timely entry of an appeal, against which there can be no legal objection as an annihilation of the judgment, which is not all essential to the entry of an appeal—it being exclusively founded upon the dissatisfaction of the party, to the verdict rendered.

Upon the law and the facts of this case, I am, therefore, of the opinion, that the objection cannot be sustained, and that the attorney of the plaintiff can enter and file his final judgment, *nunc pro tunc*, or of this term as he may elect.

Judgment ordered.

## 105 \*Isaac Hendricks v. Robert Lewis and William Brownjohn, Constable.

July, 1821.

**Debt—Property Not Liable Therefor.—**The necessary equipments of a militia soldier, the implements of trade, necessary wearing apparel, and bedding for self and family, cannot be made liable for debt by any process, particularly a distress warrant.

By CHARLTON, Judge.

This is a petition, verified by the oath of Isaac Hendricks, stating, among other matters: "That he has been tenant of a lot and improvements, owned, as he believes, by one Robert Lewis, since 13th December, 1820, rented by petitioner at the rate of \$275 per annum: that previous to the expiration of the second quarter, and before the rent of that quarter became due, Lewis went before a Justice of the Inferior Court, and made oath, that the petitioner was indebted to him, in the sum of \$68 75, due for house rent: that thereupon, a distress warrant was issued against the goods and chattels of petitioner: that some rent was due, but petitioner denies that the second quarter's rent was due: and that he was entitled to various credits, for goods furnished at the commencement of the new lease, and moneys advanced to said Robert Lewis, which goods and moneys, ought to have been applied, and had been agreed between them, should be applied to the first quarter's rent: that in violation of this agreement, the said Robert Lewis, considered proper, to apply the goods and moneys to the second quarter's rent, and thereby made the law for collecting rents, an instrument of oppression, availing himself of it,

before his rent was fully due: that under the authority of the Justice's warrant of distress, the Constable, William Brownjohn, distrained upon, and took into his custody, the bed-clothing, and bedding of the 106 petitioner, \*his private bodily clothing, the necessary clothes of petitioner's wife, and children, one of whom is an infant, six months old: that nothing is left petitioner's wife, but a single change of dress, to petitioner's self, a pair of white summer breeches, and two or three shirts and cravats, save what they now wear: that even the caps, and other requisite articles of dress, have been taken from petitioner's infant: that petitioner's family, are divested of every article of kitchen furniture, save a common tea kettle, and are reduced to absolute penury: that the tables and chairs of petitioner's sitting room are taken, and, that of the house furniture, as he believes, remain but a few old broken cups, a coffee pot, and one or two table knives": —If all this is true, a more complete sacking a poor lessee's habitation, cannot be found in the very full annals of bailiff hard-heartedness. At all events, it evidences a zeal, to execute process of this description, which can find no justification in law, and I am pretty sure, none in humanity.

On the return of this rule, the landlord, Lewis, shewed no cause against the application of the petitioner, and the Constable, William Brownjohn, obeyed the rule no further, than putting the Court in possession of the warrant, and a schedule of articles (without official signature) distrained, under its authority. This list or schedule, does not seem in any manner to contradict the statements and allegations of the petitioner, but rather to confirm them, in their full extent. The motley, miscellaneous enumerations of this inventory, shew, that the smallest chattels—some, that could have been of little value, or for which it would have been difficult to find purchasers at a public sale, were "pointed out by plaintiff," and I hope, for the honor of official duty, reluctantly seized by the Constable. In this inventory or schedule, are inserted, "1st. one bed and bedstead, with bedding, left with the plaintiff—2d. one trunk of clothing—3d. one small trunk of clothing unknown—4th. one do. do." Through 107 the last three items, \*the pen is drawn, with a view of obliterating them.

The inference is, that there is falsity in the statements of the petitioner as they relate to these articles of clothing, or, that the fact of their having been distrained, is concealed from me, by the loose, informal, and slovenly schedule, handed me by the Constable, as explanatory of his conduct under the warrant. Until better instructed, I am at present inclined to believe all the allegations of the petition, and that these articles were distrained as therein set forth. Assuming then, the facts of the petition, verified as they have been, and not controverted otherwise than as before suggested, I must, and do decide, that this distress

warrant has been illegally and oppressively executed. The mode only of collecting rent, has been changed by the laws of Georgia. The principles and doctrines of the common, and statute law of England, so far as they do not militate with these laws, are still in force, provided the reason of our municipal relations, will permit their application, and as our laws are silent on the things to be distrained, we must necessarily resort to the English system, for their ascertainment. According to that system, among many things exempted, such as utensils of a man's trade, averia carucae, &c." a covenable distress, is not of armour or vessel, or apparel, or jewels, so long as there are other sufficient or covenable." (Co. Litt. 47; 2 Inst. 133.) So by our laws, in analogy to that surrender, an insolvent is required to make of his goods and effects, his arms, implements of trade, necessary wearing apparel, and bedding for family are allowed to be retained—and no process, particularly a distress warrant, can render them liable for debt. The laws of Georgia, so far respect the comforts of her citizens, as not to suffer them, under the pretext of her justice, to be stripped by relentless creditors or landlords, of the decencies of life. Every officer knows this, and acting in violation of it, shall, as long as I preside here, receive appropriate animadversion, or punishment. My duty is to do equal justice to the rich and to the poor, and especially to protect the latter— 108 against \*any oppressions, their miseries may have invited. This is one of those cases, as I collect, from the representations before me, representations, which the landlord has not condescended to confute, or, the Constable, in any material matter, to palliate. The Constable, on the contrary, instead of keeping possession of all the articles distrained, as was his bounden duty, until legally disposed of, has "left with plaintiff one bed and bedstead, with bedding," so it is mentioned in his inventory.

Upon the whole, it is ordered and adjudged, that on or before Friday next, the 6th of the present month, the necessary apparel of the said Isaac Hendricks, his wife and children, together with their bed and bedding, be, by said William Brownjohn, restored to said petitioner, Isaac Hendricks: and that the rule be, and is hereby made absolute for a certiorari, directed to the said Robert Lewis and William Brownjohn, returnable to the next Superior Court, to be held in and for the county of Chatham, upon the said Isaac Hendricks' giving good and sufficient security, to be approved by the Clerk of this Court, for the amount of rent sworn to be due, and costs, to abide the further order, judgment or decree of this Court, on the return of the certiorari aforesaid.

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By Act of the General Assembly of the State of Georgia, passed 23d December, 1822, the following articles are exempted from levy and sale, on account of any debt contracted after that day, viz.:



two beds and bedding, common bedsteads, a spinning wheel and two pair of cards, a loom, cow and calf, common tools of his trade, and ordinary cooking utensils, and ten dollars worth of provisions—to which is added by Act of 22d December, 1834, the family Bible—and the benefit of the first mentioned Act, is extended to widows during widowhood and their families, by Act of 22d December, 1835.—(Ed. of Original Edition.)

# **109 \*Petition of Gale, et ux.**

July, 1821.

**Marriage Settlement—Removal of Trustee.**—A Court of chancery, on sufficient grounds being shewn, will remove a trustee under a marriage settlement, and appoint a new one.

**Same—Substitution of New Trustees—What Is Not Per Se Ground for.**—If the original trustees are dead, the fact that the representative of one is temporarily absent, and the representative of the other unwilling to act, is not per se, sufficient to justify the substitution of new trustees. The Court has power to compel such representatives to assume the trusts.

**Same—Same.**—But the Court may with the assent of all parties, substitute new trustees.

**Same—Same—How Grounds Therefor Shown.\***—But to justify the removal of such representatives as trustees, their refusal or incapability must be shewn, either by answer to the petition for substitution, by affidavits of petitioners, or neglect of representatives to shew cause, on proper citation.

By CHARLTON, Judge.

This is a petition on the equity side of this Court, stating the death of the trustees, in the marriage settlement—the absence of one of the representatives and the unwillingness of the other, to assume and discharge the trusts. The prayer is, to substitute other trustees, named by the petitioners.

A Court of Chancery will remove a trustee, refusing to act—it will appoint a new trustee under a marriage settlement, the trustee, in the settlement, being willing to be removed—it will remove a trustee for breaches and abuses of his functions, and it will accede to the application of a trustee, to be removed and discharged, upon sufficient grounds being stated in his bill: but this application does not precisely fall within any of these cases. It is not alleged, that Charles Stephens is permanently removed from this State, and therefore incapable of ever giving that personal attention to the interest of the trust estates, that they may require, and it is only alleged that

R. F. Williams, the other representative, is unwilling to accept the trust. This is not a ground per se, to justify the removal of this representative, because  
110 his principal \*having assumed and assented to the discharge of the duties of a trustee, this Court can compel the representative to re-assume his functions. But it is still competent for this Court, to substitute new trustees, all parties formally assenting thereto. The ulterior safety and rights of the issue of this marriage, require the interposition of a Court of chancery to substitute other persons, for the protection of their interests, other than those, named in the settlement. The validity of all acts of the parties, to the deed themselves, depends upon the proper annunciation and notice to the world, of the change in the media, through which these acts in the investments and mutations of the trust property may pass and be conveyed. For these purposes there must be a direct or implied refusal, or incapability of these representatives, to discharge the duties expected from, or imposed upon them. This refusal may be either notified to this Court, by an answer to this petition—by affidavits of petitioners, stating incapability from residence abroad, or by refusing to shew cause, why they should not be removed as prayed for in this petition. The latter mode will be the most efficient and regular.

It is therefore ordered, that notice stating the substance of the petition, be given in a public Gazette of this city, citing the said Charles Stephens and R. F. Williams, (to be inserted once a week for the space of sixty days,) and requiring them, and each of them, to shew cause, if any they have, why new trustees as named by petitioners, should not be substituted for the trustees, of whom they are representatives: and upon their failure to shew cause at the expiration of said term, and a certificate of such failure, being attached by the Clerk of this Court to the petition of said Wm. Gale and wife, that then, it is ordered and decreed, that James Eppinger and Adam Cope, be, and they are hereby appointed—trustees in lieu and in the stead of the trustees and their representatives as named in the marriage settlement: and it is further ordered, that Adam Cope be and is hereby appointed a receiver of said trust estates, until the said trustees shall have entered upon their duties in obedience to this order.

**\*Trustees—Appointment—Petition.**—In *Mitchell v. Pitner*, 15 Ga. 319, 320, it is held that, in equity, trustees may be appointed upon petition in cases "where all parties are represented and consented, and where there is no question of fact in dispute." BENNING, J., delivering the opinion of the court, said: "As long ago as 1821, we find the form of a petition resorted to in equity, apparently, as a matter of course, for the purpose of getting trustees appointed. This was done in the case of the *Petition of Gale et ux.* before JUDGE CHARLTON, the elder. (R. M. Charlton's R. 109.) JUDGE CHARLTON was contemporary with the Act of 1799."

# **111 \*Ex Parte Matthew Simpson.**

July, 1821.

**Evidence—Copy of Receipt.**—A copy of a receipt is not admissible, without proper notice to produce the original, or proof of its loss or destruction.

**Insolvent Debtor—Issue "Fraud or Not Fraud"—Verdict.**—Upon an issue formed between an insolvent debtor and his creditors, of "fraud or not fraud," the Jury should find the affirmative or negative of the issue. A general verdict of "guilty" is improper and illegal.

**Inferior Court—Power to Grant New Trials.**—The "In"

ferior Court" as established by the Constitution of Georgia, and distinguished from other inferior jurisdictions ordained and established by the General Assembly, has the power to grant new trials.

**Writ of Certiorari—Constitutional—Judicial—Distinction between.**—The Constitutional writ of Certiorari is applicable to the errors of inferior jurisdictions, contradistinguished from the "Inferior Court." the Judicial writ of Certiorari is alone applicable to the "Inferior Court" as before distinguished.

**Same—Judicial**—The necessity of exceptions and 20 days notice applies only to the judicial writ.

**Mandamus—Justices of Inferior Court—Refusal of New Trial \***—It seems, that where improper evidence has been received by the justices of the Inferior Court, on the trial of an insolvent debtor for fraud, or where the Jury have not found a verdict conformable to the issue, upon the refusal of said justices to grant a new trial, a mandamus to them will be awarded.

By CHARLTON, Judge.

This is a petition for a certiorari, and it states:

"That the petitioner was, on the 19th of May, of the present year, confined in the common jail of this county, by virtue of process issued out of a Justice's Court, at the suit of one Samuel Cripps—that he applied for the benefit of the Insolvent Act—that an order was granted by a Justice of the Inferior Court, returnable on the 21st of June, conformably to that Act: that on the 28th of May, certain creditors therein named, by their attorneys, filed in the office of the Clerk of the Inferior Court, a suggestion of fraud, against the application of petitioner, embracing five grounds, upon which an issue was made up between petitioner and the objecting creditors: that three of these grounds were abandoned by counsel for creditors, and the two following only insisted upon, viz: 1st. that the said Matthew, on the 12th of May, fraudulently purchased goods from the said Tufts and Reed, (two of the objecting

112 \*creditors,) on a credit, well knowing that he was about to be insolvent, or that he was about to declare himself insolvent: and that, 2d. the said Matthew, with a view to defraud his creditors, made a sale of all his goods and effects, immediately before he went to jail, which goods were generally those he had purchased from said James Kenyon, (another objecting creditor,) and Tufts and Reed." That on the 28th of June, the issue on this suggestion of fraud, came on to be tried, in the Inferior Court of Chatham county, before the Honorable George L. Cope, and Thomas N. Morel, two of the Justices of that Court, by a Jury sworn and impaneled for that purpose, on which trial the said Justices ruled, and permitted the following errors and irregularities, for, that they suffered the counsel for the creditors, to read and give in evidence a copy of a receipt from

the petitioner, to one Thomas Cowley, for goods sold him, without having proved, or shewn that the original was lost or destroyed: that the copy of said receipt was read from the county record, although the counsel for petitioner strongly objected thereto: that one Charles Roe was introduced and sworn as a witness, on the trial of said issue, and did give evidence, which evidence was, that the petitioner did purchase, from Tufts and Reed, on the 12th of May, 1821, goods to the amount of \$184 51, on a credit of twenty days, upon which testimony the counsel for the petitioner's creditors relied before the Jury, for the establishment and support of the said suggestion of fraud, and the Jury returned a verdict of guilty, with a recommendation of petitioner to mercy."

Upon these statements the petitioner proceeds to allege, that the proceedings and verdict of the Court below are contrary to law: 1st. "Because the Court permitted illegal evidence to go to the Jury: 2d. Because the verdict of the Jury is repugnant to the issue and contrary to law, and 3d. Because the Jury should have found fraud or no fraud." The petitioner relying upon these statements, allegations and reasons, prays for the writ of \*certiorari.

Subsequent to this application, however, for the writ of certiorari, to remove this cause before the Superior Court, an attempt was made, and on my suggestion, to obtain from the Inferior Court a new trial, upon the errors assigned in the petition, but more particularly upon the grounds, "That the verdict of the Jury, did not find the issue, according to law, but was repugnant thereto: that the said verdict of the Jury is "guilty," and has received the same force and effect, as though it alleged a fraud against the said Matthew Simpson: that the confinement of petitioner, under the verdict, is contrary to an Act to carry into effect the 7th Sect. of the 4th Article of the Constitution." The justices before whom the issue was tried, received this petition or motion for a new trial, and passed upon it the following order: "Upon reading the foregoing petition, we are of opinion, that a new trial ought not to be granted, and the same is hereby refused."

(Signed)

THOMAS N. MOREL, J. I. C. C. C.  
GEO. L. COPE, J. I. C. C. C.

It is obvious that the errors and irregularities stated in the petition to this Court, for a certiorari, and in the subsequent motion and application to the justices for a new trial, afford sufficient bases for granting it. The inadmissibility of the copy of the receipt, without notice to produce the original, or proof of its loss or destruction, or other equivalent secondary evidence, connected with the finding of the Jury, which is irreconcilable with the issue, (and operating as it does so penally, it ought to have followed the terms of the statute,)—these, I say, independent of other grounds, were of themselves sufficient in *favorem libertatis* for a re-investigation. This

\*Writ of Certiorari—Exception—A *certiorari* may issue without exceptions having been taken, unless in case of *certiorari* to the "Inferior Court" which is alone referred to by the statute. *Roser v. Marlow*, R. M. Charlton 542, citing principal case.



Court cannot believe, that the Honorable justices refused a new trial for the insufficiency of the reasons assigned, but must have done so under an impression, I find pretty generally imbibed, that the Inferior Court has no power to grant a new trial. I

114 am referred to no opinion of this Court, on \*record, denying this among the other concurring powers of the Inferior Court, and I know not how such opinion could derive authority from our Constitution and laws, or by analogy even to British jurisprudence. The 3d Art. as amended of the Constitution, Sect. 1st, divides the judicial powers of the State among Superior Courts, and such inferior jurisdictions as the Legislature shall from time to time ordain and establish—except cases “respecting titles to land,” the “Inferior Courts shall have cognizance of all other civil cases.” Throughout this article, “Inferior Courts” are contradistinguished from inferior jurisdictions, or judicatories—the former derive their birth and powers, as to “all the civil cases,” from the Constitution, the latter are to trace their parentage to an ulterior subordinate establishment by the Legislature. If the Inferior Court then, has a constitutional cognizance of, and concurrent jurisdiction with the Superior Court, of “all other civil cases,” it results, that it possesses all the incidents and powers of the Superior Court, in the investigation and determination of causes, of which, it can take cognizance. In this respect, it is analogous to the Court of Common Pleas of England, in its relations to the King’s bench. There is no greater limitation, upon its authority, in the trial of causes, which may be constitutionally brought before it, than we find imposed on the Court of Common Pleas. It consequently possesses as ample jurisdiction and discretion, in refusing, or granting, a new trial. It is this power supposed to be vested anew by the declaration of English authorities, and particularly the elder, that a new trial cannot be granted by an Inferior Court. (Salk. 650; Str. 113; Sayer, 203; Salk. 201.) A reference to the division of the English Courts, and the subordination of one Court to another, according to Hale’s An. and adopted by Bacon, will clearly shew, that the Inferior Court, to which the inhibition to grant a new trial is directed, cannot apply to our constitutional “Inferior Court.” The division of the English Courts is, into such as are of record, and not of record; and those of record, into such as are

115 supreme, \*superior or inferior. The Supreme Court of the Kingdom is the high Court of Parliament—Superior Courts of record are, 1st. Those that are more principal, and less principal. 1st. The more principal ones. 1. The Lord’s House in Parliament. 2. The Chancery. 3. King’s Bench. 4. Common Pleas. 5. Exchequer, &c. The less principal are Goal delivery, Oyer and Terminer, Assize, Nisi Prius, &c. The Inferior Courts of record, “as ordinarily so called, are Corporation Courts, Courts Leet, and Sheriff’s Tourn,

&c.” Courts not of record, are the Courts Baron, County Courts, and Hundred Courts, &c. Now, our Inferior Courts, invested as they are, as Courts of record, with the high and important powers and attributes delegated by the Constitution and laws, are, as distinguished from other inferior judicatories, and according to the English division and classification, Courts “more principal,” because they have an amplitude of jurisdiction analogous to the English Court of Common Pleas, which is a Court “more principal,” as designated in the English division. It follows, and to my mind as an irresistible conclusion, that our Inferior Courts possess the power of granting new trials. It is a doctrine, which to me, seems to teem with absurdity, that a Court possessing, as the Inferior Court does, concurrent power with the highest tribunal of the State, in the trial of civil cases, to any amount, and an importance as it may relate to principle, is notwithstanding fettered in its authority and discretion to award substantial justice, upon the manifest errors of law and fact, of the first verdict. The inhibition of the English authorities has no applicability. It will be found to extend to very Inferior Courts of record, or not of record. As illustrative of this proposition, I shall advert to two or three cases generally relied upon, in support of the doctrine. The first is the case of Dem. Regina v. Hill, et al. (Salk. 201.) “Judgment was given in the Town Court of Bristol, and costs taxed and a sci. fa. taken out against the bail, and a year afterwards the Court granted a new trial, and set aside the first judgment, and

116 an attachment was \*granted against the Judge for this cause.” (Perk. 550; S. C. 2 Salk. 650; S. C. 3 Salk. 363; Holt. 421.) “Yorke removed for a Mandamus to the Judge of the Court of Sandwich, to give judgment upon a verdict, though he had granted a new trial for excessive damages, without payment of costs. And he insisted that a Judge of an Inferior Court cannot grant a new trial: and to that opinion the Court inclined.” Brooke v. Ewer and ux. (1 Str. 113). It will then be perceived that the Inferior Courts, to which the English authorities deny the power of granting a new trial, are similar in their functions and organization to our subordinate Inferior Courts of record, and not of record—such as Corporation Courts, Justice’s Courts, Courts Martial, and other inferior judicatories ordained and established by the General Assembly. Having endeavored to remove, and I hope satisfactorily, the doubt, if it existed, on the minds of the justices, another application to that Court may, perhaps, be attended with better success. Within any reasonable time after the verdict of the Jury, (particularly as an extra session of the Court is held, and the Jury impaneled for the special purpose of trying the issue of fraud,) to the motion for a new trial may be made, and upon its being granted, it is perfectly competent for that

Court to assign a convenient time, and direct another Jury, to be drawn for the second trial. This effort is due to an unhappy fellow creature, who is doomed to perpetual imprisonment, if another investigation should confirm the verdict under which he is now confined. This being the destiny which awaits him, the humanity of the Court will surely avail itself of any legal grounds which may possibly in its developments entitle the prisoner to the benefit of the insolvent act. I am satisfied a new trial ought to be granted, and if it is refused under all the circumstances suggested, it will become my duty to find one remedy for a case, which without the interposition of this Court is deprived of one. That remedy, will, under my present impressions, be the writ of Mandamus, directing a new trial upon the grounds stated in the petition and motion of the prisoner. I hope, however, that a reconsideration of the justices will prevent any further application to this Court. The rule nisi for the certiorari must be discharged, and upon some of the objections urged by the counsel for the creditors. I still maintain the distinction between the constitutional and judicial writ of certiorari. The former is only applicable to the errors of inferior jurisdictions, other than "Inferior Courts;" the latter is the legislative remedy for the correction of errors of Inferior Courts, as before contradistinguished from Inferior Judicatories. A petition stating in extenso the errors of the Inferior Judicatory, and verified by the applicant, will upon such terms, as the circumstances of the case may require, such as payment of costs and giving security, obtain a rule nisi, upon notice to the opposite party, or, if the exigency of the case should demand a more energetic and speedy proceeding, an immediate granting of the certiorari. The principles and the exigencies which influence a Court of chancery in granting injunctions, will be good guides for this Court on applications for the constitutional writ of certiorari, the objects of both remedies, being very similar. The judicial writ of certiorari is exclusively for the correction of errors of the Inferior Court,—that Court next in dignity to the Superior Court. In the exercise of this power by the Superior Court, the party applying for the certiorari must shew that he has complied with the preliminary measures of taking exceptions, having them over-ruled, and giving twenty days notice. It is also required by Act of General Assembly passed 16th December, 1811, payment of costs which may have accrued on the trial below, and sufficient security for the eventual condemnation money, or any future costs which may accrue. These latter requisites are in common with every species of certiorari, constitutional or judicial, but the necessity of exceptions and twenty days notice are only requisite on applications for certioraris to the Inferior Courts, and no other Courts can be implied in the Judicial act of February 16th, 1799,

Sect. 54, because the Judge of the Superior Court is commanded upon deeming the exceptions \*sufficient, forthwith to issue a certiorari directed to the Clerk of such Inferior Court. This certiorari cannot therefore issue to an inferior jurisdiction not having a Clerk. Hence the correctness of the exposition, establishing the distinction as contended for, between the constitutional and judicial writ of certiorari. I hope this subject is now at rest and that I have rendered myself sufficiently intelligible to silence further explanations in the distinction. In this case no exceptions having been taken, or notice given, and other requisites complied with in terms of the acts of 1799, and 1811, I am compelled to discharge this rule, and it is accordingly discharged.

Rule for certiorari discharged.

# 119 \*Ex Parte Rosetta Ralston.

July, 1821.

**Infant—Custody\*—Guardian.**—Where it appears that the grandmother of an infant of tender years, is unable properly to maintain and educate her, the Court on the application of the guardian of such infant, will direct her to be delivered to him, she being too young to make a proper election.

**Same—Same.**—Where an infant is of sufficient discretion to make a free and unbiased election, the Court will permit her to go where she pleases.

By CHARLTON, Judge.

This is an application by the guardian of the infant for the possession of her person, for the purpose of better care and education, than she can now receive from her grandmother, Mrs. Duke, to whom the writ is directed.

The infant is only seven years old, and cannot make a free and unbiased election between her guardian and grandmother. Upon different circumstances, this Court upon the authority adduced, would permit the infant to go where she pleased. The grandmother is to have access to the infant on her request, and at convenient periods.

It is Ordered, that the infant Rosetta Ralston, be delivered to the custody of her guardian, John Shellman.

# 120 \*The State v. Henry J. Howell.

July, 1821.

**Criminal Law—Fugitive from Another State—Detention.**†—A person charged with a felony in another

\***Infant—Custody—Habeas Corpus.**—The writ of *habeas corpus* at common law will apply, though there be strictly speaking no illegal restraint and confinement of the infant, and the court will determine under this application the right of custody. To this point, the principal case is cited in Matter of Mitchell, R. M. Charl. 491.

†**Criminal Law—Fugitive from Another State—Detention.**—A fugitive from justice, from another state, may be arrested here, and, on sufficient evidence of guilt, be detained in custody for a reason-



State, and fleeing to this, may upon a principle of comity between sovereign States be detained for a reasonable period, for the purpose of affording an opportunity to the proper authority, to demand the prisoner.

**Same—Felony—Bail—Discretion of Court.**—Where a felony of a high grade is charged upon a prisoner, it rests in the sound discretion of the Court, whether he shall be admitted to bail, and where on such a charge, the affidavits against him are very positive, and there are no extrinsic circumstances in his favor, bail will be refused.

By CHARLTON, Judge.

The prisoner being brought up by the writ of habeas corpus, D'Lyon moved for his discharge, upon the ground:

1st. That the offence charged was committed, it committed at all, in the State of South Carolina—and that therefore, the prisoner could not be detained, but upon the requisition of the Governor of that State for the prisoner, as a fugitive from justice—and if this objection was over-ruled, then that the prisoner was entitled to be bailed—to answer to any offence charged to have been committed in the State of Georgia.

On the first ground, I am of the opinion, that a person charged with a felony in another state, and fleeing to this, may upon a principle of comity, which obtains in such cases between sovereign States, be detained for a reasonable period, for the purpose of affording time for an application to the Governor of the State, where the felony is charged to have been committed, to make the demand as stated in the Constitution. Not only the morality and reasonableness of the thing, as involved in the general principle of comity, but the cases referred to by the States' counsel, support the opinion.

2d. As to application for bail: the 121 prisoner is charged with \*having in his possession a counterfeit Bank Bill, with an intention to pass the same in this State. By the 53d Sect. of the 6th Division of the penal code of this State, that offence is punished by imprisonment at hard labor, for any period of time not exceeding fifteen years. In this high grade of felony, whether the prisoner shall be bailed or not, rests in the sound discretion of the Court. The

able time, in order to give the foreign executive an opportunity to make a regular demand for his delivery, under the constitution of the United States. *State v. Loper*, Ga. Dec. pt. 2, p. 33.

**\*Same—Bail—Discretion of Court.**—The judges of the superior court have a discretionary power (governed by the circumstances of the case), to bail in all cases whatsoever. *State v. Abbott*, R. M. Charl. 244.

Where it appears upon a charge of homicide that there are favorable circumstances in the case, and there is a presumption that the prisoner has been guilty of manslaughter only, the court will exercise its discretion by admitting bail. *State v. Wicks*, R. M. Charl. 139.

The granting or refusal of bail in criminal cases is a matter resting in the sound discretion of the court, to be exercised or not, according to the facts of each particular case. *Lester v. State*, 33 Ga. 193, citing *Corbett v. State*, 24 Ga. 392.

positiveness of the affidavit in this case, and there being no extrinsic circumstances in favor of the prisoner, will not permit me to accede to this branch of the motion, particularly as the proximity of the session of the Superior Court, excludes the idea of any hardship or rigour, in continuing the imprisonment.

It is ordered, that the prisoner be remanded and detained in custody, to answer to such bill of indictment as may be preferred against him, at the next Superior Court.

Habersham, Davies & Berrien, & Bond, Sol. Gen. for the State—Wilde, Gordon & D'Lyon, for prisoner.

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**\*The State v. Matthew Simpson.**

January, 1892.

**Insolvent Debtor—Discharge—Fees of Confinement**

**—How Paid.**—Where an insolvent debtor is discharged in the manner prescribed by the laws of Georgia, the fees of confinement must be paid out of the debtor's property, which he had assigned for the benefit of the creditors. If there is no such fund, the fees must be paid by the committing creditor.

**Same—Conviction of Fraudulent Practices—Confinement.**—The confinement of an insolvent debtor, convicted of fraudulent practices, under the insolvent laws of Georgia, is merely a continuation of the confinement under civil process; it is not a punishment inflicted for a crime.

**Same—Same—Discharge.**—If the creditor at whose instance such debtor so convicted, is confined, refuse to pay his jail fees, he will be entitled to his discharge.

By CHARLTON, Judge.

It appears from the return to this habeas corpus, that the prisoner, Matthew Simpson, was confined in the common prison of Chatham county, by process issuing from the Court of Common Pleas and of Oyer and Terminer of the City of Savannah; that application was made by him for the benefit of the Insolvent Acts; that fraud being suggested, and an issue made up, and tried thereon, the Jury returned a verdict of "Guilty," in consequence of which, the defendant was remanded.

He is now brought up before me by writ of habeas corpus, and D'Lyon, his counsel, moves for his discharge, upon the grounds, that the jail fees have not been paid, and that the creditors, or the principal creditors, under whose process he is still confined, consent to his discharge, upon the conditions, that they shall not be made liable for expenses, costs and charges incurred: and that they, the creditors, (Cumming and Gwathmey,) are permitted to reserve to themselves the right of taking judgment against the prisoner, on a suit pending, and to be determined in January next. Gordon and Pooler, attorneys for creditors, also expressed a willingness for the discharge of prisoner, provided it can be

123 \*effected, upon legal principles. I have to observe, that this expression of willingness for the discharge of the

prisoner, with its restrictions, amounts to nothing; for in confining the Court to legal principles, it leaves no room for the exercise of the humanity of this Court, or the creditors. If the case is to be decided upon legal principles, it is to be decided as all other cases are, or should be decided; and if the creditors feel commiseration for, and a disposition to set the prisoner free, the illustration of their mercy through me, must have no conditions imposed. I can only then advert to the motion of prisoner's attorney, founded on the non-payment of jail fees, as expressed in the return of the Jailer to this writ. On the discharge of an insolvent debtor, the true exposition of the Act of the General Assembly of 1801, is, that the fees of confinement are to be paid out of the debtor's property, placed by assignment, in the hands of the trustee or trustees, for the benefit of all the creditors. The last section of the Act, must contemplate and intend, a payment of fees by the person, at whose instance such insolvent person is confined, where the debtor exhibits no schedule, or surrenders no property, out of which the fees can be paid. In this case, the debtor failed in his application for the benefit of the Insolvent Acts, and he was remanded under a verdict of a Jury, that he had been guilty of fraud. The effect of this species of imprisonment, in relation to the payment of jail fees, is then the only subject for consideration, on this motion for the discharge of the prisoner. The prisoner is now placed in a situation, which deprives him of any further application for the benefit of insolvency; and the result is, that his confinement must be continued until his debts are discharged, or a sponge put upon them, by the unqualified consent of his creditors. This confinement, is not however, to be considered as a punishment inflicted on a criminal conviction. It is a continuation of the confinement under civil process, and cannot assume the aspect of a crime, technically viewed, in any one of its advances.

The onus of jail fees, does not therefore fall upon the public. \*The creditors, at whose suits the prisoner is confined, are now responsible for his fees: and his imprisonment, will become illegal, so soon as those creditors refuse to discharge them. These fees, I think, are still paid over to the corporation of Savannah, or accounted for to that body, by the Jailer. If so, a demand made of fees by the Recorder, on the creditors, and a signification of refusal to pay them, through him, will entitle the prisoner to his discharge, and it will be granted by this Court, under its present impressions of the law.

D'Lyon, for prisoner—Gordon & Pooler, for creditors.

125 \*John Bolton, et al. v. Robert Flournoy.

January, 1822.

Chancery Practice—Bill—References.\*—The refer-

\*Chancery Practice—Jury.—Although the practice

ences of a bill in chancery are a part thereof. Where a bill in chancery, seeking an injunction, refers to another bill pending in same Court, in pari materia, and intimately connected with it, the Court may invoke the allegations of the latter bill and the answer thereto, in deciding upon the prayer of the former.

Same—Powers of Superior Courts.—The powers of the "Superior Courts" of Georgia, as Courts of equity, are co-extensive with those of a Court of chancery in England.

Same—Jury.—Is a Jury required by law in a chancery case in Georgia.—Quære.

Same—Appointment of Master.—The Judge of the Superior Court acting as Chancellor, has the power to appoint a master in chancery, pro hac vice.

Same—Reference to Master.—And where the title is in dispute, and facts are necessary to be ascertained to determine such dispute, it will be referred to such master to examine and report thereon.

By CHARLTON, Judge.

This is a bill for an injunction, and it prays also for general relief.

I shall only give the allegations, as far as they are necessary for the purpose of this opinion. It is stated, that the complainants to this bill, are John Bolton, Curtis Bolton, Richard Richardson, and Durham T. Hall, trading under the firm of R. Richardson & Co.: that his co-partnership, a commercial house of this city, borrowed of the defendant, on the 27th of March, 1818, the sum of \$15,879 79, of Mississippi stock, and gave an acknowledgment of this loan, promising to return it on demand, after thirty days notice, or to pay interest for it, at the expiration of the demand: that one of this firm, the complainant, John Bolton, was the proprietor of lots Nos. 1, 2 and 3, in 3d Tything, Anson Ward, in this city, with the buildings and improvements thereon: that Richard Richardson, (another of the complainants,) as

in Georgia is to associate a special jury with the judges of the superior court in the determination of chancery causes, there is no law which imposes a necessity of such association. McGowan v. Jones, R. M. Charl. 184. In this case, JUDGE CHARLTON, said: "I have had occasion before to decide, that the laws of this State are silent on the necessity of a special, or other jury, in the determination of chancery causes (*Bolton v. Flournoy*, 138 *supra*). The association of a jury with the court, in such cases, is merely sanctified by the practice, which has long obtained in this, and I presume the other districts of this State, under the impression perhaps, that it was a positive or implied legislative requisition, or perhaps, the general cherished predilection for the trial by jury, in causes of every description. *Communis error facit jus*, as a maxim bearing upon this subject, I shall not be the first judge to subvert; and until the pleasure of the Legislature is expressed, I shall permit, as heretofore, the co-operation of a special jury, as required by a rule of this court, in the trial of equity cases." See note by editor of original edition appended at the end of the principal case.

A jury is a part of the chancery system of Georgia. *Hunt v. Formby*, 43 Ga. 79.



agent of the complainant, John Bolton, (and it is added with \*his approbation,) in November, 1819, entered into a contract with the defendant, Robert Flournoy, for the sale of the lots and buildings, and the said defendant agreed to purchase, for the price of seventeen thousand dollars—the loan of Mississippi stock to be taken as part payment, and the residue to be made up from proceeds of the sale of cotton, shipped to Liverpool, on account of defendant, by complainants, and other funds in the hands of complainants, belonging to defendant: that the complainant, R. Richardson, after entering into this contract, communicated what he had done to his partner, (and one of these complainants,) John Bolton, who then resided at New York: that John Bolton executed titles, in which his wife joined, and returned them to the complainant, R. Richardson, for the purpose of having them delivered to the defendant: that under the impression that the contract would be complied with by defendant, the complainants, as a firm, considered the Mississippi stock, as the individual property of the complainant, John Bolton: that on the re-transmission of the titles from New York, executed by the complainant, John Bolton and wife, the defendant, Robert Flournoy, refused to accept them: that the defendant has sued the complainants, and recovered judgment against them, for the amount of Mississippi stock and proceeds of Cotton, which sums united, are not sufficient to pay for the property purchased: that John Bolton hath also filed a bill against defendant, praying a specific performance of the contract and agreement entered into with the complainant, Richard Richardson: and that the complainants have applied to, and requested defendant to suspend proceedings on his judgment, until the final decision of the bill of John Bolton, now pending, for a specific performance, upon which decision depends, (as is alleged,) the benefits of defendant's judgment.

Upon these statements, the bill prays for an injunction to restrain further proceedings upon the verdict and judgment of defendant; and rests its application 127 upon the interrogations: \*whether the complainant, John Bolton, hath not filed his bill for a specific performance of the complainant Richardson's contract? and whether that bill is not now pending?

Without further reference to this contest, what are the inquiries that now necessarily present themselves? I presume they are these:—is a bill thus alleged to have been filed by one of the complainants for specific performance, pending in this Court? and is it true, that it is so intimately connected with this prayer for an injunction, that without its invocation, there would be no basis for this application, for an injunction? This bill declares, that such bill for specific performance is pending; and that a decision upon it, and upon it alone, will depend the justice and equity of the defendant, to avail himself of the verdict and judgment

at law. The fact is, that such bill for specific performance is pending, and the other inquiry as to the intimate, inseparable connexion between it, and this bill for injunction, is now to be considered and answered. I answer this inquiry then, by plainly saying, that I know not by what possible means, I can find access to the doctrines which are to direct me to the equity claimed by complainants, without asking information from one of them. The firm of Richardson & Co., is composed of the complainants of this bill. Who are they? John Bolton, Curtis Bolton, Richard Richardson, and Durham T. Hall. A judgment is obtained against this house, upon a loan and debt for which all are liable. But, this liability assumes a new, and different aspect in chancery—it is thrown upon the shoulders of one of the co-partnership, because, the defendant in this proceeding, has contracted and agreed to take the separate property of John Bolton, one of the firm, in payment of the debt due by the firm. This agreement was anterior to the judgment. The defendant's conduct was, therefore, in violation of good faith, in prosecuting his claim to verdict, and we, the firm, are entitled to injunction, until he complies with the terms of his agreement with our Mr. John Bolton, 128 \*through our Mr. R. Richardson.

This is substantially the argument of the bill, filed by Richardson & Co.—and it consequently admits, that without reference to the bill of injunction of Bolton, for specific performance, there can be no foundation for this bill of complainants. Authorities are cited to shew, that you cannot travel de hors the allegations of the bill, and denials of the answer in granting injunction; and therefore, this bill, notwithstanding its reference to the bill of John Bolton, for specific performance, is to stand, or fall, by its own isolated assertions. No case goes to this extent, nor could it, because, the references of a bill are parts of the bill, and are among its vital principles. In this case, unless the bill of R. Richardson & Co., for injunction, and general relief, and the bill of John Bolton, the co-partner, are considered in *pari materia*, or explanatory of, and auxiliary, each to the other, the bill of R. Richardson & Co., is an ignis fatuus leading and bewildering us, we known not where, until the beacon of John Bolton's bill appears, and directs us to the port of destination. There can be no injunction, unless John Bolton, *prima facie* is entitled to specific performance. This was the reason for granting the rule nisi, and this, upon the whole, must be the reason for rendering it absolute. This bill has no other expectation of the relief solicited, than an association of the allegations of the two bills; and so considering it, I must necessarily look to the very object upon which it primarily relies—and solely relies, for the refusal of the motion submitted, for a dissolution of the injunction—and that object is, the bill for specific performance. This bill of the partner,

John Bolton, for specific performance, alleges, (among other matters, not material now to advert to,)—that Richard Richardson, in behalf of this complainant, entered into a contract with the defendant, Robert Flournoy, for the sale of the lots and improvements, as mentioned in the bill of R. Richardson & Co.: that this complainant approved the contract—signified his approbation by letter—and in the same communication, expressed his readiness to execute titles, whenever they should be prepared, and forwarded to him. The complainant admits the previous loan of Mississippi stock, upon the liability of the whole firm, as stated in the bill of R. Richardson & Co., but that it subsequently became his individual property—by the agreement to transfer his town lots and improvements, in discharge and payment of the loan of Mississippi stock to the firm—for the value of which stock, he became a creditor to the firm, and that, after entering into the contract (as set forth in the bill of R. Richardson & Co.) the defendant, R. Flournoy, “in pursuance thereof, took possession of said lots, and the appurtenances.” Confined as I am, as it will soon appear, to a limited discussion of this case, I deem it unnecessary, to notice any further charges or allegations of this bill.

The connexion between the two bills will now be more clearly perceived, and consequently, the impossibility, of considering alone the bill of Richard Richardson & Co. for the purposes that bill has in view. The bill of R. Richardson & Co. prays for an injunction, upon the ground, that the defendant has been paid the debt for which he has obtained a verdict, and now seeks to make the firm liable; and it refers to the bill of the co-partner, John Bolton, to shew, how that debt has been extinguished, and adds, that any hope, which the defendant can have, of obtaining the benefits of his recovery at law, essentially, and entirely depends upon the final decree of this Court on John Bolton’s bill for specific performance. We are therefore, as before stated, compelled to invoke the allegations of this bill for specific performance, in deciding upon the charges of the bill of R. Richardson & Co.—and if the allegations of the bill of R. Richardson & Co., force upon us this necessity, there is no abandonment surely, of the fundamental principle of chancery practice, that in granting injunction, we must keep within the allegations of the bill praying for injunction. Having settled this point—our attention is now called to the answers of defendant. To the bill of R. Richardson & Co. he answers, that R. Richardson & Co. some time in July, 1819, borrowed the sum mentioned in their bill, in Mississippi stock, upon the terms also mentioned in that bill: that R. Richardson & Co. were further indebted to defendant, on an unsettled account for cotton sold; that to recover the whole, defendant instituted a suit and has obtained a verdict: that in November, 1819, defendant had a conversation with Richard Rich-

ardson, concerning the purchase of lots Nos. 1, 2 and 3, in Anson Ward, in the city of Savannah, with the improvements thereon, and six feet of ground, to be taken from the lot occupied by Mr. Alex. Irvine: that this defendant consented to discount \$17,000 due him by R. Richardson & Co. for this property, (represented to be the property of John Bolton,) and the defendant, expecting to get good, legal, indisputable titles for the same, in fee simple: that at the instance of R. Richardson, the defendant occupied a part of the premises: that discovering from an examination of the will of John Bolton, (which he makes an exhibit to this answer,) that John Bolton had only a life estate in the property, he, the defendant, declined entering into any written agreement, with R. Richardson, for the property thus intended to be purchased, and would have refused any title from John Bolton, if it had been tendered—but that no such title has been tendered to defendant or, (as informed) to his attorney. That he admits a bill has been filed by John Bolton, for a specific performance of the alleged contract, entered into between the defendant and R. Richardson; that he has filed his answer to that bill, and was anxious during the May Term of this Court, to have had a decree on the merits of the bill and answer; but, that complainant did not proceed, and refers to this bill and answer to shew, the futility of any expectation of specific performance. The answer to the bill for specific performance, is with few additions, mutatis mutandis a transcript of the other. It urges, that the occupation of the premises, and the very ground work of any arrangement with R. Richardson, was under this impression

—indeed the conviction—that indisputable titles could be given;—and that the defendant had no idea of any difficulty whatever, with regard to the titles, “otherwise, the defendant would have had nothing to do with the property.” He admits the judgment at law. Upon these pleadings the complainants R. Richardson & Co., have been required to shew cause, why the injunction should not be dissolved.

It was contended by the solicitors for defendant, that it was competent for them in shewing cause why this injunction should be dissolved, to range through the whole ground of equity, occupied by these bills and answers. Under this impression, the case was argued by Mr. Bulloch, and as the basis of his argument, he assumed three positions. 1. There is no contract exhibited, or evidence of contract furnished by bill and answer. 2. If there were evidence of contract, it would be unavailing, because the complainant John Bolton, has not a clear indisputable fee simple title to the property, which is attempted to be transferred in his behalf, by such contract. 3. Equity will not enforce the completion of an agreement, if there be substantial doubt as to the goodness of the title of vendor. The assumption of these grounds and propositions threw the whole case upon the



Court, and imposed upon it the necessity of deciding upon the effect of the agreement, in relation to the Statute of Frauds and Perjuries, the perplexed and variant adjudications as to part performance—and when all these points shall have been disposed of—the still more involved and intricate question, as to defectiveness of titles. The further advances of the argument of the defendant's counsel in extenso, was arrested by Mr. Harris (one of solicitors of complainants,) by a suggestion, which he attempted to illustrate and establish by authorities, that the main, and principal inquiry as to validity of title, can only present itself to the consideration of a Chancellor, upon the report of a master, after reference to him, in the usual practice of a Court of equity: and that if such reference and report

were not sanctioned by the usages  
132 and practice \*of the equity side of this Court, still the discussion in extenso, would lead to a judicial usurpation, upon the rights of a special Jury,—because, the discussion upon all the equity of the bill and answers, would involve the whole merits of the case, and would therefore demand a final decree, but which decree according to the judicial system of Georgia, requires the aid and co-operation of a special Jury. He contended, (and it was afterwards enforced by Davies & Berrien,) that if the validity or defectiveness of title were to influence the Court, even in the opinion it might express, or the order it might give on this motion, still, whether that title was valid, or defective, could not be conclusively ascertained by the bills, the answers, or the exhibits, because, the condition and capacities of the parties, might be very variant and different now, (as that condition and these capacities, operated upon the tenures and interests created by Robert Bolton's will) from what they once appeared, or, might appear at the plenary hearing; and that whatever might have been the defectiveness of title, at the epocha of the agreement, or at any other time during the occupancy of the property, or a part of it, by R. Flournoy—it was sufficient, for all the purposes of equity, contained in the bill for specific performance, to tender a good title at the period of the decree. Mr. Harris, asks, (in support of his suggestion, that the practice in chancery required a reference to a master,) "is there evidence in the bill, or answer, that the title is good, bad or doubtful?" The defendant attaches to his answer, a will of Robert Bolton, which he charges, gives only a life estate to John Bolton, in right of the interest vested in his wife, the devisee—for, this is an executory devise, it is a fee limited on a fee, and upon the extinction of heirs of Sally Bolton, the fee simple interest vests in the heirs of another daughter.

How is this Court to ascertain from the bill and answer, the facts necessary for the ascertainment of the interest John Bolton

has in the property, even under the  
133 construction given to the \*will, by

defendant's answer? Can this Court know judicially, that John Bolton, his wife or children are living—and that the other daughter of Robert Bolton is living, having children, in whom this expectancy may ultimately vest? These facts, are not disclosed in the pleadings. If the Court therefore has no judicial notice of the facts—and particularly of the persons in esse for whose benefit the limitations in the will of Robert Bolton are intended, a fortiori, the Court can have no personal knowledge of these facts. It is a matter therefore of investigation and evidence, beyond the allegations of the bills, and the charges and exhibits of the answer, and if thus dependent upon ulterior investigation, for the purpose of settling, and ascertaining extrinsic facts and circumstances—the expediency, the propriety, and necessity, of a reference to a master, or other officer, must be strikingly obvious;"—and numerous authorities, are cited to shew, that a Chancellor of England would consider the order a reference, as a matter of course.

I think, this is a fair representation of Mr. Harris' argument, on his motion or suggestion for a reference to a master in chancery.

Law and Jackson, associated with Mr. Bulloch, as solicitors for defendant, repel this motion for a reference, by contending, that the appointment of a master in chancery, cannot be exercised by this Court, and there can be no such officer of this Court, with the functions claimed for him, under any construction of the positive, or adopted jurisprudence of Georgia. Admitting the history of these officers in chancery, as detailed by Harrison, (the authority referred to,) it is now for the first time to be considered, whether such an officer, can, under the equity jurisdiction of a Superior Court of Georgia, be appointed pro tempore, for the discharge of duties, that are usually imposed upon him, by the chancery jurisdiction of England. Time is not allowed me, nor does the nature of this case, at

this period of the discussion require,  
134 \*that I should detail the powers of a Court of equity in Georgia, as exercised by the Superior Court, with all the incidents of these acknowledged powers. In reference to the Judicial Act of this State, I can only say, that the powers of the Superior Court, cover every foot of ground, that a Court of chancery can occupy in the exercise of its ordinary, or extraordinary authority, as contradistinguished from a Court of common law. The Judicial Act of the State, declares, that "the Superior Courts in the several counties shall exercise the powers of a Court of equity in all cases, where a common law remedy is not adequate, to compel parties in any cause, to discover on oath all requisite points necessary to the investigation of truth and justice, to discover transactions between co-partners, and co-executors, to compel distribution of intestate's estates and payment of legacies, and to discover fraudulent transactions for

benefit of creditors, and the proceedings in all such cases, shall be by bill, and such other proceedings as are usual in such cases, until the setting down the cause for trial." Now, this Act clothes the Judge of the Superior Court most completely with the broad and full mantle of a Lord Chancellor, so far, as that habiliment may be compatible, with our political and judicial relations. It gives the ample powers of a Court of chancery, in all cases where a common law remedy is not adequate, and as there are many and other cases of that description, I consider the particular enumeration of powers, as inserted, *ex abundanti cautella*, and not at all restrictive of the general and sweeping authority, before designated. And this I believe, and hope, has been the exposition uniformly given. There is no legislative mandate for the co-operation of a Jury in a chancery case—unless it is implied in the term "trial," which necessarily conveys the intention of the Legislature, as to the interposition of a Jury. But, shall such an implication, in opposition to the full powers, given to the Superior Court as a Court of equity, and the direction that the proceedings shall be, as

are "usual in such cases," strip the Judge of the Superior Court of these powers which had been before expressly delegated to his department? It is, then, fairly a matter of doubt, whether a Jury is required in a chancery cause. But it may be said *communis error facit jus*, and the common error has been to give this co-equal power to a special Jury, whose aid is deemed essential to the validity of a final decree. A Jury is an anomaly in a Court of chancery, and in the language of our Judicial Act, is not usual in "such cases." What is usual in "such cases?" Why to refer the facts to a Court of common law for trial—and is there any positive inhibition in the judicial system of Georgia, to interfere with that course of proceeding—thereby preventing the unnatural amalgamation, which now exists of chancery and common law jurisdictions? I think not. But it is not my intention to disturb the belief, which has been impressed upon the public mind, that a special Jury is required by law in an equity case. It is required by a rule of Court—and required by this rule of my predecessor, in obedience probably, not to any interpretation of the law of the State, but to the received and adopted practice of the Court. In this minuteness of discussion, my object has been to shew—that *ex debito justitiæ*, the complainants are not entitled to any rights, they have insisted upon in relation to a trial by Jury, and that this Court might without infraction of law decree upon the full merits of the case; but another, and principal object has been to shew, that if this Court sustaining a chancery jurisdiction, might dispense with a trial by Jury, where mere naked equitable doctrines were involved, it followed, it was an irresistible deduction, that it possessed all the incidents of a Court of chancery. If therefore, it should become

necessary in aid of the principal powers of this Court, to create a master, with the functions usually attached to his office in the country whence we have borrowed our equity system, I do not hesitate in saying, that this power is incidental to the Court, and that such officer, *ad interim* may be appointed. His functions will of course expire with the purposes, or the case requiring the exercise of his functions, because there is no feature in the organization of this Court, requiring a permanency in his station: and if it did, the Clerk may always be considered as master in chancery.

This brings us to the question, whether this case requires a reference? Mr. Harris, has assigned reasons, why there should be a reference, which reasons have been adverted to. Mr. Law, does not deny the power of a Chancellor to refer, or that it is the general course, but, contends, that a reference has never been made, but where the title was the only matter in dispute. This is the doctrine, if this Court can appoint a master in chancery, which he had before controverted. He cites late chancery adjudications in support of his position. The title in this case, he says, is not the exclusive matter in dispute. There are facts in the bill variant from the admitted facts in answer, and this is illustrated by the fact, charged in the answer, of six feet of ground, in addition to lots, Nos. 1, 2 and 3. Mr. Habersham in reply, afforded the explanation: but I consider the suggestion and explanation as refinements, not interfering with the fact, that stands in the front of this discussion, that the title is in dispute, and may constitute the only pivot upon which the final decree may turn—and that final decree according to the practice of this Court is the result of the conjoint deliberation of the Court, and a special Jury.

A bill is filed for an account,—could it be expected—would it be according to the power given by the judicial system to adopt the usual proceeding in chancery, to submit voluminous and complicated items for the consideration and decree of Judge and Jury? I presume a reference to auditors, would on motion be the inevitable order of the Court: and can there in the nature of things, be any distinction between such reference to auditors, and reference to a master, or a Clerk of this Court, or any other person who may be appointed, to report on the complicated, entangled facts, of a disputed title? The reason

operating in favor of one reference, operates as forcibly in favor of the other. This case may assume an aspect at this period, very different from the aspect assumed on the filing of these bills. The exhibits do not afford all the evidence, the Court and special Jury would require, the former, in delivering its charges, the latter in returning its decree. The complainant (upon which I have formed, and expressed no opinion, but refer to the argument of his advocates), may at the decree perfect, what was before perhaps a defective title:



and this perfection of title may depend upon the persons in esse, objects of Robert Bolton's benevolence. With these views, I shall direct a reference, but upon terms I hope, which will evince an anxiety to accede to the wishes of defendant for a speedy investigation, at a full hearing, and to consult the equity of the case.

It is ordered, that the bills and answers, together with their respective exhibits, be referred to the Clerk of this Court, who is hereby directed to proceed forthwith and without delay, to notify to the complainants and defendant, that he will receive and hear at his office, at a time to be appointed by him, all evidence in aid of, or against the bills and answers, so far as that evidence may relate to the persons named as devisees in the will of Robert Bolton, and the issue of such devisees living, appearing to be entitled to the property in dispute; to report also, with expedition, on such evidence, and on all other matters which may be submitted to him, by complainants and defendant, on the validity, or defectiveness of the title of complainant John Bolton, to the property upon the alleged transfer of which, he seeks a specific execution.

And it is further ordered, that the complainant have leave to file his general replication, and that this cause be set down for a hearing, during (if practicable) the present term, to abide the further order of this Court, as to its continuance, upon the said report of the Clerk—and that this injunction be continued until the said report shall have been notified to this Court as filed, or until \*this Court shall have given its further order, on the motion for a dissolution of said injunction.

For complainants—Harris & Habersham.  
For defendant—Bulloch, Law & Jackson.

By the Act of the General Assembly of Georgia, passed 23d December, 1830—the Judges of the Superior Courts of the counties of Chatham, Richmond and Bibb, respectively, are authorized to appoint a master in equity. As that Act leaves the compensation of the master, to be determined "by the Court and Jury trying the particular cause," it would seem that the doubt entertained by the Court, in the above decision, whether a Jury was indispensably necessary, in a chancery case, under our judicial system, can no longer exist—Vide Acts of 1830, p. 57.—(Ed. of Original Edition.)

### 139 \*The State v. P. L. Wicks.

February, 1822.

**Criminal Law—Homicide—Bail.\***—Where it appears upon a charge of homicide, that there are favorable circumstances in the case, and there is a presumption, that the prisoner has been guilty of manslaughter only—the Court will exercise its discretion by admitting bail.

The prisoner being brought up, his counsel moved that he be admitted to bail

\***Criminal Law—Bail—Discretion of Court.**—See *foot-note* to State v. Howell, R. M. Charl. 120.

upon the grounds, that it appeared from an examination of the affidavits returned, as taken before the committing Magistrate, and the Coroner, that the offence with which the prisoner stood charged was manslaughter, and that if such should not be the impression of the Court, yet there was a presumption of innocence, and many favorable circumstances, which called upon the Court to exercise its discretion, to the extent of the prisoner's application—and that he was prepared to give any bail and security the Court might require.

By CHARLTON, Judge.

There are favorable circumstances in this case, and there is a presumption, that the prisoner has only been guilty of manslaughter, and therefore, supported as I am, by numerous authorities, which, under a similar combination of circumstances, have admitted to bail.

It is ordered, that the prisoner be discharged upon his entering into recognizance before the Clerk of this Court, himself in two thousand dollars, and two good securities to be approved of by the Court in two thousand dollars each, to answer to such bill of indictment as may be preferred against him during the present term.

### 140 \*Joseph Cumming—Plff. in Execution, & Eleazar Early—Claimant.

February, 1822.

**Chattel Mortgage—Failure to Record—Effect as to Purchasers.**—If the mortgagee of personal property fail to record his mortgage, a bona fide purchaser, claiming under mortgagor without notice, will be entitled to retain the property.

**Same—Same—Same.\***—A purchaser for valuable consideration without notice, actual or constructive, will be protected, though he purchase from one who had notice.

**Personalty—Possession—Effect.**—Possession of personal property is prima facie evidence of title.

By CHARLTON, Judge.

The decree, or rather verdict of the special Jury in this case, presents the following facts for the decision of the Court.

"We find that the negro William was levied on by virtue of an execution founded on the foreclosure of a mortgage, from Benjamin W. Leach to Joseph Cumming—that when the levy was made, William was in Early's possession—that Cumming, on the 7th July, 1819, sold the said negro to Leach, and took the mortgage above mentioned, dated 7th July, 1819—that Leach, on the 12th August, 1819, sold the negro to E. Wallen, by bill of sale—that at the time Wallen purchased from Leach, he knew of the mortgage of Cumming, and that the same was unsatisfied—that the bill of Cumming to Leach and Leach to Wallen, were both recorded 16th August, 1819—that Cumming's mortgage was recorded on the 19th

\*So also, a purchaser, with notice, of land covered by an unrecorded mortgage, from a purchaser without notice, will be protected. *Douglass v. McCrackin*, 52 Ga. 592.

January, 1820—that on the 28th December, 1819, Early purchased the said negro from Wallen for a valuable consideration, and without any notice of the existence of Cumming's mortgage. There was no conveyance in writing from Wallen to Early, but the sale was made by parol, and the delivery of the said negro to Early. If upon this finding of facts, the Court should be of opinion that Early is entitled to the negro claimed—then we find the property levied on not subject to the execution—if the Court should be of opinion that Cumming 141 is \*entitled, we find the property levied on subject to the execution, and assess therefor, the sum of \$400 damages and costs of suit. 25th January, 1822.

ALEX'R TELFAIR, Foreman."

The plaintiff in execution, upon whom the burthen of proof lies, according to our judicial system, gives in evidence a mortgage from Leach to him of this negro, thus levied upon to satisfy the execution, issued on the foreclosure of his mortgage, and the question is, whether this lien, of which Wallen had notice, is to affect the proprietary interest of the claimant Early, who had no notice of the incumbrance, and who purchased for a bona fide, and valuable consideration. It is conceded, that Cumming's bill of sale to Leach, and Leach to Wallen, were both recorded 16th August, 1819, and that Leach's mortgage to Cumming was registered 19th January, 1820. The statutes referred to by the attorney for plaintiff in execution, are all calculated for, and intended to prevent fraud, by requiring a registry of the lien or incumbrance. Record the conveyance or mortgage, the world has then notice, and the purchaser pays his money for the property, under all the penalties and consequences of, caveat emptor. As it relates to a chattel, or personal property, like that in controversy—the indicia of title are, possession and bill of sale. Possession itself, is *prima facie* evidence of title, and unless controverted by notice on record, or, other notice, of a better or more legal interest, will protect a vendee for valuable consideration. I say other notice, because any information which may put the vendee on his guard, or suggest the propriety of enquiry, will save and preserve the lien of the mortgage. The records were, at the date of Early's purchase, silent as to this lien, and no other notice was furnished, to awaken suspicion as to Wallen's title.

Upon the clearest principles of law then, the dormant and concealed mortgage of Cumming, (technically concealed, because not registered, or personally communicated,) cannot defeat the validity of the sale and delivery of the negro, from Wallen to the claimant Early—and therefore, it is the opinion of this Court, that the property is not subject to the execution.

142 \*The State v. Calvin and Others.

February, 1822.

Criminal Law—Copy of Indictment—List of Witnesses

—Waiver of Right to.\*—The right of a prisoner under the laws of Georgia, to have a copy of the indictment, and a list of the witnesses who gave testimony before the Grand Jury, is waived by not making the demand before arraignment

Same—Indictment—Indorsement Thereon of Witnesses

—Notice to Prisoner.†—The Court on motion of the Sol. Gen. and upon reasonable notice to the prisoner, (charged with felony or with a crime, which might subject him to penitentiary imprisonment for three years,) will permit the names of witnesses to be indorsed on the indictment, who did not give testimony before the Grand Jury, and such witnesses may be examined before the Petit Jury. But without such notice, such witnesses cannot be sworn or examined.

By CHARLTON, Judge.

Bills of indictment have been found against the prisoners, for offences which may subject them to an imprisonment in the penitentiary, for a longer period than the term mentioned in 16th Sect. 11th Div. of the penal code. That section is in these words: "Every person charged with a felony, or any offence which may subject him, on conviction, to an imprisonment in the penitentiary for the term of three years, shall be furnished previous to his arraignment, with a copy of the indictment, and a list of the witnesses who gave testimony before the Grand Jury."

After the arraignment of these prisoners, their counsel applied for copies of the indictment, as a matter of right, under this

\*Criminal Law—Copy of Indictment—List of Witnesses—Demand Therefor Necessary.—The Georgia Constitution (Code 1895, § 5702) provides that "every person charged with an offence against the laws of this state shall be furnished, *on demand*, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded."

A defendant in a criminal case is not entitled to a copy of the indictment and a list of witnesses sworn before the grand jury, except upon demand. *Bird v. State*, 50 Ga. 585. See also, *Dean v. State*, 43 Ga. 218.

The Georgia Criminal Code 1895, § 945, provides that "every person charged with an offence against the laws of this State shall be furnished, *on demand previous to his arraignment*, with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded."

†Same—Witnesses—Competency—Name Not in List Furnished Accused—Effect.—In *Keener v. State*, 18 Ga. 194, 217, it was held that a defendant in a criminal case is entitled only to a list of witnesses sworn before the grand jury; and that therefore a witness is not rendered incompetent to testify on the trial because his name was not on the list sworn before the grand jury, nor among those of whom the defendant had notice. *LUMPKIN, J.*, who delivered the opinion of the court, citing *Stokes v. State*, 18 Ga. 17, as authority for the decision, said that a different construction had been placed on the section of the penal statute under consideration by JUDGE CHARLTON in the principal case; but, while he admired the humanity of the motive which prompted JUDGE CHARLTON'S interpretation he could not agree therewith; that



section of our penal code. I then was of opinion, that the application came too late, for, though the language of the section was imperative and mandatory upon the prosecuting officer of the State, yet it was a right, *ex debito justitiæ*, only previous to arraignment. In other words, that the prisoners might refuse to be put upon their arraignment until furnished, as this section directs, with "a copy of the indictment, and a list of the witnesses who gave testimony before the Grand Jury;"

143. but that the neglect or \*omission to demand this copy of the indictment and list of the witnesses on the arraignment, was a waiver of the right, and left it discretionary with Mr. Solicitor General, after arraignment, whether he would or would not furnish a copy of the indictment and list of witnesses. This section of the penal code was borrowed from the criminal law of England, in relation to treason; and the opinion I expressed when the application was made in behalf of the accused, has since been strengthened and confirmed by reference to English authorities. By the Stat. 7, W. 3, c. 3, it is enacted—that the prisoner shall have a copy of the indictment—(which includes the caption, but not the names of the witnesses), five days at least before the trial, that is, upon the true construction of the Act, before his arraignment; for then is the time to take any exceptions thereto, by way of plea or demurrer. (Fost. 229, 230; Dougl. 590.) By consenting to the arraignment, the prisoner

the wording of the statute—from which the intention of the legislature was to be gathered—was too obvious to admit of any such construction, and that it was very clear that all that was designed was to let the accused distinctly know before arraignment the charge brought against him—the prosecutor who preferred it and the witnesses who gave testimony before the grand jury.

And, in *Inman v. State*, 72 Ga. 269, 276, it was held that the provision of the Constitution of Georgia (Code of 1882, § 4997, Code of 1895, § 5702), "that every person charged with an offence against the laws of this state shall be furnished, on demand, with a list of the witnesses on whose testimony the charge against him is founded," entitles the accused to be furnished with a list of the witnesses who gave testimony before the grand jury, on demand; and does not render a witness incompetent to testify on the trial because his name was not on the list furnished. In this case, it is said that the words "on whose testimony the charge against him is founded" contained in the constitution (Code of 1882, § 4997, Code of 1895, § 5702, Crim. Code 1895, § 94), are equivalent to the words, "the witnesses who gave testimony before the grand jury," used in § 4634 of the Code 1882.

In *Cunningham v. City of Griffin*, 107 Ga. 690, 693, 33 S. E. Rep. 664, the court said: "On the trial objection was made to receiving the testimony of a witness for the state whose name was not endorsed on the warrant. We know of no rule of law which makes the competency of a witness depend upon the fact that his name is indorsed as a witness on the warrant or accusation."

admits that he has had a copy of the indictment, or waives the benefits he might otherwise claim under the section referred to, of the penal code of Georgia. The statute of William, also directs, in cases of treason (it enumerates) that the prisoner shall have a copy of the panel or jurors, two days before his trial. This statute is as imperative as the law of this State, and still it has been decided, "if there is any objection to this copy, it must be objected to before the plea. For the copy is given the prisoner to enable him to plead; therefore, by pleading, he admits that he has had a copy sufficient for the purposes intended by the Act." (4 State trials, 668.) A similar concession is involved, under our system of criminal law, by neglecting, or omitting to demand copies of the indictment and list of witnesses, on the arraignment; for at that period, the prisoner pleads orally, which it is the duty of the Clerk to place upon the minutes. One of the counsel for the prisoners, Wayne, has since expressed his acquiescence in the decision of the Court, and has referred me to a case in *Salkeld*, in support of it. The doctrine now on this point,

is settled, and will remain unshaken, 144 until subverted by \*legislative interference. Another motion has been made by Mr. Solicitor before me, at Chambers, to permit him by order of Court, to indorse upon these bills of indictment, the names of five additional witnesses, one of whom could not have given testimony before the Grand Jury, because he was then in Charleston.

The motion is opposed and resisted by the counsel for the prisoners, upon a variety of grounds; by Wayne and Cuyler, because of its hostility to a decision of this Court, in a case tried at the last term, in which it is said, the Court determined, that no witness could be examined at the trial of the accused, whose name is not on the indictment, among the list of witnesses who gave testimony before the Grand Jury: by Mr. D'Lyon, because the decision in the case referred to, was subsequently acted upon, and confirmed in *Gates's* case, to whom a new trial was awarded, at the same term, upon the objection, that a witness was sworn and examined on his trial, whose name had not been indorsed on the bill of indictment, among the list of witnesses who gave testimony before the Grand Jury: and because adding these names now, would operate as an amendment, or alteration of the record, which could not be done in a criminal case; by Mr. Wilde, because indictments were not within the statutes of Jeofail: and these additional names upon the record, would, as contended for by D'Lyon, operate as an amendment; and because the motion, if acceded to by the Court, deprives the prisoners of all the kind and merciful benefits of the penal code, intended for them—the principal of which was, that the prisoner might have time to inquire into the characters of witnesses.

Mr. Habersham, of counsel for the prosecution, did not believe that the decision of

the Court in the case referred to, went to the extent urged by the counsel for prisoners: and if it did, it ought to be considered as a *nisi prius* adjudication, which given under the impulses and suggestions of the moment, amidst the heat of forensic discussion, was always liable to errors; and if it contained <sup>145</sup> any, upon the ulterior and grave reflection of the Court, it was its bounden duty to correct those errors, by its judgment delivered more deliberately. It might be done on this motion and the public justice required that it should be now conclusively settled and understood, whether, under a sound construction of this section of the penal code, witnesses upon whose testimony the State might rely for a conviction, were prohibited from being sworn and examined before the Petit Jury, because they were not found in the list of witnesses who gave testimony before the Grand Jury.

Mr. Bond, the Solicitor General, said this motion could not be fairly viewed, if it was thought that it assailed the beneficent intention of the Legislature of Georgia. The intention of the law was, and its reason was, to enable the prisoner or the accused to inquire into the character of the witnesses: that this motion, if granted, afforded an opportunity of making such inquiry, and that therefore, the intention of the Legislature, (which is admitted to be the foundation of every exposition of the penal code,) being ascertained, this motion could not be considered in violation of it. It was also urged in behalf of the motion, that the application to record the names of these witnesses did not militate against the decision in the case mentioned, because the witness in that case was rejected upon the objection, that no sufficient notice had been given of the intention to place her name on the indictment, among the names of the witnesses who had given testimony before the Grand Jury; and that the distinction was supported by a decision of my predecessor. Upon the weight of these reasons in support of and against the present motion, I have now to decide—1. whether such was the intention of the Legislature, as is contended for by the Solicitor General—and 2. whether that intention as contended for, is in accordance with the decisions of this court.

<sup>146</sup> 1st. As to the intention of the Legislature. I am at liberty to say) that the penal code of Georgia was framed by Mr. Harris and myself, under the appointment of the then Governor of the State. We felt anxious to adapt the criminal law of our ancestors, to the republican institutions of this country, and with that feeling as the pole star of the duty confided to us, we endeavoured to place the accused upon as high a scale of dignity, as was dictated by the wide difference between a citizen of a republic, and the subject of a monarchy. We consequently infused into the system (which the Legislature of Georgia did us the honor to adopt,) every principle of mercy

and indulgence which that contrast suggested. We placed a citizen of Georgia, or any person, committing an offence against her good order and government, (which inflicted upon him, or her, a penitentiary punishment for the term mentioned in this section of the code,) upon the same footing as a subject of England, charged with treason. We considered that the best men, under the soundest impressions of moral, religious, and political obligations, might commit the crime of treason, who would from their souls abhor, and be the first to punish the unfortunate creature who had committed the offence of petit larceny. Under this impression, we also thought, (at least I did,) that the privileges intended by the statutes of England to persons charged with treason, ought to be extended to persons charged with a felony, which subjected him to a penitentiary offence. In short, that reason required the same indulgencies to the one, that were awarded to the other. In foro cæli there could be no distinction. Hence the introduction of this section into the penal code. It was an adoption of the humane provisions of the British statutes, in relation to treason, which ought to apply to an American citizen, charged with felony. The statutes of England to which I allude are the statutes of Wm. III, c. 3, and 7 Ann, c. 21. The statute of Wm. requires, as before stated, that the prisoner shall have a copy of the indictment before his arraignment: and the statute of Ann, that the prisoner shall not only have a copy of the indictment, but a list of the witnesses <sup>147</sup> to be produced, and of the jurors impaneled, with their professions and places of abode, the better to enable him to make his challenges and defence. The reasons of the indulgencies are, that the prisoner may inquire into the characters of the witnesses and qualifications of the jurors. These are the reasons which influenced the framers of the code, and as I presume, the Legislature of Georgia.

2. As to the decisions of this Court.

I certainly decided at the last term in the case so repeatedly pressed upon my recollection, that a witness who had not been sworn to give testimony before the Grand Jury, could not be sworn and examined on the trial of the accused before the Petit Jury. My reason for this decision was founded upon the reason assigned by the British law, that the accused ought to have an opportunity of inquiring into the character of the witness. The sudden and unexpected presentation of the witness prevented this inquiry, and therefore she was rejected. This was the decision in the case, and it must, or ought to be remembered, by every person who heard the opinion. But suppose that notice had been given by Mr. Solicitor, that he intended to apply for a witness' name, to be recorded on the bill, which notice allowed time for an inquiry as to character, was not this a compliance with the requisition and object of the penal code? My predecessor



has said that it would be, and, cessante ratione, cessat et ipsa lex. Mr. Wilde, of counsel for the prisoners, has pressed upon me the maxim stare decisis, that it is better erroneous decisions of the Court should be adhered to, than to be dependent on the contrarious oscillating opinions of this Court. I answer stare decisis—and upon that maxim this case under the present motion shall be decided.

It is therefore ordered, that the names of the witnesses mentioned in the motion of Mr. Solicitor, be recorded in the list of \*witnesses on these bills of indictment who gave testimony before the Grand Jury.

For the State—Bond, Solicitor General, & Habersham. For the prisoners—Wayne, Cuyler, D'Lyon & Wilde.

149 \*In the Matter of the Presentments of the Grand Jury.

February, 1822.

**Presentment—Expunction from Minutes.**—The presentment of a Grand Jury, will on motion, founded on sufficient reasons, be expunged from the minutes. **Justices of Inferior Court—Eligibility to Legislative and Military Appointments.**—The justices of the Inferior Court are eligible to legislative and military appointments, in addition to their judicial duties, and if so elected, and the respective duties happen to be contemporaneous, may elect which to perform.

By CHARLTON, Judge.

This is a motion of Mr. Solicitor General to expunge from the minutes of the Court a presentment of the Grand Jury of this term, in the following words. "We present as an evil of no small magnitude, the failure of the sitting of the Inferior Court of this County, for ordinary purposes." The motion is founded upon these reasons: (authorized by the justices to be assigned for the failure of the Court,) that two of the justices of the Inferior Court, were at the time the Court for ordinary purposes should have been held, in the discharge of their duties as members of the General Assembly, and that another was compelled from indisposition, to visit the upper Country.

The Inferior Court, sitting as a Court of ordinary, is composed of five justices. Three were absent for the reasons assigned, and these reasons were assigned by Mr. Justice Harden, who was heard at the bar of this Court. My opinion is therefore required upon the sufficiency of this apology, for the apparent neglect of duty, on the part of the justices of the Inferior Court. I can only say that these gentlemen have assumed capacities, and undertaken to discharge functions, which, it is true, are allowed by law, but which may occasionally be in hostility, each with the other. As members of the Legislature, they make laws; as justices they are required to expound them. In one case it is jus dare, in the other it is jus dicere. In short it is a peculiar, and perhaps, by all the world

may be thought, a singular feature in the Constitution of Georgia, that justices of the Inferior Court having co-equal and co-extensive powers with this

150 \*Court (the highest tribunal in the State,) in civil cases, with few exceptions, should be eligible as members of the Legislature, when the Judge sitting here is considered one of the departments of the government, and therefore ineligible to the Legislature. It may be considered as a still greater anomaly, that the justices of the Inferior Court, of each county in the State, having then co-equal and co-ordinate powers (with the exceptions contained in the Constitution and laws,) should not be required to have any professional knowledge or experience, and may at the same time be invested with the highest military ranks, within the gift of the people or the government. It may appear still more extraordinary, that this branch of the judicial department, should be chosen by the people and possess the powers of a Court of ordinary, powers arising as they do, on the interests accruing under wills and testaments. With these representations of the powers attached to the justices of the Inferior Court, and the persons of whom that Court may be composed—composed in reference to the other capacities they may assume, it may be asked whether if the people so will it, the justices of the Inferior Court may not make the election, as to the judicial, legislative, or military duties, they may be required to perform, if the requisition on these duties, should happen to be contemporaneous? I answer in the affirmative—because the people by electing justices of the Inferior Court, as members of the Legislature, have waived the sessions of the Court, which but for this election would have been held. The people by such election have considered, that the judicial shall give way and be postponed to the discharge of the political duties, which such election has imposed upon the justices. Such was the decision of the citizens of this county in electing two justices of the Inferior Court, and at the time the Court should have been held, they were in performance of their political duties, and the other incapable of acting from indisposition. The presentment therefore cannot be supported in its character of the animadversion, and must be expunged from the minutes.

Motion granted.

151 \*The State v. Russel Calvin, Samuel Jones & Henry J. Howell, Otherwise Called John Bishop.

February, 1822.

**Criminal Law—Counterfeiting—Statute—Construction.**—The 49th Sec. of the 6th Div. of the penal code of Georgia prescribes the punishment to be inflicted on a person who shall falsely and fraudulently make, sign or print, &c. any counterfeit note or bill of a bank, &c. The 52d Sec. declares, that if any person shall falsely and fraudulently pass, pay,

&c. any false, forged, counterfeit or altered note as aforesaid, &c. HELD, that the latter section must be taken in connexion with the former—that the term counterfeit was sufficient without the addition of the words "in imitation of" or "purporting to be"—and that there was no repugnancy or inconsistency in the sections.

**Same—Indictment upon Statute.\***—An indictment must pursue the very words of the statute, upon which it is founded.

**Same—Same.**—But it is sufficient, if the counts taken collectively pursue the words.

**Same—Counterfeiting—Indictment—Allegations—Sufficiency.**—The indictment charged that the counterfeit bill was a note purporting to be a note of the P. & M. Bank of So. Ca. which was the name given by the charter; the tenor of the note as set forth, was "The President, Directors & Co. of the P. & M. Bank of So. Ca.": HELD, that the addition of the words "The President, Directors & Co." in the note, was a mere designation of the persons composing the corporation who made themselves liable for the payment of the note, and that there was no variance or repugnancy between the tenor and purport.

**Bill of Credit—Bank Bill.**—A Bank bill issued by an institution taking its franchises from State authority for the mere legal conveniences of a corporate body, is not a bill of credit, within the inhibition of the Constitution U. S.

**Forgery—Indictment—Allegations—Intention to De-**

**\*Criminal Law—Statutory Offense—Indictment—Sufficiency.**—The legislature, in 1833, declared that every indictment or accusation of the grand jury should be deemed sufficiently technical and correct, provided it stated the offence in the terms and language of the Code, or so plainly that the nature of the offence charged might be easily understood by the jury. *Stephen v. State*, 11 Ga. 240. See Criminal Code 1895, § 929.

In construing this statute, NISBET, J., delivering the opinion of the court in *Locke v. State*, 3 Ga. 540, said: "The requirement of the statute is, that the offense must be so plainly stated that the jurymen may easily understand its nature. Our construction of this statute is, that the indictment shall leave nothing to inference or implication; but that its statements should be so plain that a common man may without doubt or difficulty, from the language used, know what is the charge made against the accused."

An indictment which states the offense in the terms and language of the Penal Code, or so plainly and distinctly that the nature of the offense may be easily understood by the jury, is sufficient. *Camp v. State*, 3 Ga. 417. To the same effect, see *Cook v. State*, 11 Ga. 53; *Studstill v. State*, 7 Ga. 3; *Rix v. State*, 16 Ga. 600; *Hester v. State of Georgia*, 17 Ga. 130; *Sharp v. State*, 17 Ga. 290; *Hatcher v. State*, 18 Ga. 465; *Hines v. State*, 26 Ga. 614; *Jackson v. State*, 76 Ga. 553; *Johnson v. State*, 90 Ga. 443, 16 S. E. Rep. 92.

Every indictment is sufficiently technical in this state, which states the offense so plainly, that a man of ordinary capacity would readily understand the nature of the offence charged. *Stephen v. State*, 11 Ga. 227.

The form of an indictment, as prescribed by § 4535 of the Rev. Code, need not be followed to the letter; it is sufficient if it be conformed to all material particulars. *Lloyd v. State*, 45 Ga. 57.

**fraud.**—In an indictment for forgery it is not necessary to allege an intention to defraud, where the statute, upon which such indictment is founded, does not contain these terms—such intention is embraced in the words "falsely and fraudulently."

**Criminal Law—Principal and Accessory—Joint Indictment—Joint or Several Trial.**—Where principal and accessory in a felony are jointly indicted, it is a matter of discretion with the Solicitor General, whether they shall be jointly or severally tried, particularly, when they have joined in the general issue.

**Same—Same—Witness—Accessory.**—An accessory jointly indicted with principal in a felony, may be a witness for the State, but it seems not for the prisoner.

**Same—Counterfeiting Bank Bills—Evidence That Bank Incorporated—Sufficiency of.**—Where the charter of a bank required that certain acts should be performed, before it should be considered as incorporated—proof that its bills were received by the public officers of the State granting the charter, in payment of public debts, and that such bills were in general circulation in said State, held sufficient evidence on an indictment for counterfeiting its bills, that the conditions had been complied with, and that the bank was an "incorporated Bank."

**Same—Forgery of Bank Note—How Proved.**—On an indictment founded on a statute, for the forgery of a bank note, it is sufficient to prove it counterfeited by proof of any imperfections. It is not indispensably necessary to disprove the hand writing of the payee or President. One skilled in the matter is competent to prove by a comparison with a genuine bill, that the note, the subject matter of the indictment, is a counterfeit.

**Same—Presumptive Evidence.**—Presumptive evidence will be received in proof of any fact involved in a criminal prosecution.

**Same—Same.**—If the evidence raises a violent presumption that the offence for which the prisoner is indicted, was committed in the county where he is tried—it is sufficient.

**Same—Counterfeiting Bank Notes—Statute—Construction—Quære.**—The penal code of Georgia prescribes the punishment for counterfeiting, &c. the note of any incorporated bank "whose notes are in circulation in this State." Is the word "are" to be construed as relating only to banks, whose bills were in circulation in this State at the time of the passage of the act.—Quære.

By CHARLTON, Judge.

The first indictment preferred and found against these persons charges in the first count, Russell Calvin, with the offence of falsely and fraudulently passing a counterfeit note, purporting to be a note of an incorporated Bank, which notes are in circulation in the State of Georgia; and it further charges in the form of a distinct accusation, Samuel Jones, Henry J. Howell, otherwise called John Bishop, with being severally accessories, advising and encouraging Russell Calvin in and to the perpetration of the felony. The second count charges Russell Calvin, with having committed the offence of falsely and fraudulently altering a counterfeit note, purporting to be a counterfeit note of an incorpo-



rated Bank, whose notes are in circulation in this State. Another accusation is appendant to this Court, charging Samuel Jones and Henry J. Howell with severally being accessories, feloniously advising and assisting in, and to the felony of this Court. There is a third count, which charges Russell Calvin with having committed the offence of falsely and fraudulently tendering in payment, a counterfeit note, purporting to be a note of an incorporated Bank, whose notes are in circulation in this State, and the appendix, or supplemental accusation to this Court, charges Jones and Howell with being severally accessories, advising and encouraging Calvin, in and to the perpetration of the crime.

153 \*The Grand Jury, upon these accusations against Calvin, as principal, and Jones and Howell, as accessories, returned "True Bill." The prisoners were arraigned—upon that arraignment pleaded "Not Guilty"—and the usual issue being joined by Mr. Solicitor General, they were on their trial by the Petit Jury, found "Guilty." Another bill had been preferred against them, charging in the first count, Russell Calvin, with the offence of falsely and fraudulently passing a counterfeit note, purporting to be a note of an incorporated Bank, whose notes are in circulation in the State of Georgia; with the additional accusation as charged in the first count, of the first indictment. The second count of this indictment is the same as in the first indictment with a similar charge, against Jones and Howell, as accessories. The third count, of this indictment, charges Russell Calvin with having committed the offence of falsely and fraudulently passing a forged note of a Bank, whose notes are in circulation in this State; and to this count is likewise added, in the form of a distinct accusation, a charge against Jones and Howell, with being severally accessories, advising and encouraging the principal, Calvin, in and to the perpetration of the felony. In all the accusations, the appendices of the primary counts of both indictments, the prisoners, Jones and Howell, are charged, as accessories before the fact or perpetration of the felony. Upon this indictment the Grand Jury returned "True Bill." The prisoners were arraigned, as upon the other, plead "Not Guilty"—and upon which Mr. Solicitor General joined issue. The Petit Jury returned a verdict of "Guilty," against Calvin and Jones, and of "Not Guilty," against Howell. Motions are now submitted in arrest of judgment, assailing and associating the intrinsic defects of each of these indictments, and for a new trial, for reasons dehors the record, if the causes assigned in arrest of Judgment, should be overruled, or deemed insufficient by this Court. The following reasons, why the judgment should be arrested, are assigned and placed in the following order, in the notice served

154 on Mr. Solicitor \*General. 1st. Because the 52d Sec. of the 5th Div. of the penal code, is inconsistent, repugnant,

and void.\* 2d. Because the indictment doth not pursue the words of the Act. 3d. Because the purport and tenor of the bill laid in the indictment, is inconsistent and repugnant. 4th. Because the indictment does not charge intention to defraud any person, or body politic or corporate. 5th. Because the indictment charges the prisoner, Russell Calvin, with passing and altering a forged note, purporting to be a note of the Planters' and Mechanics' Bank of South Carolina, and avers, that the said Bank, is an incorporated Bank, of the State of South Carolina, when no State, can constitutionally charter a Bank, with powers to issue bills of credit, and a Bank bill, or note, is within the true intent and meaning of the Constitution of the United States, a bill of credit. 6th. Because the prisoners were refused by the Court the legal right of severing in their defence, and were coerced to go to trial jointly.

The accusation against the prisoners is founded on the 52d Sec. of the 6th Div. of the penal Code of Georgia, which is in these words: "If any person shall falsely and fraudulently, pass, pay, or tender in payment, utter or publish, any false, forged, counterfeit or altered notes, bill, check, or draft, as aforesaid, knowing the said to have been falsely and fraudulently forged, counterfeited, or altered, the person so offending, shall, upon conviction, be punished by imprisonment at hard labor, or in solitude, in the penitentiary, for any time, not exceeding ten years." This section must be taken in connexion with the 49th, which enacts:† "If any person shall falsely and fraudulently make, sign, or print, or be connected in the false and fraudulent making, signing, or printing, any counterfeit note, or bill of a Bank of this State,

155 or \*the note, or bill, of any incorporated Bank, whose notes or bills are in circulation in this State, or falsely and fraudulently cause, or procure the same to be done, said person, on conviction, shall be punished, by imprisonment in the penitentiary, at hard labor, or solitude, for any period, not exceeding ten years." 1st. The first cause assigned in arrest of judgment is, that this 52d section of the penal code, thus extracted, and placed in connexion with the 49th section, is inconsistent, repugnant and therefore void. This objection has been pressed upon my attention by the counsel for the accused, with great ingenuity and learning, and the first impressions imbibed, under the influence of their argument, were with some difficulty removed, by the suggestions of the counsel for the prosecution, aided by the construction, derived from the best considerations

\*The 6th Sec. of the seventh division of the penal code passed 23d December, 1833, is in the same words with the section above referred to. (Ed. of Original Edition.)

†The 3d Sec. of the seventh division of the penal code of 1833, is the same, with the section above referred to. (Ed. of Original Edition.)

I could bestow upon it. The case of the United States v. Zebulon Cantril, 4 Cranch, 167, certified, from the Circuit Court of this district, and decided in the Supreme Court, was cited, as fully supporting the alleged repugnancy of this section of the penal code of Georgia. The following are the words of the Act of Congress, upon which Cantril was indicted: "If any person shall utter or publish as true, any false, forged, or counterfeit bill, or note issued, by any of the Presidents, Directors & Co. of the Bank of the United States, and signed by the President and countersigned by the Cashier thereof, with intention to defraud the said corporation, or any other body politic, or corporation, knowing the same to be falsely altered, forged, or counterfeited, shall be deemed and adjudged guilty of felony, and being thereof convicted according to the due course of law, shall be sentenced, &c." The Reporter says, the case was submitted without argument, and Marshall, C. J., delivered the opinion of the Court, that the judgment ought to be arrested for the reasons assigned in the record, and these reasons were: "1st. Because the indictment is insufficient and repugnant, inasmuch as it charges the prisoner with having altered and published as true, a certain false, forged, and counterfeit paper, partly

156 written and \*partly printed, purporting to be a Bank bill of the United States for ten dollars, signed by Thomas Williams, President, and G. Simpson, Cashier. 2d. Because the Act of Congress passed the 27th of June, 1798, entitled 'An Act to punish frauds, committed on the Bank of the United States, under which the prisoner is indicted, or so much thereof as relates to the charge set forth in the indictment, is inconsistent, repugnant and therefore void.' The judgment was arrested for these reasons, assigned in the transcript of the record. The absurdities involved in these reasons are, that a man should be found guilty of the offence, of uttering and publishing as true, a false, forged and counterfeit note, purporting to be a Bank bill of the United States; but, how could that be a false paper, purporting to be signed, by the legal officers of the Bank, only authorized to sign it, viz: the President and Cashier? and that such false, forged, and counterfeit note, was issued, by order of the President, Directors & Co. of the Bank of the United States; but how could that be false, forged, and counterfeited, thus issued by the corporation whose bill it purported to be? It required then, no legal or technical apprehension, no philological acumen—no application of any rule of interpretation, instantly to perceive upon the contrast of the offence charged in the indictment, with the statute upon which it was founded, that the statute was guilty of a *felo de se*; and thus deprived by its own hand, of every vital principle, that could confer energy upon itself—it was necessarily divested of all means, to support the sanction, it had announced. It assumed, it is true, the

giant form and proportions of an Act of Congress, and might therefore look terrible even in death, but yet, it might be insulted and violated in that situation, by the merest pigmy. The intellect of the Supreme Court of the United States, would certainly not condescend to afford such explanations as these, but they are satisfactory to my humble mind, and must be satisfactory to, and adapted to the meridian of every, and the meanest comprehension.

Is this section, of the penal code of 157 Georgia, also guilty of a *felo de se*?

Does it bear that self immolating absurdity contained in the Act of Congress? If so, the prisoners are not guilty, and it will become my duty to discharge them; *Judex damnatur, cum nocens absolutur*, will not apply to my conduct, because, the acquittal will be pronounced by the law, my sovereign, and the sovereign of us all. Mr. Wilde would then see illustrated, the wide, and it is to be hoped, the eternal separation, between the sovereign, Law, in a representative democracy, and the caprice of his Eastern Sultan; he would see the difference, in that "Beauty of Holiness" which beams from the front of one, operating with inexorable impartiality, according to the mandate of fixed principles, and the *sic volo, sic jubeo, stat prout ratione voluntas*, of the other. This will be the third time, I have been called upon and compelled by judicial duty, to decide upon this exception, to the indictment. Considering the Jury as judges of the law and the fact, Mr. D'Lyon, in his defence on the first accusation, addressed the Petit Jury, on the sufficiency of this ground, alone, to justify a verdict of acquittal, and that they as judges of the law and the fact, (so expressly delegated to them, by the 23d Sec. of the 11th Div. of the penal code,) were competent to consult their own opinions, on his construction of the section, without reference to what would be the opinion expressed by this Court. He for the first time, cited Cantril's case, and contended it was strictly applicable to shew, the inconsistency and repugnancy involved in this 52d Sec. of the penal code. The Jury, under the charge of the Court, which did not accede to the construction given to the section, by the counsel for the accused, (exercised, it is presumed, the full power given them, to decide upon the law and the facts,) and, returned a general verdict of guilty. On the second trial for the same accusations, (with a variance between the third count of the first indictment, and the third count of the second indictment, before referred to,) I may say with the Poet, in his allusions to Fame, *Vires acquirit eundo*—for all the strength, backed by the dexterity,

158 science, and its concomitant ingenuity could add, were \*brought forth at this trial, in aid of the argument first urged, on this supposed fatal exception to the indictment. Messrs. Gordon, Wayne, and Wilde, in the order I have thus placed them, contended for the repugnancy, with the ability that was calculated to reach



every fastness of the impressions, upon which I charged the Jury, and to shake to its very foundation the opinion I had given them. These impressions, however, formed under the influence and workings of my own judgment and reflection, confirmed as they were, by the then satisfactory, impressive, and lucid argument of Mr. Davies, counsel for prosecution, who disposed in detail of all the difficulties presented by the opposing counsel, assisted and illustrated as his argument was by the reply of Mr. Bond, Solicitor General, I adhered to the opinion, I had before communicated to the Jury, and they, I presume, on this occasion, as they did on the other, exercised their right of deciding upon the law and the facts, and returned a verdict of "Guilty" against Calvin and Jones, and a verdict of "Not Guilty" as to the prisoner Howell. A third time, this objection, and others associated with it, in arrest of judgment, and for a new trial, have been discussed, and if any one supposed, after hearing the former arguments, that nothing of novelty could be suggested in this, he would have discovered, and discovered it with surprise, in attending to this ulterius consilium, that the resources of genius are infinite, and baffle all calculations as to the amount, which may be ever found in its exchequer. I must be excused in using a style, and resorting to figures, generally thought incompatible with the usual shrivelled and morose complexion of a Judge's decision. The counsel for the accused, as well as the counsel for the prosecution, placed before me their several torches, to light, guide, and direct me, in the path of duty, they each wished me to pursue; and could torpidness be now expected from me, warmed as I have been by the blaze, so profusely shed around me? The fault, if any, is with the gentlemen, and to it, I take leave to ask for my apology. Mr. Harris, with that synthetic and convincing manner, which always accompany his arguments, answered the objections of the opposite counsel, by putting the question, as to the import of the word counterfeit. What does it mean, (he enquired) in its common acceptance? As defined by Orthodox and classical expounders of our language, and in common acceptance, it imported, an "imitation," "likeness," "resemblance." In this acceptance it was understood, and taken by all mankind. In reference to standard compilers of the words, forming our language, the word counterfeit imports nothing more. I must be permitted to name a higher authority, than any, or all quoted by the learned counsel. My authority is the favorite of nature and the muses; and in thus distinguishing him, it is ascertained at once, that I can only allude to Shakespeare. According to numerous quotations, from his works, which crowd upon my memory, as in Merchant of Venice: "What find I here, fair Portia's counterfeit;" in As you like it: "Will then take a good heart and counterfeit to be a

man;" in Hamlet: "The counterfeit presentment of two brothers;" in Othello: "It is a heavy night, these may be counterfeits." I say, according to this catholic authority, illustrated by these quotations, the word "counterfeit" means what Mr. Harris has contended for. In thus fixing its legitimate import, the gentlemen had two objects in view; 1st. To shew, that this universally received and admitted import, must have been in the contemplation of the Legislature, and intended to be given it, as inserted, and used in the 52d Sec. And 2ly. If so intended, inserted, and used, the word "counterfeit," per se conveyed every idea, that could be wished, without the addition of the explanatory expressions, "in imitation of," or, purporting to be found in British statutes, and the Act of Congress, amendatory of the defective Act in Cantril's case, which expressions, he considered as used in those statutes and that Act, merely ex abundanti cautela. In a revision of the penal code, in 1817, with this case of Cantril staring them in the face, decided in 1807, and as a decision of the Supreme Court, and 160 settled law of the nation, the \*Legislature did amend the 47th Sec. and left untouched the 52d—thereby, as was urged by Mr. Berrien, one of the counsel for the prosecution, consecrating the extensive import in 1816, given to the term "counterfeit," and conveying with almost irresistible perspicuity, the intention of the Legislature, as to the sense and latitude in which that term was to be taken. If such appears to me, to have been the intention of the Legislature, the 38th Sec. of the penal code, authorizes me, to give it full operation. That section declares: "Every section of this code, and all its terms and expressions, shall receive a liberal construction, according to the true intent and meaning, and which may be best calculated to carry it into effect." This section has been called by one of the counsel for the prisoners, "section kill all," and "cure all," a "city of refuge," to suit the purposes of a State prosecution. If it is a "city of refuge," its gates are opened, as readily to the prosecuted as the prosecutor. They are opened, whether the application for admission be to demand justice, or to seek mercy, from a too liberal exposition of her pure and unsophisticated system of jurisprudence. The public itself may flee to it, for protection, against the assaults of an offender, who, with blood stained hands, or the property of his fellow-citizens in his possession, the fruits of his rapine, may boldly shield himself from punishment, under a strict and literal construction of the very law, intended for his punishment. It is obvious, therefore, that this section is not a "city of refuge," for the convenience and purposes of the prosecutor, but an asylum, a merciful sanctuary for the oppressed, the injured, or the innocent, in the character he may have assumed or have given to him, of either accuser or accused. It is a "city of refuge," therefore, not like

that under the Mosaic dispensation, designated and intended for the temporary safety of a fugitive from justice, but a merciful sanctuary allowed and consecrated in a Christian republic, for the sovereignty itself, or the individual accused by that sovereignty; whether it was intended by

the reason and motives of the law, as  
161 \*interpreted by the common sense of justice, that the former should punish, under the facts and circumstances of the offence, as defined, or described in the penal code, or, that the latter be exempted from punishment. This innovation upon the criminal law before existing, was founded upon a respect for all the absolute rights of mankind, of life, of liberty, of property, and reputation; particularly as they ought to be respected in this republic, and therefore, it was deemed by the compilers of this code, that there was no sound reason in giving a strict construction to a penal statute affecting life, or liberty, which was not as applicable to property and reputation. Hence the introduction of this section into the penal code of Georgia. Consulting this intention then, in reference to the term counterfeit, I am of the opinion, that there is no repugnancy or inconsistency in this section, and that it bears no analogy to the case of Cantril, adjudicated in the Supreme Court of the United States: because the penal code, does not require the establishment, that this note should be a counterfeit issued by the Bank, and signed by its President and Cashier. I have thus disposed of what I considered, and until the delivery of this opinion, considered, the most formidable objections to any sentence, I was authorized by law to pronounce upon the prisoners. It is the result of a thrice argued difficulty, and though I have fostered this code as an offspring I had contributed to bring into life, yet if the discrepancy, inconsistency and repugnancy had been as apparent, as were attempted to be shewn by the counsel for the prisoners, I would have endeavoured to imitate the Roman Magistrate, and consigned it to the lictors.

2d. The indictment does not pursue the words of the Act. Upon this objection I never had any doubt. The law is thus laid down: "If the indictment proceeds upon a statute, the charge must in general be set forth, in the very words of the statute describing the offence." All the authorities proclaim the same doctrine as found

in the books cited by counsel. (2  
162 Russell on \*crimes, 14, 95; 2 East, P. C. c. 19, s. 58, p. 985.) The counts of the indictment taken collectively pursue the very words of the statute, but instead of this, it is contended, (as I understand it,) that each count, should contain the very words of the statute. This is certainly not necessary, because fraudulently passing any false, forged, or counterfeit note, is a substantive offence, so is paying such note—so is tendering in payment such note—so is altering such note. If substantive offences, they may be distinctly charged.

They are so distinctly charged, and therefore, the context of the indictment, which is the accusation, is conceived in the words of the statute, and consequently complies with all the requisitions of the authorities cited.

3d. The purport and tenor of the bill laid in the indictment, is inconsistent and repugnant. The indictment charges, that this was a note purporting to be a note of the "Planters' and Mechanics' Bank of South Carolina," and the tenor as set forth in the indictment, "in words, letters, and figures marked," is a note of the "President, Directors & Co. of the Planters' and Mechanics' Bank of South Carolina." Is not the baptismal name and style of the corporation, alleged with perfect consistency in the charge of the indictment and tenor of the bill as set forth in the indictment? Where is the discrepancy? The charge in the indictment is, that it is a note of the "Planters' and Mechanics' Bank of South Carolina," so, in the tenor it appears to be, a note of the "Planters' and Mechanics' Bank of South Carolina," which the "President, Directors & Co." promised to pay on demand. The first section of the Act incorporating the institution, declares, that it shall "be held and deemed and taken as a body corporate, by the name and style of the Planters' and Mechanics' Bank of South Carolina." That name and style are charged in the indictment, and contained in the tenor, with the addition of a designation of the persons composing the corporation, who made

themselves liable to the payee, under  
163 the name and style given to \*the corporation, by the Legislature of South Carolina. There is not then any material or substantial variance, or repugnancy, as contended for, particularly as was suggested by Mr. Berrien, under the 5th section of this Act of incorporation, a note of the description contained in the tenor is directed to be considered a note of the Planters' and Mechanics' Bank of Charleston, South Carolina.

4th. Because of the unconstitutionality of the Act of incorporation of the "Planters' and Mechanics' Bank of South Carolina." This objection was deemed sufficiently important by one of the counsel of the accused, Mr. Wilde, to demand, and it did accordingly put forth, some of the best efforts of his legal and political information. The objection is founded on the 10th section of the 1st Art. of the Constitution of the United States, which declares, among other inhibitions, that "no State shall emit bills of credit." Unless then, these Bank notes, can be considered bills of credit, emitted by the State, the Constitution of the United States, is violated only by the construction—that these Bank notes, though not literally bills of credit, issued directly under State authority, and auspices, yet they amount to the same thing, for they are bills emitted by a Bank, deriving its existence, and its franchises from State authority, and therefore, the State has done



that per obliquum, which it could not have done directly. This was in substance the argument of counsel, and I am therefore called upon to declare this charter unconstitutional, upon what is perhaps a far fetched, and strained implication, and by one "fell swoop," not only to annihilate its operation upon this prosecution, but to destroy the charters of every Bank in this State, and at the same time to proclaim hostilities ad internecionem, against every State Bank of the Union. If I should adopt the counsel's construction and do so, it might have the effect to save these men, but its other consequences, would be as innocuous, and as little regarded, as the terrors of that lava, which purports to flow, 164 from a mock vesuvius \*of the pencil.

A Judge—a State Judge particularly, is not warranted by any power that his department is clothed with, to declare an Act unconstitutional—certainly not, by the application of the common rules of interpretation, much less then, under a construction, which has resulted from a refined ascertainment, of the intention of the framers of the Constitution. On the contrary, the infraction must hurl direct and unequivocal defiance in the very teeth of the Constitution. The outrage must be so daring and open, that every one may see or feel it—so obvious and apparent, that it requires, on the contrast of the law, and the Constitution, the simple, unvarnished enunciation from the bench, "the law is unconstitutional." These are the restraints, I impose. (and they are restraints, which have been imposed, I think, by the opinion of the Supreme Court of the United States,) upon the power of the judicial department of government, to declare a law unconstitutional. Applying these doctrines, to the charter of this Bank, I may be permitted to ask the question, does the Act of incorporation directly assail the 10th Sect. of the 1st Art. of the Constitution? I answer without hesitancy, and without suffering my mind to be influenced by a doubt, that this Act of incorporation does not oppugn the Constitution of the United States. These Bank notes are not bills of credit, as meant and intended by the Constitution of the United States. A bill of credit, emitted by a State, is a bill, purporting to be issued, and is issued directly by State authority. It must be redeemable at its treasury—that is, its legislative Bank—signed by the Governor as President, the Secretary of State as Cashier, or some other officers, as intimately associated with the sovereignty of the State.\* I would thus describe 165 a bill of credit, emitted by a \*State,

a description, which is hallowed by the contemporaneous exposition of the 10th Sect. of the 1st Art. of the Federal Compact. Where were the Banks in 1787, to which this inhibition could apply? Could the convention have been inspired, and looking down the vista of time, see these institutions, springing up, at the present epocha, like Hydra's heads? No, the convention did not intend such a prospective operation. Its object and intention were most obviously, to inhibit in future bills of credit, and that species of paper currency, which the exigencies of the Revolutionary War had put in circulation—had inundated the country, had become worthless, had impaired, and were even calculated to impair the credit of the different States, and if permitted to be emitted ad libitum by the States, would ultimately sap the foundations of the honor and credit of the whole nation. In speaking of this revolutionary currency, and its subsequent phases, it is not I hope improper, in this station, and on this occasion, to give it the passing tribute of my respect. It was one of those efforts, among others of our brave and suffering people, which contributed to free my country. It contributed to scatter on our banner, Thirteen brilliant Stars, under whose beams, our fathers, and our countrymen, fought, bled, and triumphed; and if we have now on that Banner, additional Stars of greater magnitude, we ought in gratitude to attribute their present splendor, to this, among the other efforts, of our glorious revolution. The bills of that era, which are now only found in the Cabinet of Virtuosi, have, by this section of the Federal Constitution, a kind of sanctity thrown around them; because no other bills of a similar nature, can be emitted, and therefore our reminiscences are forever retained, of the agency, this revolutionary currency had over the destinies of the republic. Bank notes possess no analogy to the bills of credit thus meant and intended in the Constitution. The Act of incorporation, communicates franchises and attributes affording necessary legal facilities, to the operations of the Bank, but in issuing a Bank note, the \*President, Directors & Co. exercise no greater right, and privilege, than they before individually possessed. Each, before the incorporation, could have issued a promissory note, payable at his house or counting room; and the charter therefore, only authorizes the issuing of a Bank note, or promissory note, in their aggregate capacity, with the incidents and liabilities of a corporation, which each of the individuals composing, or interested in that corporation, could previously have done, in his individual capacity. The operations of the Bank are not interfered with by State authority, its bills are redeemable at Bank, for which only the credit and capital of the stockholders are pledged, its dividends accrue to the stockholders, its bills are issued upon the faith and credit of the Bank, and in no way connected with the fiscal arrange-

\*For the definition of the terms "bills of credit," as used in the Constitution U. S., see Craig et al. v. State of Missouri, (4 Peters' S. C. Rep. 410); Briscoe v. the Bank of the Commonwealth of Kentucky, (11 Pet. S. C. Rep. 257), in which latter case, the definition given is, "a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money." p. 314.—(Ed. of Original Edition.)

ments of the State, or blended with the State's resources. Under what aspect then, can a Bank bill issued by an institution, taking its franchises from State authority, for the more legal conveniences of a corporate body, and for the ulterior benefits of the individuals composing it, under what aspect can a Bank note, thus issued, be likened to a bill of credit, emitted by a State? It is not even "the counterfeit presentment of two brothers," there is not only no resemblance, but not the most distant family connexion. This objection, therefore, must share the fate of others preceding it in arrest of judgment, and is overruled.

5th. Intention to defraud should have been charged. Some of the most important British statutes, on the subject of forgery, omit these expressions, other statutes of equal importance contain them. The penal code of Georgia, in reference to the section, upon which these indictments are founded, and every other section, except the 47th, under the head of "forgery and counterfeiting," avoid the insertion of these terms, thereby establishing the distinction, which the Legislature intended, between the crime of "forgery," properly so denominated, and counterfeiting. The terms, "falsely and fraudulently," involve

167 every idea of deceit, \*whether practised upon an individual or body politic, and supersede the necessity of more fully designating the deceit, on the person, or body politic, the counterfeiter had an intention to defraud. The indictment substantially sets forth the offence in the word of the statute, and that is sufficient under our system of criminal jurisprudence.

The 6th ground assigned in arrest of judgment is extrinsic the record, and therefore must be considered among the causes assigned for new trials. These causes are: 1st. Because the Court coerced the prisoners to be tried jointly, and thereby deprived them of a legal privilege, and excluded legal and proper evidence. 2d. Because the Court charged the Jury, that they had nothing to do with the law. 3d. Because the Court charged the Jury, that the Planters' and Mechanics' Bank of South Carolina, was duly proved to be an incorporated Bank. 4th. Because the Court instructed the Jury, that the bills were sufficiently proved to be spurious, without disproving the hand writing of the payee, Gibbs, and the President, Blackwood. 5th. Because the Court instructed the Jury, that the 52d section of the penal code, was not repugnant, inconsistent, and void. Other reasons are founded on the admission of improper testimony, and are thus stated. 1st. By admitting the witness, Malcomb, to testify to a fact, of which he declared he had no knowledge, except what was derived from a book or writing called the Register, which was not produced. 2d. By admitting the testimony of witnesses to prove the bills spurious, who were unacquainted with the hand writing of the parties, and who could only testify to a belief,

founded on a comparison of the forged and genuine bills, upon the footing of the maxim, that every one is to be believed in his own art. 3d. By admitting the mere letter of the President of the Bank, declaring the bill spurious. 4th. Because hearsay evidence was admitted, the witness, Malcomb, being allowed to testify, that Gibbs had afterwards declared his name in the bill not to be his hand writing.

168 Other \*grounds are urged for a new trial, founded upon the absence of all evidence to support the charges against prisoners. 1st. Because no evidence whatever was given, that the offence of Jones and Howell was committed in the county of Chatham, or city of Savannah. 2d. Because no evidence was given, that the Planters' and Mechanics' Bank of South Carolina, had complied with the condition upon which alone their charter was to take effect. 3d. Because the words of the penal code: "the bill or note of any incorporated Bank, whose notes are in circulation in this State," are in the present tense, and no evidence whatever was given, that the notes or bills of the Planters' and Mechanics' Bank of South Carolina, did circulate in this State on the 20th December, 1817.\* I am enjoined by the Constitution of the State, to place upon the minutes the reasons of the Court, for refusing or granting a new trial, and I must perform that duty in the present case, in reference to the numerous grounds, stated in the motion, but the great labor imposed upon me by the presentation of so many bases for the motion, will scarcely admit of those detailed explanations, I should otherwise bring to the assistance of the general reasons, I may assign for my opinions. 1st. This Court did not coerce the prisoners to be tried jointly; it decided, that according to its opinion of the Constitution, and legal prerogatives of Mr. Solicitor General, it was discretionary with him, in what manner the prisoners, should be tried, whether severally or jointly. Over that discretion this Court would exercise no control, unless it infringed some established and legal right, upon which the prisoners might claim the interposition of the Court's authority.† The prisoners claimed no right, which I refused to extend to them,

169 \*or that they were entitled to receive. If in severing, the object was, each to have his twenty peremptory challenges, (allowed to this offence by the penal code,) that object was not stated, and the fact is, that twenty peremptory challenges were al-

\*The 3d Sec. of the 7th Div. of the penal code of 1833, contains the same words. (Ed. of Original Edition.)

†By the 50th Sec. of the 14th Div. of the penal code of 1833, it is enacted "that when two or more defendants shall be jointly indicted for any offence, any one defendant may be tried separately, except such offences as require the action and concurrence of two or more to constitute the crime, and in such cases the defendants shall be tried jointly." (Ed. of Original Edition.)



lowed to each. If the object in soliciting separate trials, was, that each might avail himself of the testimony of the others, such testimony was incompetent, and inadmissible. Where the principal and accessory are tried together, the accessory may enter into the defence of the principal, and avail himself of every matter of fact, and every point of law, tending to his acquittal, for he is particeps in lite, and this sort of defence, necessarily, and directly tends to his acquittal. (Fost. 365; 1 Russell on crimes, p. 55.) Thus allowing the accessory, to controvert the guilt of the principal, can he be examined *ex debito iustitiæ*, as a witness for the principal? A particeps criminis or accomplice, may be witness for the Crown, or here, for the State, against the prisoner, but has the prisoner the correlative right of examining the accomplice as his witness? I do not, until better advised, understand this to be the law. The current of authorities is opposed to it, and no cases have been cited, where the trials have been severed, for the purpose of allowing one charged with a felony, to give testimony in favor of others associated with him in the accusation. The information of an accomplice, taken under the requisitions of the statute Ph. & Mary, may be read in evidence against a prisoner (Leach, C. C. p. 12). An accomplice may be admitted by the magistrates for the Crown. (Ibid, 115, 122, 155, 464, 478.) The distinction is, that the State may use the accomplice as a witness, but the prisoner cannot. Be this as it may, it is settled by the authorities, that the best and most usual course is, to indict, and try the principal and accessory together, and if so tried together, the accessory cannot ask the indulgence of not being brought to trial, until the guilt of the principal is legally ascertained. (1 Hale, 628;

Fost. 365; 1 Hale, 623; 2 Hawk. c. 29, 170 5, 45; \*Fost. 360.) But every difficulty contained in this ground of the motion is removed, by a reference to the plea. The prisoners, after arraignment, and before they were put on their trial, joined in the general issue, and plead "Not Guilty." The law upon that point is this: "If the principal and accessory appear together, and the principal pleads the general issue, the accessory shall be put to plead also, and that if he likewise plead the general issue, both may be tried by one inquest. But it seems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the accessory shall not be forced to answer, till that plea be determined." (2 Hawk. P. C. c. 29, 8, 47; 1 Hale, 624.) Charnack's case, cited from 3 Salk. 80, 81, and so much relied upon, only establishes the doctrine, "that if the prisoners (indicted in that case as principals), intended to take the liberty of challenging separately the allowed number of peremptory challenges, they must be tried separately, but by joining in their challenges, induced the necessity of being tried jointly." Such was the course pursued in relation to the prisoners at this bar. 2d. This ground did not con-

tain the matter of fact, and was therefore waived in the argument. 3d. I did instruct the Jury, that the Planters' and Mechanics' Bank of South Carolina, was duly proved to be an incorporated Bank. The evidence in support of this instruction was, 1st. The charter of the Bank. 2d. Oral proof of its notes being received by the public officers of South Carolina, in payment of debts due the State, and, 3d. Proof of its notes being in circulation in this State and South Carolina. 1. The charter. The first section of the Act, granting this charter, declares that the company constituting this corporation, "are hereby incorporated and held, and deemed, and taken, as a body corporate, by the name and style of the Planters' and Mechanics' Bank of South Carolina." The 2d sec. that the said company shall continue incorporated until 1st January, 1832. Then the 10th enacting section declares: "That the Bank hereby intended to be incorporated, shall not be

171 incorporated, or derive any benefit\* or advantage from any of the clauses or provision of this Act, unless it shall transfer, or cause to be transferred to the Treasurer of the lower division, for the benefit of the State, 800 shares of the stock of the said Bank, on or before the 1st day of November next." This Act is dated 20th December, 1820. The apparent incongruity in the 1st clause of the Act, and the 10th now referred to, must strike every mind. The 1st clause incorporates absolutely and without restriction; the 10th declares that the corporation was only intended, until its condition precedent, shall have been complied with. But it is not with the incongruity I have now to meddle. The question is, that notwithstanding the positive unqualified announcement of the fact of incorporation in the first clause, that incorporation is still dependent upon proof of a compliance with the condition, and terms imposed on the incorporation by the 10th enacting clause? I am of the opinion, that sufficient proof, for all the intents and purposes of this prosecution, has been adduced, to raise presumptions ordinarily equal to positive facts, that the transfer of shares was made within the limited time by the Act; and the presumptions arise from proof, that the notes of this Bank are received in payment of taxes due the State of South Carolina, and that they are in general circulation in that State. Would a Bank with this condition, dare to put out its paper, and is it to be presumed that the State would so long have acquiesced in this bold infraction of its charter? Besides, the weight of these presumptions is almost conclusively established by a section of an amendatory Act, passed in December, 1811. It is the 4th enacting clause, in these words: "The bills or notes of the Planters' and Mechanics' Bank, originally made payable, or which shall have become payable on demand." This clause, it has been contended by the counsel for the State, particularly Harris and Berrien, is a recognition of the pre-existence, and circulation of the notes of this

Bank, and consequently, an acknowledgment by the State of a compliance with the terms upon which it was intended to incorporate the Bank. I am of that

172 \*opinion. 4th. I am still of the opinion, twice before and oftener perhaps expressed, that there was sufficient proof of the spuriousness of these bills, without disproving the hand writing of the payee Gibbs, or the president, Blackwood. Many forgeries of instruments, at common law, render proof of the signatures to the instruments indispensably necessary; indeed, a *sine qua non* of the investigation; for the plain reason, that every thing might depend upon the genuineness of the signatures, and nothing upon the context of the instrument. One definition of forgery at common law is: "the fraudulent making, or alteration of a writing to the prejudice of another man's right," and "a false making, or making *malo animo*, of any written instrument, for the purpose of fraud and deceit." (2 East. P. C. c. 19, s. 1, p. 852, 965.) It would seem to be necessary, (I mean generally necessary,) in prosecutions for forgery at common law, to prove the signatures of the persons charged to have been defrauded, for the purpose of proving the alteration, or other forgery committed, of a genuine instrument; but *cessante ratione, cessat et ipsa lex*. The reason of the requisition of such proof on an indictment for a common law forgery, ceaseth, on its application to the forgery of a Bank note. It is true the signatures to a Bank note, are among its vital principles, but the genuineness, of the signatures does not impress a genuine character upon the note; and without any proof of the hand writing of the President and Cashier, it is competent, according to authority, and the reason of the thing, to prove the note a forgery, by proof of any imperfections, which may shew aliunde the signatures, that the note is counterfeited or forged. This doctrine is settled by a decision of the Judges of England, in the year 1801. (McGuire's case, 2 East. P. C. c. 19, s. 68, p. 1002.) It is a case not in hostility with any law of England, which was in force in this country previous to our revolution, or that portion of it adopted on the establishment of our independent government. On this subject, I heard with entire approbation, the suggestions of Mr. Habersham, to whose learning and

173 research, I am indebted \*for this case, the principles of which, however, I had before communicated. Russell, in his compilation of criminal law, vol. 2, p. 1507, thus notices this decision: "In a case which was referred to the consideration of the Judges, a conviction for forging a Bank note, was holden good, though there had been no testimony of the Cashier, at the trial, to disprove his hand writing, as the forgery of the note had been proved by other evidence which shewed that the instrument was false in all its parts, in the texture of its paper, the watermark, the engraving, the ink, and the written date of the year, which was in 1798, though the

printed date under the Britannia was 1799, being altogether proved, to be such, as the Bank never made or issued."

In the present cases, Mr. Malcomb, an officer for years past of the Planters' and Mechanics' Bank, swore with positiveness, that the signature of Lukens, the Cashier, was a forgery, that the vignette encircling the word "Charleston," was a forgery, and the number of the bill did not, and could not correspond, from his knowledge and inspection of the Register of the Bank, with any number issued since the incorporation of the Bank. A few bills some years ago, were by mistake falsely numbered 200, (these forged bills are below that number,) but that no mistake has since been committed. It is altogether then in my opinion proved, that these notes upon which the indictments are founded, are such as the Planters' and Mechanics' Bank never issued. This opinion rests upon the maxim, *falsus in uno, falsus in omnibus*—the unimpeached testimony of Mr. Malcomb, and that of Mr. Mayor Morrison, who, under the process he adopted, swore positively to the forgery, and ascertained it at an earlier period than some of the officers of the Bank itself. Mr. Henry, an officer of the State Bank of Georgia, was enabled, by a comparison with a genuine bill, to swear also, that the forged note of the second indictment to which evidence was applied, was a counterfeit. As an officer of the Bank, Mr.

Henry was familiar and conversant

174 with \*the subject matter, and I received his testimony under the influence of the maxim, *cuique in sua arte, credendum est*. The letters from Mr. Blackwood to the Mayor of this city, the one acknowledging the notes to be genuine, with the exception as to the numbers, and the other retracting that acknowledgment, and declaring the notes to be entirely spurious. These letters were invoked from the Mayor's possession, by a subpoena, *duces tecum*, issued by prisoners' counsel. The first acknowledging the genuineness of the bills, with the exception of the number, was read on the cross examination by the prisoners' counsel, and the other would have been read, but at that time was mislaid. It was found by the Mayor, and tendered by him the next day in the course of his examination. It was not called for by the counsel for the prisoner, and its being read as evidence, was resisted for that reason, but it was permitted by the Court, because it was a continuity of the evidence, which had been partially gone into and invoked by the subpoena *duces tecum*. I remain of the opinion, it was properly admitted: but if improperly suffered to go to the Jury, the contradictory declarations of Mr. Blackwood, were favorable to the case of the prisoners, and therefore cannot now be considered by me, as having influenced the Jury in their convictions. The hearsay testimony, attributed to the testimony of Malcomb, when speaking of the declaration of Gibbs, comes as a ground for granting a new trial with a very



ill grace from the counsel for the prisoners, because they had before insisted upon the competency of declarations of Gibbs to the Mayor, as to the genuineness of the alleged bills, with the exception of the numbers; upon the ground, that he was a party to the bills in the capacity of payee and the confessions and declarations of a party to the record, are always admissible. Upon the weight of this law, the declarations of Mr. Gibbs, when they favored the prisoner, were admitted, and under the same authority were admitted when they operated against the prisoners. These contradictory declarations were also favorable

to the case of the prisoners, and therefore could not have influenced the

Jury in the verdicts rendered. Under this 4th assignment in the motion made for a new trial, I have noticed and overruled, with the exception of two—(the remaining grounds,) the objections in this voluminous motion, for a new trial. And other objections and reasons assigned in the motion, not particularly adverted to, in the opinion delivered under this 4th division of the motion, will be found to have been answered in the opinion delivered on the motion in arrest of judgment: the two remaining appeals to my discretion for a new trial, are:

1st. That there is no evidence, that the offence of Jones and Howell was committed in the county of Chatham.

2d. There is no evidence, that the bills of the Planters' and Mechanics' Bank were in circulation on the 20th December, 1817.

First. I must confess that amidst the doubts which agitated my mind, and weighed upon my conscience, I should have felt satisfied with a verdict of acquittal of these accessories, not from any belief of their innocence, but because of my impression, that there was no direct evidence, that the offence was committed in the county of Chatham. The Constitution requires that the offender "shall be tried in the county where the crime was committed." Is there proof in this case, that the prisoners, Jones and Howell, were accessories before the fact to the felony in the county of Chatham? It is contended by the Solicitor General, and the counsel associated with him, that presumption is proved, and that the whole evidence raises a violent presumption, that the crime was committed in the city of Savannah, a city in the county of Chatham. The Mayor of this city deposed that these men were brought to the Police Office under arrest, as concerned in passing counterfeit notes. He found in Jones's trunk or portmanteau, taken from the Washington Hall, a large amount of counterfeit notes. From their own confessions they had travelled together,

and two of them put up at the Washington Hall, whence they were conducted under arrest to the Police Office, and it was in evidence that an intimacy subsisted between them. Mr. Morrison was examined and addressed as Mayor of Savannah, by the Court and by the counsel; and his reference

to the Police Office, must have referred to the Police Office of the city of Savannah. If such is necessarily the reference, when speaking of his conduct, in this case as Mayor of Savannah, the Hotel kept by the witness Newcomb, and called the Washington Hall, must have been situated in the city of Savannah, and consequently the crime charged against the accessories, is constitutionally proven to have been in the county of Chatham, by presumption, as irresistible as positive proof; particularly, if it is recollected, that the time occupied by the Constables in obeying the mandates of the Mayor, shews that the arrest of the prisoners, could not have been at any place, beyond the limits of the county of Chatham. This was the argument of Mr. Davies, and he concluded by putting the question, whether such presumptions did not amount to that proof exacted by the Constitution? I can only say, that presumptions may be admitted in proof of any fact involved in a criminal prosecution, and that the Jury as Judges of the law and the fact, were authorized to decide upon the sufficiency of this evidence as to the locality of the offence. It was admitted by Mr. Wilde, that the English law is against the application for a new trial in a case of felony. (6 Tm. Rep. 625, 638, 13 East. 416, n. b.) and yet, without convincing me, that this is not the law of Georgia, as adopted by her penal code, I am called upon to accede to a motion which may assail the power given to the Jury as judges of the law and the facts, and to assert myself, a discretionary authority, over their verdict; which, by the law quoted by the prisoner's advocates, it is extremely doubtful if I can exercise. Upon this point I give no opinion, and it is reserved for the deliberate consideration of the Court, when it shall be presented by the State's prosecuting officer. But it shall influence me on the present occasion, among other reasons and motives, in not disturbing

177 \*the legal course of these verdicts.\*

My principal reason for not disturbing the verdict is, that justice has been done. 2dly. There is no evidence that the notes of the Planters' and Mechanics' Bank, were in circulation, at the passing of the penal code in 1817. Admitting that it was the intention of the Legislature of Georgia, that it was its policy, and that the grammatical construction of the term "are," confined it to the present tense, and protected notes only of incorporated Banks whose notes were in circulation in 1817, still under the opinion before expressed, these notes were at that epoch in circulation. I conclude by assenting to, and adopting the opinion of the Supreme Court of North Carolina, on a motion for a new trial, delivered by Leawell, J.: "This being a case, where the Jury decided not against

\*See also *Rex v. Ball, Russell & Ryan's crown cases* (Green's Jurist Ed.) 99. But see *Graham on New-Trials*, p. 503 et seq.; *State v. Simons, Dudley's* (Geo.) Rep. 27.—(Ed. of Original Edition.)

a flagrant violation of duty, but where there may reasonably be a difference of opinion, amongst honest men; and it being quite certain, that justice has been done, this Court feels it unsafe to interpose, where there is a bare probability, that the accused may be innocent." (King v. Hill, Tm. Rep. No. Ca. vol. 3, p. 211.)

It is ordered, that the motions in arrest of judgment, and for a new trial, be, and are hereby overruled.

Wilde, D'Lyon, Wayne & Cuyler, for the motions. Bond, Solicitor General, Habershaw, Harris, Davies & Berrien, against them.

178 \*William J. Spencer v. Negroes Amy and Thomas.

May Term, 1822.

**Void Manumission—Effect on Slave's Condition.**—A manumission subsequent to the Act of 1801, not sanctioned by legislative authority is absolutely void, and produces no change in the condition of the slaves.

**Penal Statutes—Retrospective Effect.**—Penal statutes cannot have a retrospective operation.

**Same—Same—Case at Bar.**—The Act of 1818, passed in relation to the attempt to manumit slaves illegally, being a penal statute, cannot be so construed, as to accumulate the penalties of the statute of 1801 to an act committed before the passage of the former statute.

By CHARLTON, Judge.

The question in this case is, whether the will of the elder Spencer, directing the manumission of these slaves and the deed of the heirs carrying the wishes of the testator into effect, dated 25th of October, 1808, subjects them to the order and sale of the justices of the Inferior Court of Effingham county, under the powers delegated to magistrates by the Act of 1818? This Court has already decided on this circuit, that a manumission by deed, will, or otherwise, subsequent to the Act of 1801, produced no legal alteration in the condition of the slave,—that the instrument was absolutely void, for any purpose of freedom,—and following the language of the statute, that the slave was still to "all intents and purposes, as much in a state of slavery, as he was before he was manumitted and set free, by the party so offending," by giving the instrument of manumission. The Act of 1801, is too unambiguous to require the aid of any technical interpretation, to comprehend its object and intention. It visits with a penalty, the person infracting its inhibition to manumit by private deed, act or instrument, or in any other manner, or form, than the one prescribed, and it places the slave precisely in the condition he was before.

I always feel happy, when I can decide upon the plain expression of the law itself, without travelling beyond its context  
179 into a \*field of unnecessary supererogatory learning. I am of the opinion then, that "under the operation of the Act

of 1801, these slaves remained the property of William Spencer, notwithstanding the directions of his will, and the subsequent instrument of manumission. And they must now be considered the property of that estate; and that interest can only be divested by an Act of the Legislature, not impairing the claims of legitimate creditors. —The Act of 1818 cannot operate retrospectively, so as to annihilate or accumulate the penalties of the Act of 1801,—because this would be repugnant to the best established doctrines in the construction of penal statutes; and because, as a penal statute it must operate prospectively. There was then manifest error in the proceedings of the Court below, in considering these slaves, as liable to be sold under the sanction of the Act of 1818.

It is, therefore, ordered, that this case be remanded to said Court, with instructions, and it is hereby instructed, to abstain, in relation to these slaves, from any further proceedings, under the Act entitled an "Act supplementary to, and more effectually to enforce an Act prescribing the mode of manumitting slaves in this State, to prevent the further migration of free persons of color thereto, to regulate such free persons of color as now reside therein and for other purposes." Passed 19th December 1818.

180 \*Jno. Miller Surv. for Use of Assignees v. Joseph Thorn Survg. Co-Partner.

May Term, 1822.

**Partnership—Suits between Partnerships with Common Member.**—S. was a co-partner with M. under the firm of M. & S., and with T. under the style of S. & T.: after the death of S., M. as surviving co-partner of M. & S., sued T. at common law, as surviving co-partner of S. & T., upon transactions which had been held between the two firms in the life time of S.—HELD, that such action could not be maintained.

**Same—Suit between Partners.\***—As a general rule, one partner cannot sue another at common law.

**Common-Law Practice.**—The same person cannot be plaintiff and defendant in the same suit, at common law.

By CHARLTON, Judge.

This is a motion for a new trial, upon the following grounds:

1st. Because a certain book of accounts, said to be a book of accounts of Stoutenburgh and Thorn, was permitted to be given in evidence to the Jury, without notice to the defendant, to produce his books.

2nd. Because, the entries in said book were admitted as evidence of certain items in the plaintiff's account, when it appeared that higher and better evidence could and ought to have been produced in support of such items.

3rd. Because it was made to appear by evidence adduced by the defendant that the plaintiff and the said defendant, were co-

\*Under Georgia law, one partner may sue another at law, even concerning the partnership, if there has been a settlement. Moore v. Stone, 50 Ga. 161.



partners in relation to the transactions which were the foundation of the action, and therefore the said Court as a Court of law, ought not to have entertained jurisdiction of the case.

4th. Because it appears from the record that the transactions which were the foundation of the action accrued between the plaintiff and one B. B. Stoutenburgh, as co-partners, under the firm of Miller & Stoutenburgh, and the defendant, and the said B. B. Stoutenburgh, co-partners, under the firm of Stoutenburgh & Thorn, under which circumstances the said Court, as a Court of law, ought not to have entertained jurisdiction of the case.

181 5th. Because the verdict of the Jury, is contrary to evidence and the principles of justice and equity.

I have held this case under advisement for several days, and have experienced much difficulty in forming an opinion upon any one of the grounds stated.

The difficulty has been greatly increased, by the reverence it is my duty to pay to a special Jury, clothed as they are in appeal cases, with such ample, and almost plenary powers, under the judicial Act of Georgia. Satisfied in any case that this verdict of a special and enlightened Jury (as the one rendering the verdict, was,) is founded on the principles of justice and equity, I would with great caution, award a new trial, upon what are called apices judices. In this case, I dismiss from my consideration, all the reasons assigned why the Court should grant a new trial, except the fourth,—and if the record does proclaim what it is said to do, this Court, as a Court of law, ought not to have entertained jurisdiction of the case.

It is a fundamental principle, that one partner cannot sue another, in a common law tribunal, with one or two exceptions to the principles stated by Mr. Harris in his argument, and which cannot apply to this case.

This action is brought by John Miller,—"who hath survived one Benjamin B. Stoutenburgh, now deceased, who in his life time, together with the said John, traded as merchants, and co-partners, under the firm of Miller & Stoutenburgh, for the use, &c.

Then the petition sheweth: "That Joseph Thorn, of the said county of Chatham, who hath survived one Benjamin B. Stoutenburgh, is indebted to your petitioner (the plaintiff,) as surviving co-partner of the aforesaid Benjamin B. Stoutenburgh." Is this "Benjamin B. Stoutenburgh aforesaid," the "one Benjamin B. Stoutenburgh" alleged to have been the 182 co-partner of the \*plaintiff? or does the grammatical construction, and technical phraseology of the declaration, refer simply to the "one Benjamin B. Stoutenburgh," who was the co-partner of the defendant Thorn? These queries present the difficulty, with which I have had to contend. It was said by Mr. Habersham, that the language of the record did not an-

nounce B. B. Stoutenburgh, the co-partner of Miller, as the same Stoutenburgh, whom Thorn had survived. There is certainly much strength and plausibility in the suggestion, particularly as the term "aforesaid" may very grammatically and sensibly point and refer to the Benjamin B. Stoutenburgh who was the co-partner of Thorn—without carrying the connexion to the B. B. Stoutenburgh who was the co-partner of Miller. On the other part, the term "aforesaid" may refer to the B. B. Stoutenburgh who was the co-partner of Miller; and the strong and almost irresistible presumption is, that the aforesaid "one B. B. Stoutenburgh," whom Thorn survived, is the identical "one B. B. Stoutenburgh," whom Miller survived. With all my anxiety that this verdict should stand, because I believe it is founded in principles of justice and equity, I have in vain endeavored to remove from my mind the conviction, impressed upon it by the record, that the B. B. Stoutenburgh, who was the co-partner of Miller, was also the co-partner of Thorn. If this is the fact, (and it appears so from the record, and may be more strongly confirmed by another investigation,) the unity of interest which exists between co-partners—their *my et per tout* seizure, render this substantially a suit by Stoutenburgh, against Stoutenburgh—and if so, it exhibits the singular spectacle of a man suing himself—and carries in its bosom that self-immolating principle, which deprives this Court of a common law jurisdiction; and if this is not the forum for the contest between the parties, I am bound to take notice of it, in whatever form it may present itself.

With these impressions, and because the preponderance of my belief is, that B. B.

Stoutenburgh, of the firm of Miller & 183 Stoutenburgh, \*was the B. B. Stoutenburgh, of the firm of Stoutenburgh & Thorn—and therefore, in sustaining this action, I authorize one partner to sue another, before a common law tribunal, (this case not falling within any of the exceptions, that allow such litigation,) I am of the opinion that a new trial ought to be granted.

New trial ordered.

Harris, for the motion—Habersham & Berrien, against it.

184 \*McGowan v. Jones, et al.

May Term, 1822.

**Chancery Practice—Jury.**—Although the practice in Georgia is to associate a special Jury with the Judge of the Superior Court, in the determination of chancery causes, there is no law which imposes the necessity of such association.

**Married Woman—Will—What Necessary to Make Valid.**—It seems, that the will of a femme covert will have no efficacy, unless there be an agreement

\***Chancery Practice—Jury.**—See foot-note to Bolton v. Flournoy, *ante*, p. 125.

†**Married Women—Testamentary Capacity.**—See Urquhart v. Oliver, 56 Ga. 344; Ga. Civ. Code, 1895. § 3264.

before marriage giving her the power to make such will, or such right has been conferred on her after marriage, by some act analogous to an agreement before marriage—the mere parol assent of the husband, is not sufficient to give such a will validity.

By CHARLTON, Judge.

This is a petition for a rehearing of this cause, decided by verdict of a special Jury, at the last term of this Court, held in the county of Liberty.

The defendants believe themselves aggrieved by the verdict, because, it is contended, that, the complainants could derive, as devisees, no title under the will of the femme covert Mrs. Way, tho' such will was made with the parol consent of her husband; because the words of the will created an express estate tail, in the husband, and the bequest being of personal estate, thereby vested the interest absolutely in him; and because, the limitation over in favor of complainant, is too remote, that being dependent upon an indefinite failure of issue. The defendants conceive themselves aggrieved by the verdict, on another ground—that it was rendered in opposition to the charge of the Court, on the legal validity of the femme covert's will, made under the parol assent of the husband, and not subsequently ratified by any act, equivalent to an agreement before marriage, that the wife should by will, possess a disposing power over any portion of the husband's property. I have had occasion before to decide, that the laws of this State are silent

on the necessity of a special, or other  
185 Jury, \*in the determination of Chancery causes.\* The association of a Jury with the Court, in such cases, is merely sanctified by the practice, which has long obtained in this, and I presume the other districts of this State, under the impression perhaps, that it was a positive or implied Legislative requisition, or perhaps, the general cherished predilection for the trial by Jury, in causes of every description. Communis error facit jus, as a maxim bearing upon this subject, I shall not be the first Judge to subvert; and until the pleasure of the Legislature is expressed, I shall permit, as heretofore, the co-operation of a special Jury, as required by a rule of this Court, in the trial of equity cases. But, bound by no law, I shall always approach the decree of a special Jury, in an equity cause, with much less reverence, than when exercising the functions legitimately delegated to them. I shall respect their decision upon facts, but if a special Jury, unfolding its own code of equity, extracts from it, and applies doctrines, subversive of the best established, and, I may add, the most consecrated principles of a chancery jurisdiction, I must be suffered to put up the legal landmarks, which their discretionary judicial legislation has re-

moved. In the present case, I was not at all satisfied, that this will, though it had passed through the ordeal of an ordinary probate, had been made under those circumstances of assent, which impressed upon it the character of validity.

The proposition that a wife could make a will, was not, and could not be controverted. That power, may be conferred on her by the agreement, and compact of her intended husband, and after marriage, by some act of equivalent solemnity. My doubt at the trial, (and which I communicated to the Jury,) was, that on a review of the authorities, it seemed, that a parol assent, unconfirmed by any act, analogous to the agreement before marriage, was not sufficient to

give validity to the will. The argument with \*which I have been favored, on this petition, has not contributed very materially to shake the opinion I then expressed to the Jury, and the influence it still possesses over my mind, must justify an order for the rehearing of this very important, and highly interesting case. It ought not to be expected that I should now advert to authorities, and pronounce any definite opinion upon any point, raised in this cause, or stated in the petition; for if I did so, the special Jury at the ensuing term, would be converted into a sort of *lit de justice* to enregister my decree, and setting down the cause for hearing, would also be a mere *pro forma* arrangement. I have then only generally to say, that sufficient grounds are stated in the petition of the defendants to grant its prayer.

And it is ordered, that this cause be reheard, at the next Superior Court to be held in the county of Liberty, on the verdict and decree rendered by the special Jury.

Wayne, Berrien & Law, for petition—Habersham, against it.

187 \*John Doe, Ex Dem. Mary Lewden, et al. v. Richard Roe, i. e. John Gribbin, et al.

May Term, 1822.

**Appeal—Special Verdict.**—An appeal cannot be entered from the judgment of the Court founded on special verdict.

By CHARLTON, Judge.

This is a motion, by Habersham, to set aside this appeal, because no appeal can lie from the judgment of the Court on special verdict.

An appeal, under our system of jurisprudence, is entered for two purposes: 1st, to correct errors in fact committed by the Jury—and 2dly, to correct the errors in law, of the *nisi prius* charge of the Judge to the Petit Jury. But in a special verdict there can be neither error nor mistake in matter of fact, because there is an agreement of the state of facts by all the parties to the record, and there can be no error of law, to be reviewed and corrected, because the

\*See note to Bolton v. Flournoy, et al., p. 138 supra; Pool v. Barnet, Dudley's (Geo.) Rep. 8.—(Ed. of Original Edition.)



Court has already by its judgment, settled the principles of law as applicable to the case. Cui bono then, is the appeal entered?

It is ordered, that this appeal be set aside, and expunged from the minutes as irregularly entered.

Habersham, for the motion.

188 \*Nichols, Dobson and Hills, v. Richard Dennis and Another.

May Term, 1822.

**Law Firm—Warrant of Attorney—Authority Thereunder after Dissolution.**—A warrant of attorney to carry on a suit, was given to L. & M., attorneys at law and co-partners: judgment was obtained thereon, and after the death of L. sci. fa. was issued against the bail by M. & N., who had entered into co-partnership—**Held**, that the co-partnership of L. & M. was revived as to the cases brought by them, by the co-partnership of M. & N., and that the latter firm had authority to prosecute such process, under such warrant of attorney.

**Warrant of Attorney—Execution—When.**—It is sufficient if a warrant of attorney be exhibited when demanded; it may be executed at any stage of the suit.

**Same—Continuation after Judgment.**—A warrant of attorney continues to exist after judgment, if any other process is required to obtain the full benefits of such judgment.

**Partnership—Dissolution—Warrant of Attorney—Execution by Collecting Partner.**—If on the dissolution of a firm, power be given to one partner to collect the debts thereof, such partner may execute a power of attorney for self and partners, for the purpose of authorizing a third person to collect the same.

By CHARLTON, Judge.

This is a scire facias, to fix the defendants as bail to the original suit, and among other objections it is contended, by Wayne, that there is no power, or warrant of attorney, to prosecute this suit; that the power tendered is only executed by Hills, for "self and other partners," after a dissolution of the firm; that it appears to have been executed, subsequent to the institution of the original action, when it ought to have been executed contemporaneously with such institution, and to have had a direct reference to it: that a warrant of attorney exists for a year and a day only, to take out execution. (Bac. Abr. tit. Attorney:) that sci. fa. is a new action, and consequently requires a fresh power of attorney; and the power now filed, has no reference to it, (2 *Ld. Raymd.* 1252; 2 *Salk.* 603, 367, 453,) and that the power of attorney, (if any,) was originally given to Lloyd & Morrison, which expired, with that legal co-partnership; and that, it could not be continued in the present legal co-partnership of Morrison & Nicoll. Nicoll, on

189 the other side contended, \*that the legal co-partnership of Morrison & Nicoll, was to all reasonable purposes, a continuation of the co-partnership of Lloyd & Morrison, under whose auspices the suit

was brought; and that the English authorities only applied, when the suit was consummated by judgment, and nothing further was to be done; but under the jurisprudence of Georgia, the original warrant of attorney, operates until all the fruits of the first action, shall have been obtained.

I did expect, that these points would have been decided by another Judge, because it was suggested, that when at the bar, I had been retained by the defendant to the original suit: but it is not in my power further to delay the expression of my opinion—and it is—that the co-partnership of Lloyd & Morrison, was revived, as to the cases brought by them, in the co-partnership of Morrison & Nicoll, who succeeded to their professional engagements—that it is sufficient if a warrant of attorney is exhibited when demanded, though it may be executed at any stage of the suit—and that admitting it expires on the obtainment of the judgment, (which ordinarily renders the attorney functus officio,) yet, that it continues to exist, if any other process is required, to obtain the full benefits of that judgment. The cases adverted to, do not, I think, impugn this doctrine. The co-partnership of Nichols, Dobson & Hills, having delegated to Hills a power to collect the debts of the firm, Hills had consequently authority, to render that power efficient, by executing for self and partners, a warrant of attorney. These are the points, which my notes of the argument present to me, and deciding upon them alone, without prejudicing any objection of more importance which has not been submitted, and which may, on a regular motion, affect this order.

It is ordered, that judgment be entered up against the defendants, nunc pro tunc.

Morrison & Nicoll, for plaintiff—Wayne, for defendant.

190 \*John Boog and Wm. F. Kelly, Ex'ors of King v. John and Isaac Bayley.

May Term, 1822.

**Chancery Practice—Bill of Revivor—Waiver.**—The practice and rule of Court requiring that a bill of revivor should be filed, to make the legal representative of a deceased complainant a party to the suit in chancery, may be waived by agreement between such representative and defendant.

**Same—Replication—Waiver.**—And a replication will be dispensed with under similar circumstances.

**Arbitration—Agreement to Submit—Effect as to Pleadings.**—An agreement to submit the controversy to arbitration, is an admission that the pleadings in the cause are perfect. When the proper pleadings have been dispensed with by agreement between the parties, they may be entered at any time, nunc pro tunc, for the sake of the record.

**Same—Submission of Lis Pendens—Order of Court Unnecessary.\***—A lis pendens, either in chancery

\***Arbitration—Submission of Lis Pendens—Order of Court Unnecessary.**—It is not necessary before parties can arbitrate to take an order of court therefor, though the cause is pending in court. *Hardin v. Almand*, 64 Ga. 592, citing *Leonard v. House*, 15 Ga. 473; *Brand v. Sorrells*, 61 Ga. 162; *Ga. Code*, §§ 2283, 4225.

or common law, may be submitted to arbitration by agreement, without an order of Court.

**Same—Award—Judgment Entered Thereon—Effect.—**

And where by the agreement entered into, the award was to be made a rule of Court, and judgment entered thereon, and judgment was entered without objection, all pre-requisites will be presumed to have been complied with.

By CHARLTON, Judge.

The brief furnished me by the defendants' Solicitor states: "That the bill in the original suit by the complainant, Thos. King, was filed in March term, 1819. The defendants' answer was put in, on the 5th May, 1891. Exceptions were taken to the answer and served 7th July, 1819: and that the complainant, Thos. King, died some short time thereafter, whereby the suit became abated.

The motion now submitted, is to set aside the judgment and proceedings entered up in this cause against the defendants, upon the following grounds: First. Because the original bill has in no way been revived since the death of the complainant, Thos. King, so as to make the present complainants, the representatives of the said Thomas King, parties to the suit, as ought to have been done, according to the 15th rule of equity, (vide rules of Court.) Secondly. Because, the facts in said suit have never been put in issue by the present complainants, according to the 9th rule in equity, by filing replication to the answer of the defendants. Thirdly. Because, this cause being the subject of equity jurisdiction, 191 tion, \*has been referred (to arbitration) without obtaining the special order of the Court, for that purpose; and Fourthly. Because, even allowing this reference to come within the statute, (Judicial Act of 1799, Sec. 30,) yet that no agreement or writing signed by the parties, and no certificate of previous undetermined judgments, or causes against defendants, has been obtained from the Clerk, and filed, upon which alone a judgment can be founded.

I shall dispose of the grounds of this motion to set aside the judgment, in the order in which they have been arranged by the Solicitor for the defendants.

1st. It is an axiom in law as well as in equity, that a party may waive a right intended for his benefit. If this is applicable to a matter of substance, a fortiori, it is to an expleture, or technical form of pleading. In this case and under this head it is objected, that no bill of revivor has been filed, by which only, according to the practice in chancery, and the special requisition of a rule of this Court, these complainants could appear as parties to this suit. The objection would be well founded and irresistible, if the defendants by their own assent and compact had not dispensed with, or rather waived the necessity of a compliance with the rule of Court. By their agreement to refer this controversy to arbitration, they of course considered every thing done in the pleadings,\* which ought to have been done—and in order that these pleadings

may be perfected, for the sake of the record, the complainants hereby have leave to file a bill of revivor nunc pro tunc.

2d. This ground may be answered as the first has been, and a similar permission is given to the complainants.

3d. It is certainly an anomaly with us to refer a controversy pending in chancery, to this domestic forum. It exhibits the singular spectacle of a case translated from one equitable jurisdiction, possessing ample powers to administer complete justice between the parties litigant, according to the liberal and unfettered views of that jurisdiction—to another equitable but restrained jurisdiction, whose determination must 192 be ultimately enforced by \*common law process. But such has been the agreement among the present parties, and our system of jurisprudence does not inhibit a reference of any case or controversy, whether pending in chancery or common law. The agreement of the parties, must always control the destinies of a suit before either forum.

4th. This objection is answered by the fact, that there is an agreement between the parties, and signed and sealed by them, to refer this case to arbitration—and in that agreement there is this clause, "finally to settle the various controversies, strifes and debates which have been or now are pending between the parties aforesaid, and the said William F. Kelly and John Boog, on their part, executors as aforesaid plaintiffs—and the said John and Isaac Bayley, on their parts defendants, consent and agree, that if the award be made pursuant to the conditions of this instrument, it may be made a rule of the next Superior Court, and entered up as a judgment and decree of the same." St. Marys, 12th October, 1821, signed John Bayley, Isaac Bayley, Wm. P. Kelly, executor, John Boog, executor. Before entering up the judgment on the award, it was competent for the defendants to have availed themselves of the proviso clause in the 30th Sec. of the Judicial Act,\* and either to have delayed, or prevented that Act of the plaintiffs by requiring the certificate of the Clerk, as to the existence on the docket of previous undetermined causes, but the objection comes too late, and after judgment I must presume, that this requisite had been complied with.

Upon the whole, I am of the opinion, that there is nothing, in any one of the grounds, upon which the motion is founded, to set aside the judgment entered up against these defendants.

Motion overruled.

\*The 30th Sec. of that Act, (Princes Dig. 213.) after pointing out the method, by which causes may be submitted to arbitration—and directing that judgment may be entered upon such award, provides, that no judgment shall be entered upon an award, where it shall appear, that any other cause stands on the docket of the Court against the defendant, undetermined, before the cause, in which the rule or other agreement in writing for arbitration is entered.—(Ed. of Original Edition.)



193 \*William Waters v. Bank of the State of Georgia and Planters' Bank.

May Term, 1822.

**Lost Bank Note—Establishment—Payment.**—A party who proves the loss of a Bank note, is entitled to have the same established as a lost paper, by pursuing the method prescribed by the rule of Court, and to require payment of said established note from the Bank from whence it issued.

**Same—Payment—Indemnity.**—\*But he will be compelled, before payment of the same, to indemnify the Bank from all liability on the original note.

By CHARLTON, Judge.

This is an application for establishment of lost Bank notes, conformably to the mode prescribed by rule of Court.

The case has been argued on paper with very considerable ability, and is entitled to a place on the minutes of this Court, for the information, and I may add, the instruction of my brethren of the bar, on topics and points of law—involving much nicety, and upon which the best cultivated professional intellect may form different opinions, and deduce the most conflicting conclusions. The argument submitted on each side, will illustrate the position, at the same time, and shew the learning—logical precision, and plausibility with which principles and doctrines may be maintained in contrary and hostile characters. The argument submitted by Mr. Davies, in answer to that of Mr. D'Lyon, did for some time change the current of my reflections as to the equity Mr. Waters was entitled to, on his application, under the rule of Court. According to Mr. Davies' exposition of the Act of 1799—the circumstances of the case—and the questionable shape of the facts upon which these Bank notes are attempted to be established as lost, or destroyed—it would seem, that the comparative equitable and summary mode of proceeding under the rule of Court, passed in pursuance of

Legislative permission, is not the  
194 \*remedy the applicant ought to have adopted. With much deference to the suggestions and reasoning of counsel, I do not think myself authorized to countenance any proceeding, for the establishment of a lost or destroyed paper, variant from that prescribed by the Legislation of the Court. The petition has gone through the forms prescribed, and the Jury have found the fact, that these notes are lost. It is true these Bank notes may still be in circulation, whether as notes payable to bearer, or post notes, for the reasons assigned by Mr. Davies, and it may be true, that the mail containing them was robbed. Still these notes in relation to the petitioner are completely lost—and throwing himself within the circle of contingencies—it would be difficult for any ingenuity to designate

\***Lost Bank Note—Payment—Indemnity.**—A party who proves the loss of a bank note, is entitled to require of the bank payments of the same, provided suitable indemnity are tendered. Robinson v. Bank, 18 Ga. 67, 111, citing principal case as directly in point.

a happy casualty by which he could flatter himself with the hope of his having them restored. Admitting the accident or the felony, by which the petitioner has upon principles of law, (particularly on the authority of the case of Miller v. Race, 1 Burrow. 452,) been divested of the possessory right to, or interest in these notes, then the difficulty would only occur when these notes are, (if they ever will be,) presented at Bank for payment. This payment might be resisted on two grounds: 1st. Under the notice of Waters; and 2dly. That his interest in, and title to them still remained. If neither ground should be available, and the Bank should feel itself obliged to pay them to the offeror, whoever he might be, the Bank would lose nothing under a satisfactory and substantial indemnity from the petitioner. It ends in this then, that unless the petitioner is allowed to establish these notes as lost, they are to him lost forever; but if established, he obtains what justice awards to him, and the Bank under his indemnity assumes no further liability than it always assumed after the issuing of these notes, and can incur no loss by payment, to any person or persons in whose hands they may be. Authorities hold me out in requiring this indemnity, and the rule of Court warrants and sanctions "such order in the premises, as shall be meet and conformable to justice."

195 \*It is therefore ordered, that the rule be made absolute for the establishment of these notes as lost papers; and that upon the presentation at the Banks, from which they may have issued, that he the petitioner do tender to the President and Directors of said respective Banks, good and sufficient security, by bond or otherwise, to be approved by said President and Directors of said respective Banks, conditioned for the full and complete indemnification of said President and Directors, against any liability on the original notes, should they at any future period be presented for payment by any other person or persons whatsoever, to whose hands they may have come.

D'Lyon, for the petitioner—Davies & Berrien, contra.

196 \*Rogers v. Bullen's Administratrix.\*

May Term, 1822.

**Executors—Levy—Money.**—Money may be taken in execution, if in possession of defendant.

**Same—Same—Money in Sheriff's Hands—Case at Bar.**—Where money is made by a Sheriff at the suit of A. who has a legal or equitable claim to it, the Court, on the return of the writ, will, on motion, direct the Sheriff to pay the money over to an execution against A.

**Same—Same—Same—Same.**—And when such money was made at the suit of A., as administrator of B., the Court will direct it to be paid over to an execution against A., as administrator of B..

\*The principal case was cited in Tift v. Griffin, 5 Ga. 193, 194.

where it appears to be the eldest judgment against the estate of B., and no interfering or conflicting claims by administrator or other parties are shewn to exist.

By CHARLTON, Judge.

The administratrix of Bullen obtained a judgment against Luke Mann, and under a fi. fa. issued thereon, made the sum of \$ , which sum being in the hands of the Sheriff of Bryan county, he was notified to hold the same subject to the order of the Court, on the application of this plaintiff, under an execution against the administratrix of Bullen. The money made on the execution against Mann, by consent has been placed in the hands of William Davies, Esquire, for the convenience of the parties, (such is the language of the statement submitted to me by Wayne and Cuyler,) subject to the order of the Court.

This is a motion by Wayne and Cuyler, for an order directing the Sheriff of Bryan to pay over the money thus collected under the execution of Bullen's administratrix v. Mann, in satisfaction of a judgment obtained by this plaintiff, Abner Rogers, against the administratrix of Bullen. William Craig, the assignee of this judgment and execution of Rogers against Bullen's administratrix, in the affidavit he has laid before me, in support of the motion of his attorneys, swears, "that he has been diligently employed for several years past in seeking property to satisfy the above execution, that for this purpose he has employed counsel, that he has been unable to find any property of the defendant, or the

estate of Bullen, liable to the same—  
197 that he verily believes \*there is no property in this State which is liable to the above judgment and execution—and that he has no reasonable prospect of the payment of said debt, unless the money in the hands of the Sheriff, be paid over on account of said judgment and execution." In aid of the motion, the counsel for the assignee has referred to 1 Dougl. 230; 1 Cranch, 116, 117; 12 John. Rep. 395, 320. Davies and Berrien, opposed to the motion, relied upon the cases in 4 East. 510, 9 East. 46, 5 John. Rep. 163. With these conflicting authorities before me, the point and question for my determination is—can this Court, under the facts and circumstances submitted, direct the money made under the execution against Mann, to be paid over to this plaintiff? I shall place in review the authorities which have been cited on both sides, and endeavour to establish the principles and doctrines infused by them into the jurisprudence of Georgia. Cases of this complexion, must, I presume, have before occurred within this, or other districts of this State, but, as usual, I can find no recorded decision to guide me, and therefore must consider this as a case of the first impression, (at least in this district)—encumbered with all the difficulties which commonly associate themselves with an unadjudicated principle. The first case, in the order of those cited in support of the

motion, is *Armistead v. Philpot*. (1 Dougl. 230.) In that case, "Kirby moved for a rule to shew cause, why the Sheriff of Middlesex should not retain in his hands, for the use of the plaintiff, a sum of money which he had levied for the present defendant, in another action in which he was plaintiff. The ground of the motion was, that the plaintiff had not been able to levy on the effects of the defendant to the amount of his demand." In all its features, this case is similar to the one before us. The motion was not opposed, "only so far as that the attorney's bill in the cause in which the money had been levied, should be paid in the first instance." The rule was made absolute, (says the authority) with that qualification. Lord Mansfield said, "he believed there were old cases where it had been held that the Sheriff could not \*take money in execution even though found in the defendant's scutcheon, and that a quaint reason was given for it, viz. that money could not be sold. It is perfectly surprising that the Judges and bar of the Court of King's Bench, should, in the year 1779, agree, that the motion of Kirby was of the first impression: and that such slight illustration of the doctrine, should have been afforded by the learned Ch. Justice. The next case is that of *Turner v. Fendall*. (1 Cranch, 117.) The opinion of the Court is delivered by Ch. Justice Marshal, a man not inferior to Lord Mansfield, or any other Judge who ever sat in Westminster Hall: at least that is the opinion formed by my humble intellect, and as an American citizen, I feel great pleasure and pride, in announcing it from this seat. In this case it is stated, that "Turner had been sergeant of the town of Alexandria, and had returned on a writ of fieri facias, issued on a judgment rendered by the Court of Hustings, for that corporation, in favor of Philip Richard Fendall, that he had made the debt and levied thereon a writ of fieri facias, issued on a judgment obtained by William Deneale, against Robert Young and Philip R. Fendall, merchants, trading under the firm of Robert Young & Co." One of the errors assigned in the translation of this case to the Supreme Court, was, "that the officer had a right to levy the execution of Deneale on the money of Philip R. Fendall, in his hands." The Ch. Justice says, (in 1801) "the principle that an execution cannot be levied on money, has been argued to be maintainable, under the authority of adjudged cases. Yet, (continues he,) no such adjudged case has been adduced." The Ch. Justice adverts to the case of *Armistead v. Philpot* in Douglass; to *Rex v. Webb*, (2 Show. 166,) where it is decided, "that by levieri facias, the Sheriff may take ready money;" to *Dalton's Sheriff*, 145, where it is also stated in terms, that money may be taken in execution on a fieri facias, and Barnes' notes, 214, *Staple v. Bird*, "where a Sheriff had levied an execution on money in his hands, that he should, notwithstanding this execution,



pay the money to the person entitled  
199 \*to the benefit of the first judgment."

This case from Barnes is thus reported in his notes. "Staple v. Bird, Trin. 32 & 33, Geo. 2: defendant being arrested by *capias ad satisfaciendum*, 7th May, 1759, paid to Sheriff of Kent's bailiff 30l. 6s. 6d., the sum mentioned in the writ, which sum the bailiff immediately sent to the under Sheriff in London; on 10th of same month, May, Mr. Elihu Bridcoak, plaintiff's attorney, (to whom the judgment whereon said *ca. sa.* was issued, had been assigned by plaintiff,) demanded said money of the under Sheriff, who excused himself, the *ca. sa.* not being then returnable. At the return the Sheriff returned, that he took defendant who paid into his hands said 30l. 6s. 6d., and that afterwards, and before the return, to wit, 11th May, a *fi. fa.* against the goods of Staple, the plaintiff in the *ca. sa. advs.* Bird, executor, &c.—the defendant in the *ca. sa.* for 29l. 10s., was delivered to the Sheriff, and that he levied the same out of the money in his hands, which with poundage exceeds the money received under the *ca. sa.* Upon this return, and an affidavit of the fact, Bridcoak applied to the Court, and obtained a rule for the Sheriff to shew cause why he should not pay him said 30l. 6s. 6d. deducting poundage, which rule was made absolute upon hearing counsel on both sides." I give this case at length, because the Ch. Justice of the United States has given a weight of authority which no other tribunal has bestowed upon it, and because it contributes to the establishment of his doctrine in the case of *Turner v. Fendall*. Alluding to this case in Barnes, the Ch. Justice says: "It is true in that case, the person in whose name the judgment was rendered, was not entitled to the money received under it, but the case is not stated to have been decided on that principle, and the very frequency of such a state of things, furnishes an argument, of no inconsiderable weight, against the right to levy an execution on money so circumstanced." This case from Cranch establishes then the proposition, that "money may be taken in execution, if in possession of the defendant;" but says the Chief Justice, "the question of

200 greater difficulty is, \*whether it may be taken by the officer before it has been paid by the officer to the person entitled to receive it?" The case decides that the Sheriff, before the return day of the execution, may pay the money over to the creditor: otherwise, the mandate of the writ to bring the money into Court must be obeyed, "there to be disposed of as the Court may direct." "This was done," (says the Ch. Justice,) "in the case of *Armistead v. Philpot*—and this ought to be done whenever the legal and equitable right to the money, is in the person, whose goods and chattels are liable to such execution." This case, adjudged by the Supreme Court of the United States, removes every doubt and difficulty as to the granting the application before me—unless this case and its

principles can be superseded and controlled by the authorities adverted to by my brother, Davies. The first in order, of these authorities, is the case of *Fieldhouse v. Croft*, (4 East. 510). It is thus reported. "Wigley moved for a rule to shew cause, why the sum of 317l. 11s. 9d., belonging to the defendant, in the hands of the late Sheriff of Worcester, should not be paid over by him to the present plaintiff, which money was part of a balance of 900l. and upwards, in the late Sheriff's hands, over and above the sum levied by the same Sheriff under a prior execution—and notice of this motion was given to the defendant, and to the late Sheriff. (The case then states the facts of the affidavit on which the rule was moved.) The plaintiff had recovered judgment for 307l. and costs, in February last, against the defendant, in another action in the Court of pleas in the city of Worcester, on which a writ of *fieri facias* issued to the Sergeants at Mace, who levied thereon 45l. 10s., and returned that the defendant had no other goods in the city. Whereupon the record being removed into this Court, another writ of *fi. fa.* issued to the present Sheriff of the county, but no other effects of the defendant could be found whereon to levy, than these in the hands of the late Sheriff, which he had notice not to pay over. Wigley admitted that he could find no au-

thority in print: but the case which  
201 came nearest was \**Armistead v. Philpot*, where a rule was made absolute, (though without resistance, except so far as regarded the lien of the attorney,) for staying in the Sheriff's hands for the use of the plaintiff in that action, money, which the Sheriff had levied for the use of the defendant in another action, in which he was plaintiff—*Lord Ellenborough, C. J.*,—"The question comes to this, whether a plaintiff can have execution of money belonging to the defendant in the hands of a third person? This is a motion of the first impression, and shall not have its first effect from me. It was the duty of the late Sheriff, if he took in execution more than was necessary to satisfy the former execution with which he was charged, to pay over the surplus immediately to the defendant—*per curiam*, rule refused."

It will be perceived, that the Court takes no notice of the case of *Armistead v. Philpot*, or any of the more ancient cases which decide that money may, or may not be taken in execution. This was a determination of the Court of King's Bench in 1804, and *Lord Ellenborough* says, it is a motion of the first impression, as had been also previously said by the bar and Court of King's Bench in 1779, consequently the cases in *Showers*, *Dalton's Sheriff*, and *Barnes*, must be considered as no authorities for the principle, that money may be taken in execution on a *fi. fa.* and that no combination or circumstances similar to those of *Armistead v. Philpot*, or the case now before me, could legally justify the direction given in *Armistead v. Philpot*, or by the Supreme Court in *Turner v. Fendall*. The next case re-

ferred to by Davies and Berrien, was Knight v. Criddle, (9 East. 48). I shall also give that case as I find it reported. "The present defendant had recovered judgment and sued out execution against one S. H. for his debt and costs; and in discharge of that execution, S. H. paid into the hands of the Sheriff of Hantz, 60l. in Bank notes; and before that money was paid over, the present plaintiff recovered judgment, and sued out his writ of fi. fa. for 33l. 10s.,

202 debt and \*costs against the defendant, which was delivered to the same Sheriff, and now upon an affidavit of these facts by the Sheriff's officer, and that he had in pursuance of the Sheriff's warrant levied the debt and costs in this cause out of the 60l. in Bank notes, remaining in the Sheriff's hands, and that he could not find any other goods and chattels of the defendant, whereof to levy the said debt and costs. Gaselee moved for a rule to shew cause why the Sheriff, Hantz, should not pay over to the plaintiff the amount of his debt and costs in this cause, out of the sum received by him on account of the defendant as before mentioned, and in the meantime retain the sum in his hands, and he cited Armistead v. Philpot, where a similar rule was made absolute without opposition, except so far as to secure the attorney's lien for his bill. But by Lord Ellenborough, C. J.: "we cannot force the defendant to come here to shew cause against a rule founded on the assumption that money (and Bank notes for this purpose are the same), may be taken in execution. It is an innovation on the law, which ought not to be admitted. The case from Douglass was by consent. The other Judges concurred in refusing to grant a rule to shew cause." Gaselee does not advert to the case in 4 East. decided in 1804, but invokes, as did Wigley in that case, Armistead v. Philpot. This case of Knight v. Criddle, decided in 1807, notices none of the ancient cases, pays no respect to the case of Armistead v. Philpot, because it was by consent—and states the English law always to have been, that money could not be taken in execution, nor could any direction be given by the Court as is contained in the case from Douglass—unless I presume, as in that case, by consent. It results that if the judgment of the Supreme Court of the United States is founded upon the supposed doctrine and principles of English Law, and was particularly influenced by Armistead v. Philpot, I hope, informed as I am, by the cases in East, that the law of England was not contained in the cases relied upon by the Chief Justice Marshall, and that any British authority

203 which announced that money could be taken in execution, \*or that the Court could direct it to be paid over under the facts and circumstances of Armistead v. Philpot, and Turner v. Fendall, was "an innovation on the law which ought not to be admitted,"—I hope, I say, that thus informed, I would not incur the imputation of presumption or temerity in declaring, that the law of the Supreme Court in Turner

v. Fendall, was not the law of Georgia. But Chief Justice Marshall in delivering the opinion of the Supreme Court, approves of what was done in Armistead v. Philpot, and without reference to any binding authority of that case, or any other British adjudication, decides that what was done in that case, on principle, "ought to be done whenever the legal and equitable right to the money is in the person whose goods and chattels are liable to such execution." And without declaring it as a conclusion from British authorities, he also announces as the opinion of the Court, "that money may be taken in execution if in the possession of the defendant," and in another part of the opinion, says, "the Court can see no reason in the nature of the thing, why an execution should not be levied on money. That given in the books, viz. that it cannot be sold, seems not to be a good one. The reason of a sale is, that money only will satisfy the execution, and if any thing else be taken, it must be turned into money; but surely that the means of converting the thing into money need not be used, can be no adequate reason for refusing to take the very article, to produce which is the sole object of the execution." On principle then, and according to the nature and fitness of things, the propositions are settled by a decision of the Supreme Court of the United States, (to which I bow with submission,) 1. That money may be taken in execution. 2. And that where money is made on the execution of A. (and in the hands of the Sheriff) who afterwards becomes defendant at the suit of B. if A. has "an equitable and legal right to the money," the Court has power, and ought to direct the Sheriff to pay the money in satisfaction of B.'s execution.—But admitting this to be the law of this country,

204 in opposition to English decisions, \*still it is contended by Mr. Davies, that the Court ought not under the circumstances of the case before it, grant the motion, because, there may be interfering and conflicting claims of the administration to prevent: and he relies upon the case of Williams v. Rogers, and Ross against the Same reported in 5 Johns, p. 163, which shews, that the Court will not grant a motion like that now submitted, where there are conflicting claims or equitable rights of parties to be ascertained. The case cited is a decision of the Supreme Court of the State of New-York in 1809—and on the point urged by Mr. Davies, the substance of the decision is thus mentioned in the marginal reference. "This Court will not order a Sheriff, who has overplus money in his hands, arising from an execution, to pay it over to a plaintiff on a subsequent execution against the same defendant; especially in a case, where an assignee of the first judgment and who was a purchaser at the Sheriff's sale, claimed the surplus moneys,—and the equitable rights of the parties were not clearly ascertained, though they might, perhaps, in a cause where the rights of the parties were



clear, and there was no other means of satisfying the plaintiff in the second execution." In this case the interposing and conflicting claims of the parties appeared from respective statements and affidavits, which induced the Court to say: "as the precise extent of the equitable rights of the claimant to the overplus moneys cannot be ascertained, the Court decline to make any rule on the subject. The Court of Chancery, has more means, and can procure more light in adjusting the equity of the interfering claims."—But how extremely dissimilar is the case before me. No conflicting or interfering claim by the administratrix is presented requiring this or a chancery jurisdiction to ascertain or adjust it. No plea was filed to the suit of this plaintiff by which I could be placed in pursuit of any legal or equitable right of the administration, or any other party which would by ulterior investigation defeat the application of the moneys, made under the execution against Mann, to the satisfaction of this plaintiff's judgment.

205 \*Years roll away. The assignee of the judgment swears, that during these years, or for years past, he has been endeavoring to trace other property of Bullen, without success, and during all this time, neither the administratrix nor any other party, interposes any claim or pretension by which this money could not be considered as assets liable to Rogers' judgment, now, or quando acciderint. Then in the absence of all matter of record, or any right legally or equitably exhibited by the administratrix, by means of which she might subtract this money as assets of the estate of Bullen, I am required on the oral suggestion of counsel that such claim may be exhibited, or such right may be in existence, because the contrary does not appear, I am required, I say, upon such suggestion patiently to wait for its interposition, after this crassa negligentia of the administratrix, and that too, without any assurance of which I could take official cognizance, that such claim will ever appear. I cannot persuade myself, that upon any principle of law or equity, under the circumstance of this case, I would be justified in withholding from the assignee of this judgment, his immediate right (it being the eldest judgment against the estate of Bullen) to receive this money from the Sheriff of Bryan, or from the gentleman in whose hands it is placed for the convenience of all parties.

It is therefore ordered, that the amount of the proceeds of the judgment against Luke Mann at the suit of the administratrix of Bullen, or so much as will in part, or the whole, satisfy the judgment of Abner Rogers against said administratrix be paid over by said William Davies, Esquire, to the attorney of the plaintiff of record or to his order.

Wayne & Cuyler, for the motion—Davies & Berrien, contra.

August, 1822.

**Arbitration and Award\*—Setting Aside Award—Mistake of Law.**—When the arbitrators meaning to follow the law, mistake it, it is a good ground for setting aside their award, so far as it is affected by that mistake.

**Same—Same—Against Law.**—But if, without reference to the law, they make an equitable decision, it is no objection to the award, that in some point, it is against law.

**Same.**—Where by the terms of submission, two persons were to be appointed, with power, if they should disagree, to call in "a third," and upon such disagreement a third person was called in, and signed the award with one of the other arbitrators, HELD, that such third person was only an arbitrator, and that therefore, there was no necessity for him to convene the other arbitrators to deliver to them his decision.

By CHARLTON, Judge.

This is a motion to set aside the award rendered in this case, upon the following exceptions:

1st. Because excessive damages have been awarded to the plaintiff, in this case. 1st. that interest has been allowed by them on the rents of the years 1813, 1814 and 1815, although the accompanying affidavit of Joseph Law proves an offer having been made by the defendant through the said Law to Mr. Roswell King, the agent of the plaintiff, to pay the rent agreed on between Mr. Woodruff, the prior agent, and the defendant, for those years, which offer was rejected by the said Roswell King. And that the same offer was made to R. W. Habersham, Esq. attorney for plaintiff, who postponed any adjustment or payment, at or about the time of the offer, by referring the subject for consideration at the next Liberty Court.

2. Interest has been allowed by them for the years 1816, 1817, 1818, and 1819, on a rent valued by themselves, never previously ascertained by the parties, and the demand for which was in the nature of an open account, or damages for a supposed trespass, neither of which could legally carry interest.

207 \*3. During the years 1816 and 1817, Wilson was in law, the tenant under the agreement between Woodruff and himself for the payment of \$25 00 per an-

**\*Arbitration and Award—Setting Aside Award—Mistake of Law.**—When questions of law are distinctly submitted, the decision of the arbitrators will be final, unless it appear on the award that the arbitrators intending to decide according to the law have plainly mistaken what it is, and have acted on an erroneous rule of law. *Crabtree v. Green*, 8 Ga. 8.

To justify a court in setting aside an award on the ground of mistake, whether of law or fact, such mistake, must be gross and palpable. Mere error of judgment in the arbitrators is not a sufficient ground for setting aside the award. *Overby v. Thrasher*, 47 Ga. 10, 22; citing *Anderson v. Taylor*, 41 Ga. 10.

num, whereas the award subjects him to the payment of \$137 50 per annum, a rent entirely beyond a just consideration for the occupancy of the premises, if no agreement subsisted, and therefore excessive, for the years 1818 and 1819 also.

II. Because the arbitrators not having agreed on the matters referred to them, called in as umpire Sam'l. S. Law, who subsequently decided without having heard the testimony of Jos. Law, who had been named by defendant as a material witness for him.

III. That contrary to the express understanding of the arbitrators, as stated in the accompanying affidavit of Thomas Mallard, one of them, the other, Jno. Stevens, had several interviews with the said Sam'l. S. Law, on the subject of the submission, and that Mallard was not invited to advise with the umpire, and that he (Mallard), had consequently no opportunity of removing the impressions on the said Law's mind which the ex parte explanations of Stevens may have produced.

IV. Because contrary to practice in cases of umpirage, and in opposition to the principles of common justice, the said Samuel S. Law did not convene the arbitrators to deliver to them his decision, precluding thereby Mallard's requiring all testimony for defendant first to be read or heard by him, and in case of refusal to read or hear, precluding his protesting against the decision for partiality, or impropriety, if he had thought any existed.

The prominent causes usually assigned in law or in equity for setting aside an award do not find a place in these exceptions—and these causes are, corruption, partiality, or concealment of essential circumstances. An award may also be set aside upon a variety of other grounds, and particularly, that urged by Mr. Jackson—where the arbitrators intending to act upon, 208 and follow \*a principle of law, happen to mistake it. But, in a late case, Kyd on awards (Amer. Edit. 1808) p. 351. "Where no lawyer could doubt upon the point of law, this distinction was laid down by the Court of King's Bench; that where the arbitrators meaning to follow the law in their determination happen to mistake it, this is a good ground for setting aside their award, so far as it is affected by that mistake; but that knowing what the law is, or laying it entirely out of their consideration, they make what they conceive, under all the circumstances of the case, to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law."

The following is the submission and award in this case, "It is agreed by Roswell King in behalf of the plaintiff, and by Josiah Wilson the actual defendant, that the plaintiff be at liberty to take a verdict; and that all questions as to rent which has accrued, and all other questions respecting the previous occupancy of the lands in question between the parties, shall be submitted,

forthwith, to two gentlemen of this county, the one to be appointed by the plaintiff, or Roswell King, Esq. his late attorney, and the other by Josiah Wilson, or his attorney, to whom all evidences, documents and agreements for rents and damages shall be submitted, and who shall thereupon decide what sum or sums of money shall be paid by the defendant, to the said plaintiff or his representatives, for the previous use and occupancy of the said land and damages; and if the said two persons shall disagree, they may call in a third, and the decision of any two shall be final and conclusive between the parties.

(Signed) ROSWELL KING, for Plaintiff.  
JOSEPH WILSON,

The subject matter of disagreement between the parties in the above case was referred by them to the decision of Thomas Mallard and John Stevens, Esqrs. A 209 meeting was accordingly \*held at Riceboro' on the 10th January, to receive testimony, and hear explanations; the parties attended, made their several statements, and submitted a number of documents. In order to give the subject a patient and strict investigation, it was determined by the arbitrators to take the papers to their respective abodes, examine them leisurely, and again convene, whenever they were prepared to make a decision. On the 4th of February, they accordingly convened, and on comparing opinions, a disagreement was found to exist on some material points: Hence it became necessary to call in a third person; and agreeably to the powers in them vested, they called upon Sam'l. S. Law, Esq. Whereupon the following decisions were determined upon, and are hereby declared by us, the undersigned arbitrators, to be our solemn decisions on the case, viz: 1st. The lands in question came into the occupancy of Col. Wilson by an agreement entered into between him and Geo. Woodruff, Esq. for J. Champneys. This agreement made the 10th Feb'y. 1813, authorized Col. Wilson to enter on the premises and cultivate 50 acres of land, by paying 50 cts. per acre at the expiration of each year. The motives which prompted the attorney to give a lease at this low rate, were no doubt founded in policy, to wit, to have any tenant upon the spot to watch over the premises, and particularly the buildings. But it is a fact well known, that the buildings on the plantation, were in a state of dilapidation at the time, as scarcely to be worthy of notice; nor are we in possession of sufficient testimony to satisfy us, that Col. Wilson did commit a trespass on them. We therefore decide that the agreement between Wilson and Woodruff, shall be sustained; or, in other words, that for 3 years following 10th Feb. 1813, Col. Wilson, shall pay 50 cts. per acre for 50 acres of land, with interest, upon the several rents as they respectively became due, (see statement subjoined). 2ndly. On further examination of the documents submitted, it is also apparent, that Mr. R. King, succeeded Mr.



Woodruff in the agency. Hence all former agreements ceased, \*and it became the duty of Colonel Wilson, to make arrangements, under the authority of the new agent. In order, to this, it is perceived, that he opened a correspondence with Mr. King, in behalf of Mr. Sam'l. Lewis and himself, on the subject of purchasing those lands—after many and various letters had passed between them, in relation to the purchase, it was at length determined to refer the valuation of the lands in question to three disinterested persons—Accordingly, on the 23d Feb'y. 1818, the persons designated appeared on the premises, and made a valuation. It does seem to us to have become the duty of Colonel Wilson either to receive the lands at the valuation then made, on the condition of good and sufficient titles being executed to him, or to have abandoned them altogether. But as he refused to do the one, and still held on to his possession, he subjected himself to the payment of a high rent, for so much of the land as he cultivated. It is a fact well known, that during the last four years of his possession, Col. Wilson made good crops of Cotton on the land, and that the price of the article for these years was equal to any price before or since known in our country. Hence we decide, that for four years following the 10th Feb'y. 1816, Col. Wilson shall pay \$2 50 for every acre which he cultivated, with interest on the several rents as they respectively became due—(see statement subjoined). We consider Col. Wilson to have been the tenant of Champneys, until the 10th Feb'y. 1820, at or about which time he delivered up the premises to Mr. Mell. It is true that Mr. Mell rented the lands from Wilson, and that an agreement in writing was entered into between them, but it is equally true that this agreement was cancelled in a few weeks thereafter. Wilson expressed to Mell his desire to surrender up the land, if he, Mell, would release him from his contract; Mell acquiesced in his wishes, and soon after communicated with Mr. King, the agent on the subject. It is certain that Wilson never received any rent from Mell—and it appears to us to be wholly immaterial, by whom the rent is paid, whether by one or the

211 \*other. Hence we decide that Wilson shall not be made responsible for the rent of the premises for the years 1820 and 1821. 3dly. It is claimed by Col. Wilson, that a suitable allowance ought to be made to him for the buildings, and other improvements which he caused to be made and erected upon the plantation—also that the expenses which he was at as defendant in the case of ejectment, ought to be placed to his credit in the account. To the first claim, we answer, that it does not appear to have been the understanding of the parties, that any buildings should have been erected upon the premises, except for the special use and convenience of the tenant; that Col. Wilson occupied the premises

sufficiently long to be compensated for the improvements which he made, and that it is an acknowledged fact, that he did cause to be carried away some of those improvements. To the second claim, we answer, that although the agent Mr. King may have been in the wrong for not staying the suit, when he Wilson, offered to give up the land on certain conditions, yet Col. Wilson was certainly wrong for making any plea to the ejectment, except that the suit was an unnecessary one, as he had, or would relinquish the premises. We therefore decide, that no deduction ought to be made in either case. 4thly. Mr. King as agent claims damages from Col. Wilson, for trespasses committed by him while tenant—to this claim we answer, that we are not sufficiently versed in principles of law to make a legal decision, but on principles of Equity we unhesitatingly declare, that so far as those trespasses have been made known to us, whatever may have been the motives for their perpetration, we do not believe that any essential injury has ultimately resulted to the property of the plaintiff. Hence we decide that no damages ought to be awarded by us under this claim. The foregoing decisions so far as our feeble judgments extend, are based on the principles of Equity and Justice. If they shall prove satisfactory to the parties, we shall feel amply rewarded—But if otherwise, we have the consolation to know, that we are justified by a tribunal superior to the opinions of men, our own consciences.

#### 212 \*Statement of Rents.

Rent of 50 acres of land, at 50cts. per acre, from 10th Feb. 1813 to 10th Feb. 1814,	\$25 00
Interest on \$50 from 10th Feb. 1813 to 10th Feb. 1822,	16 00
Rent as above from 10th Feb. 1814 to 10th Feb. 1815,	25 00
Interest on the same for seven years, to 10th Feb. 1816,	14 00
Rent as above from 10th Feb. 1815 to 10th Feb. 1816,	25 00
Interest on the same for 6 years, to 10th Feb. 1817,	12 00
Rent of 55 acres of land at \$2 50 per acre from 10th Feb. 1816 to 10th Feb. 1837,	137 50
Interest on this amount for 5 years, to 10th Feb. 1817,	55 00
Rent as above from 10th Feb. 1817 to 10th Feb. 1818,	137 50
Interest on this amount for 4 years, to 10th Feb. 1819,	44 00
Rent as above from 10th Feb. 1818 to 10th Feb. 1819,	137 50
Interest on this amount for 3 years, to 10th Feb. 1820,	33 00
Rent of 15 acres of land at \$2 50 per acre from 10th Feb. 1819 to 10th Feb. 1820,	37 50
Interest on this amount for 2 years, to 10th Feb. 1822,	6 00
Total amount,	\$705 00

Liberty Co. 15th Feb. 1822.

JNO. STEVENS.  
SAM'L S. LAW."

I think the arbitrators have followed the law of Georgia in allowing interest upon

the rents under the contract between Wilson and Woodruff, and subsequently, for the reasons they have assigned: but if they have not followed the law, it does not appear they intended to do so, and if such was not their intention, it only remains for me to ascertain, or rather to be convinced, that they have framed an equitable decision. I am convinced that the arbitrators have rendered an equitable decision, and it does not appear to me, that they meant to adhere to any strict principles of law. They have rendered their award under an unusual solemnity of feeling, and with perfect candour and impartiality. This was a reference to ascertain the damages the plaintiff Champneys had incurred, and which the defendant ought to pay as mesne profits, after consenting that Champneys should take a verdict against him in an action of ejectment. Under the circumstances stated in the award, a jury

213 would most certainly \*have given damages, equal to, if not exceeding the amount awarded. Mr. Habersham suggested this, I agree to it, and it affords one of the strongest features in the case to reconcile me to the equitable decision of the award. There was no necessity to give any notice of what is termed the umpirage of the third person called in by the nominated arbitrators, because under the terms of the submission he was only an arbitrator; and the award would have been good with his approbation and signature with that of the persons, selected by King, the agent, and Mr. Wilson. Mr. Lewis' testimony could only have had a reference to the contract between Woodruff and Wilson—it had therefore no material bearing upon the justice and equity of the award, and must besides have been known to all the arbitrators previous to the award.

Motion overruled. Ordered, That judgment on the award be entered up as of the last term of the Superior Court of Liberty County.

Habersham, for the motion—Law, against it.

#### 214 \*Ex Parte Worthington Gale.

August, 1822.

**Magistrate Court—Right to Divide Claim to Give Jurisdiction.\***—An entire contract cannot be divided for the purpose of maintaining several suits, and bringing them within the jurisdiction of a Magistrate.

By CHARLTON, Judge.

This is an application for the writ of certiorari founded upon the facts stated in the following petition:

"The petition of Worthington Gale,

\*Courts—Right to Reduce Claim for Purposes of Jurisdiction.—In *Stewart v. Thompson*, 85 Ga. 830, 11 S. E. Rep. 1030, it is said, where no statutory provision regulates the matter whether a creditor whose demand is created by express contract, can voluntarily abandon a part of his claim, or enter a credit upon it, for the express purpose of reducing it within the jurisdiction of a given court is a question

sheweth, that your petitioner in the term of May 1822, was impleaded by Duhamel & Auze before William Belcher a Justice of the Peace for the County of Chatham, in two certain actions, founded upon an account of six thousand tiles, amounting to the sum of sixty dollars; that the said Duhamel & Auze in order to bring the said account within the jurisdiction of a Justice's Court, divided the said account of sixty dollars into two accounts of \$30 each, upon which the said two actions were instituted against your petitioner at one and the same time—That in June term following the said actions came on to be tried before the said William Belcher, Esq., when your petitioner appeared and objected to the said proceedings as illegal—notwithstanding the said William Belcher, Esq., Justice of the peace, as aforesaid, did give judgment against your petitioner on the said two actions, for thirty dollars each—that the said Duhamel & Auze were allowed to prove their accounts generally by their own oaths, without first making oath in writing that they had no other evidence whereby the same could be established—that your petitioner appealed to a Jury from the judgment of the said Wm. Belcher, Esq., which Jury was duly impanelled in the term of July last for the trial of said actions, when with the same illegal testimony before them, and notwithstanding your petitioner excepted to the same, they rendered verdicts against your petitioner for the sum of thirty dollars in each case—all which actings and doings of the said William

215 Belcher, Esq., and \*the Jury aforesaid, are contrary to the law, as your petitioner is advised and believes, regulat-

upon which the authorities differ, it is probable that the weight of decision is with the affirmative. Our books furnish one case, *Cox v. Stanton*, 58 Ga. 406, squarely on the negative line and several *dicta* looking in the same direction may be found. See *Ex parte Gale*, R. M. Charlton 214; *Commissioners v. Low*, R. M. Charlton 298; *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494. Upon the special question as to the use of such means for bringing a case within the jurisdiction of the county court, we have one express ruling on the affirmative side, in *Wilhelms v. Noble*, 36 Ga. 599, a decision which was made upon the act of 1866, establishing county courts, which conferred jurisdiction in all other civil cases on which not more than one hundred dollars is claimed as damages, or principal sum due. It would seem that this language is so nearly identical with that dealt with in *Cox v. Stanton*, 58 Ga. 406, touching the jurisdiction of justices' courts, as to make the same rule of decision applicable to both. But in the latter case, JUDGE WARNER says, the two cases are unlike, without indicating in what respect they are unlike. Looking to these two cases alone, the result appears to be that for the county court one rule prevails and for the justices' court another.

In *Planters' and Mechanics' Bank v. Chipley*, Ga. Dec. pt. 1, p. 61, citing the principal case, it is held that, parties cannot, with the view of giving the justices' court jurisdiction of a debt exceeding thirty dollars, divide it into smaller sums, though payable on different days.



ing Justices' Courts within this State. Wherefore your petitioner prays, &c."

By no contrivance or subtlety, under the impression of abstract justice or equity in an inferior judiciary like a Magistrate's Court, can such subordinate tribunal be permitted to transcend the boundaries, within which it has been confined by the Constitution or laws of the State. It must look to the very letter of the Constitution and laws, from which authority is derived, and not indulge itself with any nice evasions of the limits to which it may be unequivocally restricted. A Magistrate bound to act within his district in civil cases, and no where else, cannot sustain a jurisdiction beyond thirty dollars, and such must be the entirety of the demand, as not to be susceptible of any division, for the purpose of giving jurisdiction, upon distinct citations to different terms.\* In this case, the continuity of the amount (if I may so express myself,) is broken, for the purpose of throwing the whole demand, at different terms within the jurisdiction of the Magistrate's Court. The summary justice of that Court, may under the arrangement be very acceptable to the suitor, but with very sincere respect for the probity and intelligence, of Justice Belcher, with whom I have the honor to be intimately acquainted, I must say there was error in his judgment, which I cannot suffer to be confirmed by the verdict of the Jury.

It is therefore ordered, that a writ of certiorari do issue as prayed for, and, that in the meantime, upon compliance with the requisitions of the act of Assembly, proceedings be stayed against the defendant.

## 216 \*Howard v. Bank of Darien, et al.

September Term, 1822.

**Suit in Equity—Death of One Defendant—Effect.**—The death of one defendant to a suit in equity, only abates the proceeding quoad him.

By CHARLTON, Judge.

This was originally a motion under notice to re-amend the complainant's bill, by, among other matters, suggesting the death of Jas. Johnston, and then as the complainant supposes, the equitable doctrine which resulted from that event, viz. that the interest, which Johnston had, survived to his copartners, two other defendants, Hills & Wilcox.

I shall not disturb the impression imbibed by the complainant on this doctrine, because he has withdrawn the motion as it relates to his amendment and its consequences, and now moves that the surviving defendants do answer within such time as this Court may direct.

It is a principle of equity, that the death of one defendant only abates the proceeding, quoad him. The other defendants therefore in this case must file their re-

spective answers, and as one of the amendments of complainant was effected during the last term, to which the bill was returnable, the defendants are entitled to the same time to file their answers as the rule of Court allows them four months after the adjournment of the Court, to which the subpoena to the original bill is returnable. At least I shall allow it, in the exercise of the discretion which may be assumed by every Chancellor, in granting further time on the application of defendant.

It is ordered, that the surviving defendants and parties to the bill of the complainant, do file answers to his original and amended bill within sixty days from this date.

## 217 \*Agnes Griffin v. Ex'ors Griffin.

September Term, 1822.

**Wills—Insanity of Testator—Effect—Case at Bar.**—A Will set aside on the ground of insanity, against the testimony of the subscribing witnesses, where there was proof of previous insanity; where the disposition of the property was not rational or natural, and circumstances of mystery and suspicion were thrown around the subscribing witnesses.

**Insane Persons—Act Done in Lucid Interval—Burden of Proof.**—Where previous insanity is shewn, the burden of proof is thrown on the party, who seeks to establish an act as done in a lucid interval.

**Same—Proof That Act Done Was Rational—Effect.**—But proof that the act done, was in itself natural and rational, will control evidence of habitual insanity.

By CHARLTON, Judge.

This is an appeal from the Inferior Court of Washington county, sitting for ordinary purposes; and the following is a transcript of the proceedings of the Court below:

"Georgia, Washington County,  
March Term, 1822.

And now at this term, the will of Allen Griffin was offered (before the Honorable the Justices of the Inferior Court, sitting for ordinary purposes,) for the purpose of proving the same, when Agnes Griffin appeared before said Court, and entered her caveat against the proof thereof, on the following ground to wit: for that the testator Allen Griffin was non compos mentis, at the time of signing and making the will, and is thereby void in law, and prays an enquiry of the Court.

Saffold & Glascock, for Caveator.

And Thomas Pace, one of the Executors named in the last will and testament of the said Allen Griffin, says and avers, that the testator was of sound and disposing mind and memory, at the time he made and executed his last will and testament, and that \*it is a good and valid Will in law, and this he prays may be enquired of by the Court.

R. L. Gamble, Attorney for Ex'or.

This issue on the caveat appears to have received the decision of the Court, and the arrangement between the Proctors is, as I understand it, to submit the whole case

\*S. P. Willard v. Sperry, (16 John. Rep. 121.) Smith v. Jones, (15 John. Rep. 229.)—(Ed. of Original Edition.)

to me, upon the evidence taken before the Court below, as well as the evidence taken upon interrogatories since the translation of the case by appeal, to this tribunal.

The fundamental doctrine as involved in the case before me is, "when a will is to be established, the testator must be proved to be of sound and disposing mind." *Wallis v. Hodgson*, 2 Atk. 56. The widow and Caveator, contests the validity of the will of Allen Griffin, alleging, that he was not of sound and disposing mind, at the time of its execution.

The evidence taken under interrogatories is in substance, as follows: James G. Tignor, James Thigpen, and John Whittle, are the subscribing witnesses, and depose, that they were subscribing witnesses to Allen Griffin's will, bearing date 31st December 1821, saw him sign and acknowledge the same, and that they all signed in the presence of the testator, and in the presence of each other. James G. Tignor and John Whittle, say—that they believe the testator was of sound and disposing mind and memory. James Thigpen was very little acquainted with the testator, and but a short time in his presence, and deposes—that after signing the will, the testator picked it up, and acknowledged it to be his last will and testament.

James G. Tignor further says, that he read the will over to the testator, and as it was read, the testator "looked over it, and expressed himself satisfied;" and this subscribing witness deposes also—that he had written three wills for the deceased, and that the greater part of the property, was given in each will, as in the present.

219 \*Upon his cross-examination, this witness answers to the second interrogatory; "that after he, (the testator) had written his christian name, he commenced writing his surname, with a small g, then stopped and asked witness to make a capital G, which witness did on an old letter, and then he, (the testator,) made the G, which caused the blot in his name."

James Thigpen, and John Whittle, the other subscribing witnesses, also depose to the correctness of this statement.

To the third cross-interrogatory, James G. Tignor answers—that he read the will over to the deceased, and that no other person was present, "but himself and deceased."

To the fourth cross-interrogatory, all the subscribing witnesses answer and say, that they, "know nothing which indicated insanity."

The answers of Tignor and Whittle in relation to the "swapping" of negroes, shew that the testator had a rational and good motive for any supposed inequality, in the value of the exchanged negroes.

Upon this evidence the executors rest the case as to the sanity of the testator, at the period of signing the will.

The evidence invoked by the caveator, is as follows, as far as I deem it material to advert to it.

Two physicians, William P. Haynes and

L. M. Robison, to the direct interrogatories depose—that they were called to see Allen Griffin, the testator, about the 8th or 10th January, (1822) and found him unqualified for the transaction of any business of importance, which incapacity, they believed to be owing to an effusion of water into, and pressing upon the brain, and that he could not have been compos mentis for several days previous to their being called in.

220 \*The answer to the second interrogatory, that the testator, on many of their visits to see him, did not know either of them.

Dr. Haynes, in answer to the fourth cross-interrogatory, deposes—that the illness of the testator came on some time in June, or July last year, (1821) by a sudden and violent attack of apoplexy, after which he had an attack of palsy, terminating in a drowsy; and both these physicians in answer to the interrogatory say—that the disease of the testator terminated in death, about the middle of February of the present year, (1822).

Mrs. Judy White deposes—that she was at the house of Allen Griffin, on the 31st of December, (1821) and 1st of January, (1822) and was frequently at his house, from time to time thereafter, until his death: That she knows nothing of a will said to have been drawn by Mr. Tignor: That she did not believe Mr. Griffin to have been of sound mind, on the last day of December, (1821) and her reason for thinking so was, from his frequently asking for many things which he did not recollect the day after.

Mrs. Mary Saunders deposes—that she knows nothing of the will wrote by Tignor: That she was frequently at Mr. Griffin's, from about the 20th December, (1821) until his death; and that during the time she was at Mr. Griffin's house, he was frequently out of his senses—believes he was so, for that while eating, he would mistake "butter for bread," and take other cups for his own, at a time, when he was helped to his table, in the fore part of January last, (1822).

Darius Thomas deposes—that he did not believe the testator was in sound mind, when he saw him about the middle of January last, (1822) and the reason for believing him so, is, that he (the testator) would frequently ask questions, after repeatedly receiving answers; and that he discovered the insanity, (assigning his reason for believing so, as before,) about the middle of July last, (1821).

221 \*William West deposes—that he was Mr. Griffin's overseer the last year, (1821) and believed him frequently insane from the month of June, (1821) until his death; and the reasons of witness for believing so, were,—that he (Mr. Griffin) would frequently order to be done what he would often blame deponent for doing; and that he (Griffin) "knew nothing of things one half his time." This witness to the third cross-interrogatory answers; that in conversation with Mr. Griffin, he heard him



(Griffin) say, "his wife (the caveator) need not want him out of the way, for she should not be the better off by it."

All these witnesses depose—that they "knew nothing of a will having been executed."

Mr. West also deposes—that Andrew was to be benefited by testator's will.

Jacob Giles deposes—that about the year 1810, he heard Allen Griffin say: that a Mr. Richards Lyons' children should have his property after his (Griffin's) death, and would frequently say the same, at every time witness saw him, until the last time testator mentioned it, when he (testator) observed: "Things had changed, inasmuch as he had got married to Agnes, (the caveator) and should she outlive him, he must leave her comfortable, but the balance of his property should go to Mr. Lyons' children."

Upon this evidence the question for my determination is, whether the deceased had a testamentary capacity, at the period when the will was made?

It is said by Sir John Nichol, in the case of *White v. Driver*, (1 Phil. 38): "That wherever previous insanity is proved, the burthen of proof is shifted, and it lies with those who set up the will, to produce satisfactory proof of the will, at the time the Act was done."

And by Sir William Wynne, in *Cartwright v. Cartwright*, \*(1 Phil. 100):

"If you can establish that the party afflicted habitually by a malady of the mind, has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption, for until proof of habitual insanity is made, the presumption is that the party agent like all human creatures was rational; but where an habitual insanity in the mind of the person who does the act is established, there, the party who would take advantage of the fact of an interval of reason, must prove it; that is the law; so that in all cases the question is, whether, admitting habitual insanity, there was a lucid interval or not to do the act. Now I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing first to be examined, and if it can be proved and established, that it is a rational act, rationally done, the whole case is proved."

Adopting the rules and principles of these cases, as my guides in the determination of the present contest, what does the evidence establish, as to the testamentary capacity of the testator, anterior to the period of making his will?

Doctors Haynes and Robison depose, that on the 8th or 10th of January, the testator was not qualified for the transaction of any important business—and that for several days previous to their being called in he must have been "non compos mentis."

This incapacity they say, resulted from "an effusion of water pressing upon the brain;" an affliction I believe, than which, no other is more eminently calculated, to produce mental imbecility or incapacity for the serious and deliberate concerns of this life. It appears also, from the testimony of Dr. Haynes, that in July of the preceding year, the deceased had an attack of apoplexy—then of palsy, which terminated in dropsy. I am not skilled

223 in \*these matters, but I think I may venture to say, that these attacks in July, from the nature of the disease (in the absence, if I may call it, of scientific proof), are not to be presumed to have so prostrated the mental energies of the deceased, as to have incapacitated him from a testamentary disposition of his estates: the question is, whether "this effusion of water into, and pressing upon the brain," was of a continuous operation from the 31st of December, to the periods referred to by these physicians? As informed, the Denouement—the catastrophe of this disease is, when the effusion takes place—but, that its advances to that catastrophe, may have commenced at the date of the will, and produced a mental derangement, destructive of a sedate or dispositive condition of mind. Is it probable—or rather does the testimony of other witnesses raise a presumption, that such was the condition of the testator's mind, at the period of making his will?

Mrs. White, was frequently in testator's house from 31st December to 1st January, and until his death—and says she was at his house on the 31st of December and 1st January—and from those periods to the time of his death, she assigns good reasons for her belief of the testator's insanity. She knew nothing about a will.

Mrs. Saunders, was also frequently at testator's house from 20th of December to the time of his death, and her reasons are also very cogent for the belief expressed by her—that the testator was not of sane mind, from the time in December she speaks of, to the period of testator's death.

The intimacy which these witnesses seem to have had in the family of the testator, combined with the observations they depose to have made upon his conduct and actions, certainly enabled them to deduce very satisfactory conclusions, as to the state of his mind, or, the probable state of his mind, at the period it is said his will was executed.

The situation of Mr. West, as overseer of the deceased, which \*necessarily demanded daily observation and intercourse, enabled him, to form an opinion perhaps with more conclusiveness, than any other person, as to the sanity of the testator; he traces the mental aberrations of testator back to June; and his reasons for believing him insane from that time, to the period of death, are extremely convincing.

Mr. Thomas also assigns his reason for a belief, that the testator was insane in

July, and seems to entertain little doubt, that he was so in January.

The evidence thus adverted to establishes a derangement, at least the want of a testamentary capacity, from June 1821, to the period of testator's death, which happened about two months after signing the will: and this derangement must have been continuous, (if these witnesses speak truth,) for, the evidence refers to no intermissions.

But, if the subscribing witnesses are to be accredited, the acts of the testator, at the period of making the will were both deliberative and depositive—they all believed him to be of sound mind and memory. It could have been only simple belief on the part of Thigpen, because he was "little acquainted with testator, and but a short time in his presence." He infers, I presume, that the testator was sane, as "after signing the will, he (the testator) picked it up, and acknowledged it to be his last will and testament."

Tignor deposes, that he read over the will to the testator, (no person being present but himself and testator,) "and as it was read, the testator looked over it, and expressed himself satisfied;" and that he had written three wills for deceased, of a similar import.

Previous insanity having been proved by caveat, have the executors, who now endeavor to set up the will, adduced through these subscribing witnesses, satisfactory proof of sanity, at the time the will was made?

225 \*These persons have been examined to the factum of the will, and are the persons usually "capable (in the language of Sir William Wynne), of giving an account of the manner, in which it was actually obtained." I must confess, that this consideration, combined with another, that they could have had no little interest or motive, in giving a false coloring to this solemn act of the testator, and therefore, must have been impressed with the convictions stated by them, I say, these considerations, have pressed heavily upon my mind in weighing, and rejecting their testimony in my determination of this cause. One solitary circumstance, however, as represented by Tignor, and confirmed by the other two subscribing witnesses, has had considerable influence in persuading me, that the testator was not of sound mind, at the period of signing the will; and it is, his incapability of making, or not recollecting how a capital G ought to be made, when about to write his surname. He could not recollect its shape or form, before instruction from Tignor. Now it is strange, that a man accustomed to write his own name, and not proven to be very illiterate, should in a moment forget the form of the capital letter, with which his surname commenced. Is that—can it be a state of intellect, evincing a sound and disposing mind, at a time, when a man is about to leave this world, and manifesting

his last acts of benevolence, gratitude, or affection?

Is there too much inconsistency in the testimony of Tignor, who says—that the testator looked over the will, (when he, the witness, was reading it,) and expressed himself satisfied. How could the testator express himself satisfied, after looking over the will, when he could not remember the shape of the capital letter G? With that defect of memory, what benefit could he have derived from looking over the will?

This will might have been similar to others, drawn by Tignor, but that circumstance is of little moment, if the testator was really \*ignorant of the contents of the paper he was then signing. Besides, the concealment of this will, or the silence observed in relation to it by Tignor and the other subscribing witnesses, throws a mystery over the act, not at all reconcilable to the alleged sanity of the testator. If all matters had been "above board," why should Mrs. White, Mrs. Saunders, and Mr. West have remained profoundly ignorant of the fact, that the testator had on the 31st of December made his will?

Mrs. White, was in the house on that day, so was Mrs. Saunders, from aught that appears from the testimony; and it is to be presumed that West was, from his situation as overseer; and yet, the three subscribing witnesses were all present, and so managed all the solemnities and forms necessary to the legal execution of the will, as to prevent the intrusion, or observation of any other person, or even to excite suspicion in the minds of the persons who were so much in attendance as Mrs. White and Mrs. Saunders!!

Was all this done with a view of preventing an accurate recollection of Mrs. White, Mrs. Saunders, or Mr. West, as to the state of the testator's mind at the hour of the day of the 31st of December, when the testator signed the will?

Whatever may have been the motives of Tignor and the other subscribing witnesses, I can only say, that the most unfavorable inference is to be deduced from the mystery and concealment, which enveloped their agency as subscribing witnesses, particularly as the "swapping," or exchange of negroes between the testator and Tignor, and Whittle, may probably have, in some small degree, influenced them in establishing his sanity.

But, notwithstanding the testimony of the witnesses which establish so conclusively, the continuous derangement of the testator; yet, if the will proclaimed a rational disposition of his property, such a will, as every one would say, was honorable, righteous, and natural; such a disposition would establish a lucid interval, \*not to be controlled by proof of even habitual insanity. Such is the language of the cases cited, and it is founded on the civil law, which, I agree with Sir William Wynne, is the rule of the English law: it is a rule also incorporated into



the jurisprudence of Georgia: *furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.* (Inst. Lib. 2. tit. xii Sec. 2.) But if the madman makes his will during a lucid interval, he is a legal testator.

Now, in this will a very scanty and illiberal provision is made for his wife, and his estate is bequeathed to persons to whom, upon the face of the will, he appears to be bound by no ties of duty, gratitude, or consanguinity, and in opposition (according to the testimony of Giles), of repeated declarations, as to other objects of his bounty and affection. Applying this rule, therefore, of the civil law, it is not such a will as one habitually insane, can be presumed to have made during the happy occurrence of a lucid interval. Upon the whole, I am of the opinion the testator, Allen Griffin, at the time of making his will was not of a sound and disposing mind and memory.

It is therefore ordered, that the case be, and is hereby remanded, to the Inferior Court of the said County of Washington, sitting for ordinary purposes, with instructions, and the said Court is also hereby instructed, to refuse probate of said will to the executors named therein, and to grant administration to such person or persons as said Court may appoint, under the directions of the Act of the General Assembly in such cases made and provided.

Saffold & Glascock, for caveator—R. L. Gamble, Attorney for executor.

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\*A. v. B.

September Term, 1832.

**English Decisions—Subversive of Statutory Provisions of Georgia—Effect.**—Modern decisions of Courts of England, subversive of the ancient common law, or Statutory principles adopted in Georgia, are of no authority in this State.

**Malicious Prosecution—Felony—Indictment.**—An action for a malicious prosecution, in cases of felony, cannot be maintained, without previously obtaining the order of the Court for a copy of the indictment.

**Felony—Definition.**—Felony, in Georgia, is the commission of a crime, which subjects to infamous punishment.

**Same—Forfeiture.**—Forfeiture of lands or goods, is not in Georgia, a component part of the punishment of felony.

**Perjury—Grade of Offence.**—Perjury is felony, under the criminal laws of Georgia.

**Same—At Common Law—Status.**—Perjury at common law is abrogated in Georgia.

**Same—Same—Action for Malicious Prosecution.**—An action for malicious prosecution cannot be sustained in Georgia, on an indictment for perjury at common law.

**Criminal Law—How Offence Brought under Statute.**—To bring an offence under a statute, one of these two courses must be adopted: to prefix to the general conclusion, "contrary to the form of the statute in such case made and provided," or, to recite the tenor and substance of the statute, upon which the indictment was founded.

By CHARLTON, Judge.

This action is founded on an acquittal for the charged offence of perjury, and the introduction of the exemplification of the indictment and verdict as evidence, is objected to, because there is no order of the Judge, before whom the case was tried for such copy.

The reasons assigned for the objection is, that in every case of felony, the party who intends to sue for the malicious prosecution, must obtain leave from the Court, for a copy of the indictment. Two questions then present themselves for consideration:

1st. Is a Judge's order for a copy of the indictment, in a case of felony, necessary to the support, or rather maintenance of an action of mal. pros. founded on an acquittal of that felony?

And 2dly. Is perjury a felony, under the jurisprudence of Georgia?

229 \*I. It is declared by the authorities, to which the counsel in this case, have referred, that the records of the British Court are accessible to the inspection of any subject for his "necessary use and benefit," and this inspection would seem to mean a right to demand copies of them, if copies should be required for the "necessary use and convenience" of the subject. The inspection allowed by the parliament of Edward III. involves the correlative right of a copy of the judicial record, (Phil. Ev. 322; 3 Inst. 71; Pref. to 3 Rep. 3, 4, as cited by Phillipps.)

This general right, however, of obtaining a copy of the record is restrained, says the authority, "in the case of an acquittal on a prosecution for felony," in which case, if the trial is at the Old Bailey, a copy cannot regularly be obtained without an order from the Court. Directions prefixed to Kelyng's Rep. p. 3, order 7.

Some of the Judges in the reign of Charles II., legislated on the subject, and required, that such an order should be obtained. And it is laid down, "as a general rule of law," by C. J. Holt, that "on an indictment and acquittal for felony, the party who intends to sue for a mal. pros. must obtain leave of the Court for a copy of the record." 1 Ld. Raym. 253; Phillipps, says, that the rule of the Judges (that, I presume, adopted at the Old Bailey), states, "that an action against a prosecutor cannot be maintained, without a copy of the indictment, and that a copy is not to be given, without an order of the Court."

We have it then as established law, down to the epochas of the rule at the Old Bailey, and the reiteration of that rule, by Holt, Ch. J., of the Court of King's Bench, as announcing "the general rule of law," that an action against the prosecutor cannot be maintained, without a copy of the indictment, obtained under leave of the Court.

It was also adjudged by Lord Mansfield, "that when a person was indicted for felony, it was necessary that a copy

230 of the record \*should be granted by the Court, before which the acquittal was had, in order to ground an action for a Mal. Pros."

If it is said, that the reports of Blackstone are of inferior authority to his commentaries, it will be found, that the reported adjudication of Lord Mansfield, and the text of the commentaries are perfectly reconcilable, for the commentaries declare, "that where there is the least probable cause, the Judge will deny a copy of the record:" and if it is denied, according to the decision of Lord Mansfield, there is no basis for the action of mal. prosecution. In opposition to these authorities, the counsel for the plaintiff referred to the case of *Legatt v. Tollervey*, in which, a copy of the indictment was not allowed to be read, because there was no order of the Court, and therefore a non-suit was entered. But the Court of King's Bench, through the medium of its C. J. Ellenborough, set aside the non-suit, not upon the ground that the rule at the Old Bailey was not in force; not, that the decisions of Holt and Mansfield had not truly announced that rule as general law; but that a copy of the record ought to be read, because it was offered in evidence, and if the order of the Court had not been previously obtained, why the officer of the Court furnishing a copy, had been guilty of a contempt in doing that, which he ought not to have done—and for which of course he subjected himself to punishment; yet, that this contempt and official transgression, ought not to deprive the plaintiff of its benefits as testimony. (14 East. 302.)

Upon this adjudication, if I am not mistaken, the counsel for the plaintiff rested his chief hopes for the admissibility of the copy of the record, as evidence. He might have gone further and ostensibly supported this case by other authorities. In *Branham's case*, Willis, Ch. J., is reported to have said, that by the laws of the realm, every prisoner, upon his acquittal, has an undoubted right and title to a copy of the record, for any use he may think proper to make of it—and that after a de-

231 mand, the \*proper officer might be punished for refusing to make out a copy. This case is, however, of no authority, for subsequent to it, we find, as Justice Nott has said in the reports of the constitutional Court of our sister State, "the Old Bailey rule was re-published by order of the Court."

We have then only to contend with the case of *Jordan v. Lewis*—Lord Ellenborough's decision in East, and the opinion of Philipps, (the compiler of the *Law of Evidence*), "that the rule laid down in *Jordan v. Lewis*, is the correct rule." In that case, "the order made at the Old Bailey was there read by way of objection to the evidence offered; but the Ld. Ch. J. Lee in that case said, that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without any order of the Court for that purpose."

\* From the authorities thus collated, it would appear, that the rule at the Old Bailey is only assailed by the case of *Jordan v. Lewis*, and the very modern decision of Lord Ellenborough. The counsel for the plaintiff in another case, almost immediately preceding it, had endeavored, or was about to endeavor to shake a *nisi prius* decision of the same Ch. J. Ellenborough, upon the ground that it was modern law, not incorporated into our jurisprudence; and therefore repudiated from our judicial system. I willingly assent to this doctrine, whenever the modern adjudication subverts the ancient common law or adopted statutory principles, instead of explaining them. This decision in East does subvert the ancient principle—acknowledges too, its violation of allegiance, and only justifies the treason by a sort of commiseration for the plaintiff, who is permitted to give that in evidence, which he has obtained through a punishable breach of duty of the officer affording it. This case bows to the authority of *Jordan v. Lewis*, and as *Jordan v. Lewis* conflicts with the rule at the Old Bailey and other anterior cases, it must also be rejected as the incorporated law of Georgia.

232 \*Policy and Justice are too, on the side of the rule at the Old Bailey, and are sensibly assigned in the reason for the adoption of the rule thus consecrated by the opinions of Holt and Mansfield, "for the late frequency of actions against prosecutors (which cannot be without copies of the indictment), deterreth people from prosecuting for the King (and we may here say the Republic), upon just occasions.

II. If forfeiture of land or goods, as urged by plaintiff's counsel, is the criterion for the ascertainment of felony, then it is admitted, at least by me, that there is no felony in this State. Blackstone says, that the true criterion of felony is forfeiture. The punishment of perjury, (continues this author) was anciently death, afterwards banishment, or cutting out the tongue; then forfeiture of goods, and now it is fine and imprisonment, and never more to be capable of bearing testimony. By the Stat. 5 Eliz. imprisonment, perpetual infamy, a fine, and both ears nailed to the pillory. The Stat. of Geo. II. superadds a power for the Court to order transportation for seven years; and makes it felony, without benefit of Clergy, to return or escape within the time. By these statutory punishments of England, perjury could therefore only be considered felony, upon a return from transportation: but forfeiture is not, and never has been since the organization of our government, a component part of a punishment for felony. What then is our notion of felony? It is, as has been adjudicated, the commission of a crime, which subjects to infamous punishment. This definition pursues the genius of the English law, as adopted in this State, without its gothic appendage of forfeiture equally applicable to a capital punishment and petit



larceny. The punishment inflicted for perjury by the penal code of Georgia, is as infamous and may be protracted to the periods prescribed for acknowledged felonies, such as burglary, one species of arson, robbery, and the higher grades of larceny. What can be found then in our legal or political ethics to except this atrocious crime of

perjury, striking with inveterate  
233 \*hatred, as it necessarily must, at the root and foundation of all our sacred rights of life, liberty, and property—What, I repeat, can exempt it from the appellation of felony? Law, reason, justice, the moral sentiment of my countrymen believe it felony, and I take leave through this department of the government, so to proclaim it—I mean perjury, as contained and defined by the penal code of Georgia, and when prosecuted by indictment under that system. The perjury however of the record before us, though alleged to have been committed posterior to the passing and operation of the penal code, has no technical or other reference to it, except in the conclusion, which pursues the form prescribed by the penal code, and as that cannot be deviated from, it is questionable, whether any other conclusion explanatory of the offence, that is, whether it is charged as an offence at common law, under the system of the penal code, or against a particular statute need appear upon the face of the indictment. I presume, however, if the offence is statutory, that Mr. Attorney General would prefix to the conclusion as prescribed, or has been in the habit of prefixing the terms “contrary to the form of the statute (or the Act) in that case made and provided.” Such terms would technically and definitely designate the basis of this indictment, whether the prosecution was intended under the penal code, or any particular statute. But these additional terms become unnecessary as explanatory of the offence, intended to be prosecuted, where the indictment adopts the words and definition contained in the penal code. At least such is the exposition given to the penal code, and such is the practice and impression which prevail in the section of the State, where I have the honor to preside. The better opinion probably is, that in order to bring the offence within the penal code or a statute, one of these two courses must be adopted—to prefix to the general conclusion “contrary to the form of the Act of Assembly or statute in that case made and provided,” or, to recite the

tenor or substance of \*the section of  
234 the penal code or statute upon which the indictment is founded. Either course, would render patent the object of the indictment and prosecution. In this case, though the offence is laid in the indictment in a technical phraseology, which might satisfy the requisitions of the penal code as contained in the definition and description of perjury, yet, there is not that direct reference to it, by either of the courses before suggested, as sufficiently designates the intention of the Attorney General, to prosecute

for a penal code or statutory perjury. I am therefore, or may be required to consider the offence as perjury charged at common law, punishable by fine and imprisonment and perpetual disability to bear testimony—and if perjury at common law, it is no felony, and consequently the order of the Court is not necessary for a copy of the record. The question then would be whether the variant and increased and infamous punishment, inflicted by the penal code of Georgia, has not abrogated the common law prosecution and common law punishment? Can they be co-existent upon these doctrines applicable in the interpretation of a statute, which establishes a system of criminal jurisprudence as the supreme law of the State, variant from the common law in its principles and its punishments? If they cannot co-exist, then can an indictment and an acquittal thereon, at common law, be the foundation in this Court, of the action of mal. prosecution. Upon the whole then, it would seem as established law, that in every case of felony the order of the Court for the copy of the record is necessary—that according to my opinion, perjury is felony under the penal code of Georgia—and that the common law punishment being thereby abrogated, an indictment for the offence at common law being inhibited—no action for mal. pros. can be legitimately sustained on an indictment at common law, prosecuted in this jurisdiction—and upon which there has been an acquittal—Quacunqve via data, the plaintiff must fail in his action.

Felony, is defined by the penal code of Georgia which went into operation on the 1st June, 1834. “when used in this act, as an offence, for which the offender, on conviction, shall be liable by law to be punished by death, or imprisonment in the Penitentiary, and not otherwise.”—(Ed. of Original Edition.)

235 \*Frans. H. Welman v. Polhill, Guerard and Polhill.

October Term, 1822.

**Service of Process on Agent—Effect.**—Service of petition and process on agent of defendant is null and void, under the law of Georgia.

**Void Process—Appearance of Defendant—Effect.**—Where the service of process is null and void, appearance and plea to merits will not cure it.

**Same—When Objection May Be Taken.**—And objection may be taken to such process at any time.

By CHARLTON, Judge.

In this case, service of petition and process was effected by leaving a copy of the writ and process with the agents of two of the defendants, Peter Guerard and Thomas Polhill. The service on James Polhill, a co-defendant, is admitted to be good.

In October term, 1821, Wayne and Cuyler subscribing themselves attorneys for P. Guerard and Thos. Polhill, filed the general issue for these defendants, and no plea has

been filed for James Polhill. The objection now taken by attorneys substituted for Wayne and Cuyler, is, that notwithstanding the plea of the general issue, it is still competent for them to move to set aside this service upon the ground that it is violative of the Judicial Act, which requires that service should be effected by "delivering a copy of such petition and process to the defendant or defendants, or leaving such copy at his, her, or their most notorious place or places of residence;" and the Judicial Act declares, that, "all process issued or returned in any other manner than that herein before directed, shall be, and the same is hereby declared to be null and void."

Mr. Gamble, on the other side contends, that the objection, admitting it to be a substantial one, comes too late; for that all irregularities are cured by appearance, and a fortiori by pleading. (2 Cr. 496; 7 John's Rep. 209; 3 Hen. & Mun. 309.)

I do not intend to disturb the doctrine contained in these cases, because I do not conceive their applicability. Simple irregularity \*is not complained of in this case, but a defect which "vitiates the proceedings in toto:"—and the distinction is, that objections, "or applications to set aside proceedings for irregularity should be made the first opportunity that the party has to bring his complaint before the Court, and before the party committing the error has taken any further step in the cause." (2 Taunton 242; 1 Sellon, Am. Ed. 102:—) but if the defect vitiates the proceedings, the defendant may at any time, apply to set aside the proceedings for it as it is no process—And. 16, Sellon 101. When the affidavit of personal service was defective, proceedings set aside, though the defendant was in execution—Ibid.

In this case there is not that irregularity in the mesne process, which is cured by appearance according to the authorities cited. It is a defect which renders process issued and returned "null and void." Obeying the mandate, therefore, of our judicial system, supported as the distinction is by the authorities referred to, the objection is not too late, and this service not being in conformity to the Judicial Act of Georgia, without which, it cannot be operative, and is so far vitiated with or without appearance or consent of defendant, as to be declared "null and void," I am of the opinion that the service ought to be, and is accordingly hereby set aside.

Service set aside.

R. L. Gamble, for plaintiff—Wayne & Cuyler, for T. Polhill and P. Guerard, defendants.

237 \*Guerard & Polhill, v. James Polhill.

October Term, 1822.

**Mortgage—Personal Property—Who May Issue Fiat for Foreclosure.**—Any Judge of the Superior, or Justice of the Inferior Court in Georgia, (without

reference to the residence of defendant,) may issue the fiat for the foreclosure of a mortgage of personal property.

**Same—Same—Foreclosure Granted—Who May Issue Execution.**—When such fiat is granted by a Judge of the Superior Court, the Clerk of the Superior Court of a different County and Circuit from that in which the fiat was granted, may issue the execution.

**Same—Same—Same—Execution—To Whom Issued.**—And it seems, that the execution may be directed to all and singular the Sheriffs of the State.

**Statutes—Introduction of New Rule of Law—Effect.**—In general, a statute which introduces a new rule of law, and directs a particular method of proceeding under it, will, although it has no negative words, debar any other mode.

**Mortgage—Personal Property—Foreclosure—Statute Regulating—Construction.**—Where one section of a statute without negative words, introduced a new mode of foreclosing a mortgage of personal property, and pointed out a method by which the mortgagor might dispute the sums due on the execution founded on such foreclosure, and a subsequent section of the same statute, also without negative words, allowed a defendant to make an affidavit of illegality in all cases where execution had issued illegally; HELD, that the remedy in the latter section was not cumulative to the former, and that it referred to executions, other than those mentioned in the first section.

**Same—Same—Same—Same—Defences.**—It seems, that under the mode prescribed by the 18th section of the Judiciary Act of 1799, the mortgagor may enter into any defence which may entitle him to relief from the execution.

**Foreclosure—Statute—Constitutionality.**—There is nothing unconstitutional in said section.

By CHARLTON, Judge.

On the petition of the plaintiffs in this case addressed to Judge of the Superior Courts of this State, praying a foreclosure of two mortgages on personal estate, supported by the usual affidavits of the amounts due, the Judge on the 23d of November 1821, ordered an "execution to issue in terms of the law." This order was granted by the Judge of the Eastern district. Execution was accordingly issued from the office of the Clerk of the Superior Court of Burke County, where the mortgagor resided, containing a mandate to have the several sums made on this execution, before a Superior Court to be holden in Burke. The Sheriff made his levy on the 23d of May, 1822, \*and the property designated in the return was restored to, or permitted to remain in the possession of the defendant upon his having given sufficient bond and security to the Sheriff (or which he, the Sheriff, seemed to have required), to remain in force, if the defendant should fail to establish the alleged illegality of the execution. This bond is dated the 6th day of August, 1822, and contemporaneously the following affidavit sworn to and tendered by the mortgagor.

"Georgia, Burke County.

"Appeared before me, James Polhill, who being sworn, deposeth and saith—that the execution issued against him, on the fore-



closure of two several mortgages, in favor of Guerard & Polhill v. said James Polhill is illegal for the following causes, to wit: That he had no notice of said foreclosure—that they were foreclosed out of the County where he resides, and was residing at the time of making said mortgages—that the execution was issued in a different County from that in which the foreclosure took place—that there was but one execution on two mortgages, and that the consideration for which said mortgages were given has entirely failed.”

A motion is now made by Reed, that this affidavit be set aside, for these principal reasons, because the affidavit of illegality does not apply to this species of execution—because it was competent for any Judge of the Superior Court, to grant the order for the issuing of the execution which was to operate where the mortgagor resided—because no notice of the petition for foreclosure of personal property is required by law—because the alleged failure of consideration is matter extrinsic which can never be the basis of an affidavit of illegality—because the Act of the General Assembly prescribed the remedy which the mortgagee ought to have pursued—and lastly, because if that prescribed and certain remedy was not accepted, the only cumulative re-

239 dress that could \*be afforded was to be found in the Chancery jurisdiction of this Court. Walker & Wilde, on the other side, contended, that any law which divested a citizen of a right associated with his person or his property, without due and timely notice of the proceedings by which that right was assailed and divested, was unconstitutional, because it deprived the citizen of the great privilege allowed him by our fundamental law, of being heard and tried in the County of his residence—and withal, repugnant to the fitness of things, which proclaimed in every case before condemnation, “*Audi alteram partem.*”

It was also urged by these gentlemen, that the affidavit of illegality was a cumulative remedy, reaching, and providing for every case where the illegality of the execution could be established by law or facts dehors, or intrinsic in any and every case. This, they observed, was the speedy and efficient remedy, which the Legislature had substituted for the difficulties, which might be attendant on an application for relief, to a Chancery jurisdiction. Having no access to authorities in my present situation, and the hour having arrived at which my judicial functions must cease in this district—the first consideration must carry with it my apology, for the omission of cases in support of the principles I may advance, and the second, the delivery of this opinion within so short an interval for advisement and preparation. I regret that a longer time has not been allowed me for reflection, but as a decision is expected from me, I feel it a duty under any combination of circumstances not to disappoint that expectation.

Having given a synopsis of the argu-

ments of counsel, the question which upon the whole presents itself, is simply this: Can a mortgagor of personal property avail himself of this remedy of affidavit of illegality? Under the directions of our judicial Act a mortgage of personal property is foreclosed in the manner pursued by the mortgagees. The fiat for the execution may

be granted by any one of the Judges 240 of the Superior, or Justices of the \*Inferior Court, but there is no designation of the Clerk whose duty it shall be to issue the execution. The act merely declares, that, “thereupon the Clerk of the Superior or Inferior Courts shall issue execution.”

Looking then to the literal phraseology of the Act, the fiat is not confined to the Judge or Justice of the district in which the defendant resides, or to the Clerk who may issue it; but in this case the Clerk of the Superior Court where the defendant resided issued the execution, which I presume, was done in analogy to the requisition that a defendant should be sued, or that process should issue against him in the place of his domiciliation, and in a supposed conformity to the same analogy, the writ was delivered to “the Sheriff” of the County, where was also the domicile of the defendant. The law does not require the writ should be so directed. “The Sheriff” is a generic term, which leaves it optional, I think, with the Clerk to direct the writ, to any, or all the Sheriffs of the State. Under these views of the law, I cannot sustain any objections to the fiat of the Judge, or the subsequent acts of the Clerk and Sheriff. It is in the provisory clause of the judicial Act where all the difficulty lies, and it is in these words: “That if any dispute shall happen as to the sum due on any mortgage, it shall be lawful for the said Judges or Justices of the Inferior Courts, on affidavit, to order such sale to be postponed, the mortgagor giving good and sufficient security in the sum sworn to be due, for returning such property when called for by the Sheriff, which bond shall be assigned by the Sheriff to the mortgagee, who may sue and recover therein; but the jury shall be sworn to give at least 25 per centum, in case it should appear, that such application was made for delay only.” (Marb. & Craw. 298.)

The bond therefore taken in this case by the Sheriff is to all intents void, because there is no affidavit in terms of the Act, or order for postponement and for good 241 and sufficient security. It \*cannot therefore be pretended, that those requisites of the Act have been complied with, or that any benefits can be derived from its provisory enactment. But this being the remedy prescribed for the adjustment of “any dispute which may happen, as to the sum due on any mortgage,” the question recurs, can another and a different remedy be pursued? In the great case of Middleton and wife v. Crofts, in Saunders’ Atkyn’s Appendix, 674, 675,—Lord Hardwicke who made and delivered the argu-

ments sanctioned by the opinions of the Court of King's Bench, lays down the rule "touching the repeal of laws—leges posteriores, priores, contrarias abrogant: But subsequent Acts of Parliament in the affirmative giving new penalties, and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding, ordained by preceding Acts of Parliament, without negative words"—upon this doctrine, the former mode of proceeding through a Chancery jurisdiction was not abrogated by this posterior statute, because it contains no negative expressions, is therefore affirmative, and in the language of counsel, cumulative. But, says a compiler of English jurisprudence, supported by ancient authorities, "it is in the general true, that if an affirmative statute, which is introductive of a new law, direct a thing to be done in a certain manner, that thing shall not, although there are no negative words, be done in any other manner." (Bac. Abr. 377, (G.) London Ed. 1798.) This rule must in the present case, have its full effect unless "lex posterior," announces its abrogation. The law however upon which the counsel for the mortgagor relies for his cumulative remedy, is a section of the Act containing both remedies, and of course passed contemporaneously—neither the maxim nor the rule therefore strictly applies, but the point is to be determined on the suggestion, that the sections of the judiciary Act are to be construed, as distinct regulations, susceptible of the same interpretations that would be applied to them, as if they had been enacted in separate statutes. Applying

242 this test, what \*does the posterior law, in the shape of a section declare? It declares, "that in all cases where execution shall issue illegally, and the person against whom such execution may be, shall make oath thereof, and shall state the causes of such illegality, such Sheriff shall return the same to the next term of the Court, out of which the same issued, which Court shall determine thereon, at such term." Now, the language of this section of the law is as comprehensive as it could be, because it applies to "all cases." But could the Legislature have intended that one section of an Act containing no negative words, but conceived in general and affirmative terms, should afford an accumulative remedy to a new mode of proceeding, or, the direction of a thing to be done in a particular or certain manner! I think not. I believe the Legislature intended by these apparently conflicting provisions, that the objections to an execution issued on a foreclosure of a mortgage of personal property, should be based on the isolated fact, that the sum sworn to was not due, whatever might be the truth upon that verified allegation: and under my present impressions, I do not perceive any difficulty, in going into the consideration of the mortgage, or any other fact or principle of law, which would entitle the mortgagor to relief, under this section of the judicial system.

But the 32d section must refer to executions other than those which are designated in the same Act, and the affidavit as to those executions must of course refer to other and different cases than those, which would invalidate an execution issued under the special directions of another section. The difference is, that the affidavit and order for postponement on the foreclosure of a mortgage of personal estate is founded upon extrinsic—and the affidavit of the 32d section upon intrinsic matter. The true principle however is, that no negative words of the 32d section inhibits the introduction of the new law in section 18, and that therefore it must be done in the manner prescribed by that section.

As to the constitutionality of this 243 section of our judicial system, \*I have only to observe, that the issuing of the execution and its operation being so closely brought home by the levy to the attention of the mortgagor, combined with the remedy afforded him by affidavit as to the sum due, and the ulterior investigation through a trial by jury, affords all the notice which the constitutional abstract principle suggested could require.

Affidavit of illegality set aside.

Reed, for plaintiffs—Walker & Wilde, for defendant.

JAMES M. WAYNE.

Elected Judge of Eastern Circuit, November, 1822.

## 244 \*The State v. John Abbot.

December, 1822.

**Bail—Discretion of Court.**—The Judges of the Superior Court in Georgia have a discretionary power, (governed by the circumstances of the case,) to bail in all cases whatsoever.

**Same—Failure of Coroner's Jury to Charge Prisoner with Homicide—Effect Where Affidavits Shew Felony Committed.**—It is not a sufficient ground for bail that the verdict of the Coroner's Jury does not charge the prisoner with felonious homicide, if the affidavits and depositions taken by Coroner and the committing Magistrate, taken in connexion with the verdict, shew that a felony has been committed, or is charged.

**Same—Effect When Prisoner Confesses Homicide.**—And where on such charge, it appears that the prisoner has confessed that the death was caused by him, he will not be bailed unless there be the existence of some special cause to induce it.

**Same—Same.**—Though the prisoner on his trial is entitled to have the whole of his confession given in evidence, if any part is offered, yet on applications for bail, the exculpatory circumstances stated by him in such confession, will not be sufficient to sustain the application, unless supported by other testimony, or strong intrinsic presumptions of their truth.

**Same—Failure to Prosecute at Succeeding Term—Effect.**—A person charged with felony cannot make the omission of a public officer to prosecute at the succeeding term, a ground for bail, unless such omission has operated or may operate oppressively.



By WAYNE, Judge.

This is an application to bail a prisoner who stands committed for homicide, upon the verdict of a Coroner's inquest, and the grounds upon which the exercise of the discretion of the Court is invoked, are: 1st. That the verdict of the Jury does not charge a felonious homicide; that the affidavit upon which the verdict was returned, and the deposition made before the committing Magistrate by the same person who made the affidavit before the Coroner's Jury, disclose a case of involuntary manslaughter in the performance of a lawful act, as it is defined in the penal code of Georgia; and 2dly. that the prosecution has been delayed for such an unreasonable length of time, as to create strong presumptions of the prisoner's innocence.

The case of the King v. Rudd (1 Cowp. 331) was brought to the notice of the Court, and the doctrines in relation to felonies for which bail will be allowed by the 245 Court of King's Bench, or \*by a Judge thereof in vacation, as they are expressed in Chitty's criminal law, and in Hawkins' pleas of the Crown, were also quoted. The case of Rudd could only have been cited by the prisoner's counsel, to show, that the Court of King's Bench, or a Judge thereof in vacation, has a discretionary power to bail in all cases whatsoever. The same power is claimed in the cases of the King v. Judd, (2 Term Reports, 255,) and in the King v. Marks and others, (3 East. 163, 4, 5,) also in many other cases, as well as in the text of Blackstone, vol. 4th, 299, and is a settled point; nor will it be denied that a Judge of the Superior Court in Georgia, may exercise all the powers in relation to bail which appertain to the Court of King's Bench in England or to a Judge thereof in vacation. The other authorities alluded to in the discussion were Lord Mohun's case, (1 Salk. 104,) the King v. Dalton, (2 Strange, 911,) and the King v. Magrath, (2 Stra. 1242.) Lord Mohun's case showed that Lord Holt at Chambers did exercise the discretionary power of admitting a prisoner to bail who had been found guilty of murder by a Coroner's inquest, after his Lordship had looked into the depositions upon which the Coroner had proceeded, but the only inference which can be correctly deduced from the exercise of the power in that case, is, that a verdict of murder returned by a Coroner's Inquest, will not, of itself, preclude the person charged from being bailed, and it reminds us of the language of Blackstone, 4th vol. 299, "that there are cases though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The cases of the King v. Dalton and the King v. Magrath, show that upon the return of Coroner's inquest of manslaughter, the prisoner may be bailed, but from neither of these authorities can any rule be collected which would be applicable to all cases of manslaughter, other than this, that a Judge who awards the writ of habeas corpus will

look into the depositions upon which the verdict of the jury has been returned, and into such examinations as may be 246 taken from the committing \*magistrate for the purpose of ascertaining whether they furnish such grounds as will enable him to exercise his discretionary power to bail, for though in Dalton's case, Lord Raymond said, if the depositions shew that the offence was murder, he would not bail, but if it only amounted to manslaughter, he would bail, yet his decision must be viewed and weighed in reference to the age of the party in that case charged with the homicide, the probability arising from his youth, that bail would secure his forthcoming to stand his trial for manslaughter, and to the circumstances attending the homicide as they were detained in the depositions. The prisoner in that case was a boy at Eton, who had unfortunately killed his schoolfellow. Nor will the force of these remarks in relation to the case of Dalton, be at all impaired by its having been cited by Chief Justice Spencer in Goodwin's case 188, as one of those instances in which a person charged with manslaughter has been bailed, "when there has been no presumption of innocence," for in the ensuing paragraph the Chief Justice innumersates some of the grounds which must enter into the consideration of the question of bail in felonies, and declares, "on admitting to bail, regard must be had to the probable guilt of the party." The cases have been more fully remarked upon than they would otherwise have been, to prevent any misunderstanding of my views of the law in relation to bail in cases of manslaughter. I acknowledge them as authorities so far as that persons charged with manslaughter by the verdict of a Coroner's Inquest, may be bailed by the Court of King's Bench, or by a Judge thereof in vacation. But I cannot admit that this discretionary power of the King's Bench or its Judges "to bail in all cases whatsoever" exists, independently of all rule, or that it is ever discreetly exercised in cases of felonious homicide upon an inquiry into the depositions alone, unless the depositions create some doubt, either as to the case not being comprehended within the law, which upon the trial of the prisoner will have to govern the verdict of the jury, or some 247 doubt, as to the facts upon \*which the accusation rests. It is proper here to observe also, that this discretionary power in the Judges of the King's Bench to bail in cases of manslaughter, upon an examination into the depositions taken by the Coroner, has been cautiously used, for besides the cases commented upon in this decision, the whole range of English and American Reports will furnish no other. It remains now for me to inquire whether the case of the prisoner can be brought within either of the restrictions which control the exercise of the discretionary power to bail, and in determining this point, it is not necessary for me to declare the prisoner to be guilty of any offence, for the ex-

amination of the depositions is exclusively an examination of ex parte testimony, and if the conclusion shall be unfavorable to the application for bail the decision of the Court will amount to no more than this, that the ex parte testimony furnishes no facts or grounds to warrant the exercise of the discretion possessed by the Court to admit to bail.

The inquest states that the said Ezekiel alias Isaac came to his death by a shot, (as expressed in the evidence of Dr. Feurth,) in the left side of the \_\_\_\_\_, from a gun by his master John Abbot, jr., in Effingham County." This verdict, it is true, does not charge the prisoner with a felonious homicide, and if it stood alone as the ground of his commitment, he would be entitled to bail. But the verdict of the jury must be considered in connexion with the affidavit and deposition which have been put before me, and the informal indefiniteness of the former will be no ground to admit the prisoner in bail, if from the latter it can be sufficiently collected that a felony has been committed, or is charged against him. This is the doctrine in relation to commitments for felony in which the felony is not charged, and the cases are analogous. (2d Term, Rep. 233; 3d East. 157.) As to the depositions in this case, they contain the voluntary confession of the prisoner to the physician who was called to attend the deceased, narrating at length the causes which impelled him to the deed. If

248 upon such testimony the Grand Jury shall return a true bill, the prisoner upon his trial will be entitled to the full benefit of the whole confession as evidence. But it would be going too far, upon an application for bail in a case of imputed felonious homicide, to permit the exculpatory circumstances related by the person confessing the homicide unsupported by any other testimony, or by strong presumptions of their truth, arising from the confession itself, to be a sufficient ground to bail. The utmost benefit which a prisoner can claim from his confession, is, that upon trial he may have the whole of it in evidence, the favorable as well as the unfavorable part of it, and in this way, it is that one may be said in some degree to become a witness for himself. This is a humane doctrine; it has for its basis the soundest principles of reason and morality. But it would be a perversion of it, to permit it to become the means, by which a person might elude a trial even for a minor offence, or to allow it to be of itself a sufficient reason, to exempt a party from the imprisonment to which persons accused of felonious homicide, are ordinarily subjected. The doctrine in relation to the allowance of bail in case of felony upon an examination of depositions is well expressed in Chitty 99, when he says, after speaking of the plenary powers of the Court of King's Bench. "It is not usual for that Court to bail in case of felony, unless, when in consequence of the defects of the commitment, and of the examination and depositions, it appears

doubtful whether any offence has been committed. And Hawkins B. 2d Ch. 15, sec. 40 and 80, not confining himself to an examination of the depositions, lays down the law to be, that if it stands indifferent, whether a person charged with a felony is guilty or not, he ought to be bailed, and that even in capital cases where there is any circumstances to induce the Court to suppose he may be innocent, they will bail, and the Judges will in general exercise the power of bailing in favor of a prisoner in any case not capital, though they will not exercise it when the prisoner is notoriously guilty by his own confession, or otherwise without the existence of some special 249 cause to induce \*it." Such are the principles which controlled the decision in this case.

As to the second point made by the prisoner's counsel, that the prosecution has been delayed such an immeasurable length of time, as to create strong presumption of his innocence, it is remarked, that the entire innocence of the accused cannot be meant by the counsel, as he states the case in his first ground, to be one of involuntary manslaughter in the performance of a lawful act. The facts however in this case are, that the inquest was held on the 2d of May last; in a few days after the verdict of the jury was handed to the Sol. Gen. The prisoner was not then in custody, nor was he taken until the instant, which was a day or two after a Capias had been issued by this Court for his apprehension upon the application of the Sol. Gen. The Solicitor has ingeniously stated his reasons for having omitted to prosecute the prisoner at the last Court held in Chatham County. The time since the verdict of the Coroner's inquest was given, is too short to give to the delay that aspect from which favourable presumptions of innocence can be raised, and it has been productive of no personal inconvenience to the prisoner as he has been at large. A person charged with a felony may make the omission of a public officer to prosecute, a good claim for bail, if the omission is made the means of oppression, or oppression shall be the consequence to it: as when a party is in custody, and the prosecuting officer or committing Magistrate permits a term of a Court in which the prisoners could have been tried, to pass without instituting proceedings against him. Such were the considerations which governed the case of Fitzpatrick, reported in 1st Salkeld, 102. There has been no oppression in this case, nor has the prisoner been in custody to bring him within the operation of the last principle stated. The application in this case for bail is refused, and the prisoner must be remanded.

250 \*The State v. Mayor and Aldermen,  
City of Savannah.

February, 1823.

City of Savannah—Jail—Act of 1822—Effect.—The Jail in the City of Savannah, must, under the Legis-



lative Act of 1822, taken in connexion with prior acts and circumstances, be considered as the County Jail, and as such, liable to the control of the Legislature, and the possession of the sheriff.

**Pleading—Offices—Non-Election—Issue.**—If a party on a return to an alternative mandamus, shew cause against the admission or restoration of a person to an office on the ground of non-election, he must make a direct and issuable denial of the fact.

**Corporations—Public and Private—Control of.**—Private Corporations cannot be deprived of their franchises, but by a judicial judgment upon a quo warranto, but public Corporations created for the purposes of City government, may be controlled and have their Constitutions amended and altered by the Legislative power.

**Same—Public Trust—Statute.**—If a statute destroys the character in which persons have acted in a civil or public trust, without pointing out a new mode in which the trust is to be performed, the latter is also at an end.

**Same—Revocation of Charter—Effect.**—If a Corporation be dissolved or surrendered, the offices under it share its fate.

**Same—Offices—When Legislature Can Destroy.**—The Legislature have power to destroy all offices, (except those held by Constitutional officers,) which are made for Civil government, and thus to put an end to the functions of the incumbents, before their term of office shall have expired.

By WAYNE, Judge.

This is an application by Abraham D'Lyon praying that a writ of Mandamus might be directed to the Mayor and Aldermen of the city of Savannah, commanding them to surrender to him the Jail of the county of Chatham and its appurtenances, and the custody of the prisoners confined in the same, which the petitioner claims in virtue of his being the Sheriff of the county of Chatham—an alternative Mandamus was awarded, to which the Mayor and Aldermen have made a return, protesting that Abraham D'Lyon is not the Sheriff of the county of Chatham, duly commissioned, or sworn, or qualified to act according to law—denying his legal right to the control of the building commonly called and known as the Jail of Chatham county, or the custody of the prisoners therein confined, in manner and form as he has alleged—declaring that the property in the Jail and the lots upon which it is built, are vested in the Mayor and Aldermen; stating that in

251 \*virtue of the Acts of the General Assembly, the Mayor and Aldermen are entitled to the care, management, direction and inspection of the Jail of Chatham County: that the Mayor and Aldermen, as former commissioners of the Jail, had not the possession of the Jail, nor the custody of the prisoners in it, and that one Hugh McCall, is, and was at the time when the mandamus was served, the Jailor of the county of Chatham, duly appointed, and as such entitled to the possession of the Jail and the custody of the prisoners. It is only necessary for me to remark upon the protest in the return, that A. D'Lyon is not the Sheriff of the county of Chatham, duly

commissioned or sworn, or qualified to act according to law—that the denial of his official character is not pleaded with such certainty as is required in a return to a writ of mandamus, shewing cause against the admission or restoration of a person to an office or appointment, on the ground of non-election. All the authorities declare, that there should be a direct denial of the election of the person, and the requirement is a reasonable one, for without it no issue can be made for a jury, to try the fact upon which the admission or restoration depends. Nor is the insufficiency of the pleading in this helped by the manner in which the petitioner has stated his official character, for the allegation upon his part that he is the Sheriff, is a declaration of the character in which he sues, made with sufficient certainty to have enabled the Mayor and Aldermen to tender an issue by a direct denial of the fact. But it is also declared in the return that the Jail and the lots upon which it stands, are the property of the Mayor and Aldermen, and therefore subject only to their control. And in proof of this claim, the acknowledgment in the preamble of the Act of 1801, that the Jail had been built by city funds, was strongly commented upon. That the successive boards of Aldermen, acting as commissioners of the county Jail have expended large sums annually since 1798, in the building and keeping in repairs the county Jail, to which

252 there should have been a general contribution by the people of the county, and for which the day of reckoning may not be far distant, cannot be denied, and though it is not the fact that the Mayor and Aldermen have a property in the site of the Jail, yet it must be admitted that it formed a part of the town common which by the Act of 1760, is declared to be common property of the lot holders of Savannah. But neither the advances of money to put up the buildings, nor the fact that it is erected upon lots belonging to and within the chartered limits of the city of Savannah, can give to the Mayor and Aldermen such an exclusive ownership of the premises, as will authorize them to direct it to any other object than a county Jail, or to exclude the Sheriff of the county for using it as such, if the Legislature has repealed the laws, which made the Mayor and Aldermen the commissioners of the Jail. This may be made manifest from the circumstances under which this Jail was built, and the uninterrupted admission of every Board of Aldermen for more than twenty years. The Mayor and Aldermen were first made commissioners of the county Jail in 1791, and as the records of Council will show, their attention was drawn in a year or two after, to the insecure and insufficient county prison which then stood upon Lot letter "G." and which had been set apart by the Act of 1760 as a permanent site for a public prison. In May, 1796, the City Council resolved to build a work-house, and also a prison, and marked out the sites for both of them, but the want of funds

and the distresses caused by the calamitous fires of November and December, 1796, prevented them from making any progress in their design. In December, 1798, the attention of Council was again directed to his subject, and under the pressure of exigencies which would no longer permit this work to be delayed with safety to the people of this city, the Council resolved that the work-house and Jail should be comprized in one building, and earnestly recommended the immediate purchase of materials for it. At the same time the committee declared the state of the City Treasury, and the county funds, to be inadequate to the purpose, and urged an immediate \*sale of Lots to carry on the work. The views of the Council, at that time, in regard to the interest or property it was to have in the building, may be collected from the ensuing extract of this report. The committee say, "that although the erecting of a Jail is the duty of the county at large, as it will be for their benefit and use, and ought to be their property, yet it appears it will be in vain to wait the slow and ineffectual progress of county funds, for the accomplishment of an object in which the city is so materially interested, and that the safety and reputation of the city, render it the duty of the corporation without delay to apply such funds as can be raised for this valuable purpose, hoping for reimbursement hereafter, by such sums of money belonging to the county as may come into their hands." And there can be no doubt that the source to which the Council looked for reimbursement, was so much of the proceeds of the annual tax, which the justices by the Act of 1796, were empowered to levy and to apply to the building and repair of Court Houses and Jails, in the different counties in the State. Here then we see the corporation beginning a work, without authority to levy a tax to defray the expenses of it, and apparently without expecting immediate assistance from the funds of the county to complete their design, and if the investigation ceased here, it would be difficult to deny to the Mayor and Aldermen an exclusive property in this building. But it will be found by an examination of their own proceedings on the 17th December, 1798, and before the building had been begun, that the Mayor and Aldermen resolved to further the work by the aid of county funds or property, and determined to use the authority, which they believed they had as commissioners of the County Jail, by selling the old County Jail and the Lot upon which it stood, and to apply the proceeds in part to the execution of the said Jail. This was done, and the proceeds were so applied. This is not the only instance of the Corporation acting as commissioners of the Court House and Jail, applying the county funds to their new design, \*for on the 25th February, 1799, they applied to the Governor of the State of Georgia for the sum of one hundred pounds, which had been appropriated by the Legis-

lature in 1795, to each county for a Court House and Jail, received the amount, and placed it in the City Treasury. Since the year 1801 the Mayor and Aldermen have also received on the same account seven thousand dollars, and though a large balance is due to the city by the county, for disbursements in erecting and keeping the Jail in repair, it certainly cannot be the subject of complaint, nor any wrong be done to the Mayor and Aldermen if their claim of exclusive right and property in this building is rejected, and if they are made to look for the repayment of their advances from that source upon which their predecessor relied, when it was determined to erect a Jail. But this claim to exclusive property in the premises can have no foundation, when we view the admissions of the Mayor and Aldermen upon this subject, as manifested by their acts and advances. In December 1798 they determined to build a County Jail, and used their powers in many instances as commissioners of the county Jail. To effect this object, county funds are applied by them in common with their own to such purpose. On the 19th October, 1801, after the present Jail had been completed, by a resolution of their own body, they applied to the Legislature to have vested in them the sole and entire government of the Jail of Chatham County. Such an Act was passed, and on the 1st February 1802, they accept the trust and advertise for the election of Jailor, who, by the same ordinance, (in which they speak of themselves as commissioners of the Jail of Chatham County,) is sworn in as the Jailor of Chatham County. The title and preamble of the act of 1801, with their consent designate this building as the Jail of the County of Chatham; and lastly, from the year 1801 to 1819, they apply for and receive money at different times from the Justices of the Inferior Court, for advances made by them on account of the Jail of Chatham County. I cannot but believe that enough has been shown to 255 \*disprove the claim of all exclusive property in these premises. I shall now proceed to examine the validity of so much of the return as alleges, that the Mayor and Aldermen by the Acts of the General Assembly are entitled to the management, care, inspection, and direction of the Jail of the County of Chatham, in connexion with the declaration, that Hugh McCall is and was at the time the Mandamus was served, the Jailor of the County of Chatham, duly appointed, and as such, entitled to the possession of the Jail, and the custody of the prisoners confined in it. It was argued that the right of inspection and direction, with the power to appoint a Jailor, were vested franchises in the Corporation of which the Legislature could not deprive it but with their own consent. These parts of the return are considered connectedly, for as it will not be pretended that Hugh McCall has any official existence as Jailor, independently of that which he derived from him his election under the Act of 1801,



the decision of both rights will be determined by the same principle. The Mayor and Aldermen by the 15th December, 1791, were made commissioners of the Court House and Jail of Chatham County, and their right as such was recognised in two Acts of the General Assembly which were subsequently passed, they remained only commissioners until the Act of the 30th November, 1801, when they were declared to be "solely and exclusively the commissioners of the Court House and Jail of Chatham, with full power and authority to appoint a Jailor." If we reflect upon what were the powers and duties of the Justices of the Inferior Court as commissioners of Jails, we shall be at no loss to determine the extent of the powers and rights, devolving upon the Mayor and Aldermen as such, for no other can they be supposed to possess unless they are expressly given, or may fairly be deduced by reference from the statutes which make them commissioners. The powers of the Justices in this case were altogether of a public nature, and the Mayor and Aldermen only took the place of the Justices with the additional right to appoint a \*Jailor, by whom and themselves the same public functions were to be performed, which had been previously executed by the Justices, and the Sheriff of the County. It is in this light that each successive council have viewed themselves, and the present Board of Aldermen recognized it, and admitted the existence of this public relation to the county in themselves, as commissioners of the Jail, when by their resolution of the 30th of October last, the Mayor was authorised to apply to the delegation of Chatham County in the Legislature, in behalf of the Corporation, requesting their exertions to have repealed the Law of the State, vesting the control of the Court House of Chatham County in the Mayor and Aldermen of the City of Savannah. If the duties or power given to the Mayor and Aldermen, as commissioners of the Court House and Jail, were of a public kind, there can be no doubt then, that the repeal of the law which made them commissioners, is within those boundaries of legislative authority over Corporations, which have been fully discussed in this country, and may be considered as permanently settled. The boundaries are, that private corporations cannot be deprived of their franchises but by a judicial judgment upon a quo warranto, and that all such as are made merely for the purpose of City government, or town police, are so far the creatures of the Legislature, that they may be controlled by it, and have their constitutions altered and amended by the Government in such manner as the public interest may require. *Terrett, et al. v. Taylor, et al.* (9th Cranch, 43); *Dartmouth College v. Woodward*, (4 Wheaton, 518.) The Corporation of Savannah is of the latter kind, and it has no power which is not held at the will of the Legislature. It cannot be necessary to enter into any argument to show that the

Act of 1801, making the Mayor and Aldermen commissioners of the Court House and Jail is repealed by the Statute of 1822, under which the petitioner claims the possession of the Jail, and as to the right which is still claimed to elect a Jailor, it need only be observed to show how untenable  
257 such a position is, \*that if the statute destroys the character in which persons have acted in a civil or public trust, without pointing out a new mode how the trust is to be performed, the trust and the character are both at an end. In this instance however, we are not left to conjecture. The intention of the Legislature by the introduction of the Sheriff in conjunction with the Justices into the Act, manifests an obvious intention to put the Jail upon the old footing, and the utmost certainty upon this point is attained, when the Act declares, that the Jail shall be vested in the Justices and the Sheriff, under the general Laws regulating County Jails in this State. Nor can the declarations that Major McCall is the Jailor of the County of Chatham deprive the Sheriff of the remedy for which he seeks. The appointment of Jailor was made by the Council under the Act of 1801, and though a short time of the term for which Major McCall was elected, is yet to expire, so soon as the Law was abrogated, which gave existence to his place, the place fell with it. The principle is indisputable that if a corporation be dissolved or surrendered, the offices under it share its fate. (Comyn's Dig. 5 vol. 156.) Whenever the Legislature deem it expedient, (excepting in cases of constitutional officers strictly speaking,) to abrogate those appointments which are made for civil government, without making any provision for the continuance in office of those who fill them, until the term for which they were elected shall have expired, the statute for such purpose is to be obeyed; such a measure cannot be viewed as a violation of any compact between the officer and the State, for the condition upon which all offices are accepted, in relation to the time of enjoyment is, the continuance of the office itself. This is the practice of General and State Governments, and no other principle can be applied to this subject which would not narrow the powers of legislation into an inability to pass laws which the public good may require, without delay. The only remaining part of the return to be considered, is that which states, that the Mayor and Aldermen, as  
258 \*former commissioners of the Jail, had not the possession of it, nor the custody of the prisoners confined in it. If it had been intended by the Mayor and Aldermen to disavow all control over the Jail, and to deny that it was not withheld from the Sheriff by a person whom they viewed as their officer, and who acted by their orders—a plain statement of the fact would have relieved me from the labour of this decision. I would have suppressed this Mandamus and would have directed a peremptory Mandamus to the Jailor to surren-

der the Jail and the prisoners to the Sheriff, considering it to be a clear case for the exercise of such a power in the first instance. But though the Mayor and Aldermen had not the possession of the Jail and the custody of the prisoners, facts may be collected from the documents annexed to the petition of the Sheriff, which shew by what means the statute of 1822 has not been put in force. On the 1st of January last, an application was made by the Sheriff to the Mayor for an order to receive the keys of the Jail. The Mayor replies, that his latter will be communicated to Council the ensuing day. The subject is referred by Council to a committee, to report on the following Saturday. In the mean time, the Sheriff is ordered by the Justices of the Inferior Court "to proceed to the Jail and demand possession of it." The order of the Justices was served upon Major McCall, and he replies to it by letter, saying, he was reluctantly compelled to decline the surrender of the keys of the Jail, in consequence of an order which he had received from the Mayor, commanding him to retain them, until Council shall direct to whom they shall be delivered. On the 14th of January, another application was made to the Mayor, by the Sheriff, for possession of the Jail and the custody of the prisoners, and he again declined complying until it has been referred to Council. I cannot close my eyes to the source from which the obstruction to the operation of the Act of 1822 has arisen, and against it must the remedy be directed. In fine, the views which I entertain upon this subject and which are the result of laborious research,\*are, that the act of 1822, vesting the Jail in the Justices and the Sheriff, is an entire repeal of the powers which the Mayor and the Aldermen had, as former commissioners, under the Acts of 1791 and 1801: that the Jail is the County Jail, and subject to such regulations, as the Legislature may, from time to time enact; and that the only officers who can by law exercise any control over it, are the Justices of the Inferior Court and the Sheriff of the County of Chatham.

It is therefore ordered, that a peremptory Mandamus be directed to the Mayor and Aldermen of the city of Savannah, commanding them to admit Abraham D'Lyon, the Sheriff of the county of Chatham, to the possession of the Jail of Chatham County, and to the custody of the prisoners confined in the same.

T. U. P. Charlton, & M. Sheftall, Sr., for plaintiff—J. C. Nicoll, & W. W. Gordon, for defendant.

WILLIAM DAVIES,

Elected Judge, November, 1828.

260 \*Hartridge and Others, Compl'ts, v. Rockwell and Others, Def'ts.

December Term, 1828.

Banks—Purchase of Own Stock—Disposition by Di-

rectors.\*—If the capital of a Bank cannot be usefully employed in loans, there can be no objection to investing a portion thereof in the purchase of its own stock. And the Directors of the Bank have a right to dispose of the stock so purchased by them.

Same—Same—Re-sale.—And on the re-sale of such stock, the Stockholders of the Bank have no right to a preference in the purchase.

Corporations—Right of Directors to Purchase Trust Property.—The Managers or Directors of the affairs of a Corporation cannot be considered as Trustees or prohibited as such, from the purchase of the trust property or stock, belonging to the Corporation.

Injunctions—Ex Parte.—In general, an injunction will not be granted ex parte and before answer.

Same—Same—When Granted.—But in cases of great urgency, or where irreparable injury may ensue, as in waste, &c.: where the application follows quickly after the injury complained of, the Court will grant the injunction without notice, or appearance, or subpoena served.

Same—Same—Same.—And it will not be granted ex parte and before answer, where it would deprive defendant of a right, for which no redress could be given, and where its refusal though productive of possible injury to complainant, could not divest him of any right.

By DAVIES, Judge.

Assuming for the purposes of this case that the Court has jurisdiction, the first question which presents itself, is whether the Directors had a right to dispose of the stock, previously purchased by them, or whether upon such purchase the stock lost its character as stock, and was merged in the funds of the institution. Originally the capital stock was divided into shares of fifty dollars each, and as these shares were taken, the amount paid in constituted the capital stock upon which the future operations of the Bank were to be carried on.

It cannot, I think, be denied, that from circumstances of necessity, or motives of policy, the Directors had a right to invest a \*portion of the capital stock in various ways. Having a right to manage the affairs of the institution for the benefit of the Stockholders, the Directors must necessarily have a discretion on this subject, within certain limits. In general the capital stock of a Bank is employed in making loans upon personal or other security, and the interest or discount upon such loans forms the profits of the Bank, to which each Stockholder is entitled in proportion to the number of shares held by him. The debts contracted with the Bank must sometimes from necessity be paid in property, or in stock of the Bank

\*Banks—Debt—Payment.—The debts contracted with a bank must sometimes, of necessity, be paid in property or in stock of the bank itself, or some other bank. In either case, it continues a part of the capital stock, to which the stockholders have no immediate claim; and is a fund to which the creditors of the bank must look for payment of their claims; and for the unpaid instalments upon such stock, the corporation, and not the stockholders, is responsible. *Robinson v. Bank*, 18 Ga. 92.



itself, or of some other Bank. In either case it continues a part of the capital stock to which the Stockholders have no immediate claim so long as the institution exists; but is the fund to which the creditors of the Bank must look for payment of their claims. If from the course of business, or the estate of things, the capital of the Bank cannot be usefully employed in loans, there can, I think, be no objection against the purchase of its own stock.\* In such purchase a part of the capital stock is withdrawn, but it is represented by the stock purchased; when dividends are declared, the profits of so much of the stock as may have been purchased, belong to the remaining Stockholders, and is nothing more than the profit to which they would have been entitled, if instead of appropriating so much of the capital to the purchase of stock, it had been used for making loans. But when a different state of things occurs, it may be deemed more profitable to invest again the amount appropriated for the purchase of stock, into cash, to be used for making loans; then the owners of the stock sold, become entitled to the dividends, and the other Stockholders receive in place thereof, the profits made on the loan of the money received on the sale of the stock. In any other view of the subject, the Directors would have the right of reducing the capital at their pleasure and limiting \*by that means the sphere of operations without consulting the Stockholders, which, I think, they have no right to do. The directors must have a discretion in directing the operation of the Bank within the limits and for the objects prescribed by the charter, but they can neither extend nor curtail those limits without the consent of the Stockholders. In purchasing and again selling a part of the stock, they neither extend nor controul those limits, because the capital remains the same, neither diminished, nor increased, since the stock represents so much of the capital as was invested in its purchase, and when sold, the money then stands in the place of the stock. No Stockholder has a right to touch any part of the capital so long as the institution exists;—when it is dissolved by its own limitation or from any other cause, then the Stockholders divide the capital. But it is said, if the sale was authorised, then each Stockholder had a right to a preference in the purchase to the extent of the stock previously held by him. I can discover no reason on which this principle can rest—If it were so, then the Stockholders would have the same claim to a preference in relation to any other property which the Bank possessed and was desirous of selling; and so of stock forfeited under the provisions

of the amended charter of 1827, and which is directed to be sold. The case of *Gray v. the Portland Bank*, 3 Mass. 364, was a very different case. There new stock was to be created by the provisions of the charter, and the Court seems to have been influenced by two considerations: 1st. that according to the terms of the resolution passed, the new stock was to be offered to the original associates and their assignees, and that the committee had no right by their exposition of it to exclude Mr. Gray; 2dly. that the owners of the new stock would of necessity become interested in the property acquired by the Stockholders, and that it was unjust that on paying no more than the original subscription, they would be entitled to an interest in property derived from the profits of the original investment. On the first ground I think there can be no doubt—on the other 263 ground \*it seems to me it would not apply to any part of the old stock, if it could when new stock is to be created. The old stock represented a part of the capital, on which the corporation commenced operations; when it was purchased, its price would be enhanced in proportion to the property owned by the Bank, and when sold, the same circumstance must be allowed to operate, to enhance its value; otherwise, the effect would be to diminish the capital, which could not be done. The new purchaser, therefore, would not come in on the footing of the original stockholder, but would be required to pay more or less according to the condition of the affairs of the Bank. There is nothing in the decision of the Court in the case of *ex parte Holmes*, 5 Cowen. 426, which conflicts with the view which I have taken of the case. The only question there, was, whether persons holding stock as trustees for the Bank were entitled to vote for the shares thus held, and on this question I think there can be no doubt. The Court does say that the company might take their stock in pledge of payment and keep it outstanding in Trustees, to prevent its merger. This they might do, as the best means of effecting their object, but it was not decided that the stock would have been merged but for the intervention of Trustees; indeed I think it may have been supposed that the stock was thus taken in the Trustees' names for the purpose of giving the Directors that influence which they attempted to exercise. The case of *the Marlborough Man. Comp. v. Smith*, 2 Conn. 579, thereby establishes the principle that the Directors of that company have no right, without the assent of the Stockholders, to apply for a change or increase of the powers given by the charter. But it is alleged that there was a want of good faith on the part of the Directors in making the sale; that they did not give such notice as they ought to have done; that some of the stock was sold before the passage of the resolution authorizing the sale; that it was sold at an underprice; that some of the Directors were themselves the purchasers. Now suppose that all these

\*But see penal code of 1833, 6th Div. Sec. 43d, which declares such purchase to be a misdemeanor and subjects the President and Directors, on conviction, to imprisonment in the Penitentiary, for not less than one, nor more than ten years. —(Ed. of Original Edition.)

charges may ultimately be supported, they all bear upon the fact that the

264 \*sale was at an under value, and the

Directors will be liable to the Stockholders for the injury done them. It is also charged that all this was done to promote the views of the Directors and to defeat the just rights of complainants, and to deprive them of their influence in the managements in the affairs of the institution. I do not think that these considerations can influence the Court in the present case. If the Directors had a right to sell the stock, as I believe they had, but it was sold under circumstances calculated to reduce the proceeds of the sale, they are liable to answer to those whom they have injured, whatever may have been the motive. On the other hand, if the sale was properly conducted, the motive of the sale cannot, I think, affect the parties in a Court of justice. Inquiries of this kind would lead us into a labyrinth from which we should never be extricated. In all these monied institutions, persons are influenced by motives of interest and policy, which may be very natural. It often happens that there is a contest for influence and power arising from motives which may be very good; most individuals have greater confidence in their own judgment and prudence than they have in others. It is only in cases of great urgency or where irreparable mischief may ensue, that an injunction will be granted *ex parte* and before answer. (1 *Mad.* 126; 1 *Newland*, 218; *Ogden v. Kip*, 6 *John. Chan. Rep.* 161.) In ordinary cases it is only granted upon the defendant's answer, or upon an order for time to answer, or on an attachment for want of answer. (2 *Mad.* 220.) What then is the urgency to induce me to interfere in this summary way? If the complainants have sustained a loss by the sale of the stock at the price, and in the manner charged, they have their remedy against the Directors, and that remedy will not be promoted by an injunction. Then the only other injury which the complainants complain of, is the possible result of the approaching election. This rests upon the apprehension of possible events, which, if they do occur, are rather matters of feeling than of interest, as they regard the affairs of the Bank. It cannot be rendered certain \*at this time who will be elected Directors, if the new Stockholders are permitted to vote, and it is neither certain nor probable that any great or irreparable injury will result to the institution, if the apprehension of complainants are realized. The past conduct of the present Directors is not complained of, on the contrary, it would seem that the Bank has been benefited under their management. But it is contended that the present defendants are Trustees and therefore could not themselves be the purchasers. Admit this to be the case, I cannot from the bill know the extent of their purchases; nor am I at present disposed to believe that this principle is applicable to the managers or Directors of the affairs of a corporation. They can hardly be considered as Trustees.

The company—the corporation, may rather be considered as the Trustees—the Stockholders the *cestui que trusts*. The legal title to the property is in the corporation, not in the Directors; though from the necessity of the thing, the affairs of the company must be directed by individuals; and in many cases, and generally, the Directors are themselves *cestui que trusts*. “Injunctions are allowed against those who have a legal estate of inheritance, but being a Trustee is not liable to an action of waste; to inhibit them from committing waste.” (1 *Mad.* 139.) But actions at law may be maintained by Stockholders against Directors, which could not be if the latter were Trustees having the legal title; the application of the principle to Directors of a Bank would affect transactions in which Directors are every day engaged. It may also affect Aldermen and Directors of corporations generally, and would, I think, have a most mischievous effect. Having kept out of view the answers which have been filed, (though I now doubt the propriety of my having done so,) I am bound to notice the circumstances under which this application has been made. A reason has been assigned at the bar for the delay, and I have no doubt that the reason assigned is in fact the cause; but it can not operate against the Defendants \*in cases of this kind. The application should have been made sooner, for many reasons. (1 *Newland*, 219.) “In the case of Waste and other cases of analogous nature, the Court will grant the injunction without notice, and before appearance, and before subpoena served, provided the plaintiff makes an early application to the Court, after the injury complained of has happened.” In this case there was a notice, but that can avail very little if the proceeding is, as it has been in this case, without answer and in fact *ex parte*. The purchasers of the stock have a right colourable in point of law, whatever may be the result of ulterior investigations; if they are prevented from voting at the pending election, they are deprived of a right for which no redress can be afforded them. On the other hand, if they vote improperly, the complainants are divested of no rights, though they may possibly be disappointed in their wishes and expectations as to the result of the election. The one is a positive right, the other a mere matter of feeling, or a possible injury arising from circumstances which may possibly happen, but which for any thing which appears to me is neither certain nor probable. 1 *Fonb.* (34 Note p.) speaking of a class of cases to which he refers, says, “the principle upon which these cases appear to have proceeded, is, that the injunction might operate irreparable damage to the defendant in the event of the plaintiffs not being exclusively entitled; whereas the damage sustained by the plaintiff in the event of this establishing his title, allows of compensation.”

The motion for injunction is refused.

Jno. C. Nicoll & M. Myers, for plaintiff  
—Wm. Law & W. W. Gordon, for defendants.



267 \*James B. Norris, Adm'r of Jeremiah Pitman, Compl't, v. Jesse Ham and W. A. Pitman, Def'ts.

February, 1829.

**Equity Practice—Joint Debtors—Payment by One—Effect.**—In Equity, the payment by, or the release and discharge of one joint debtor, will not operate as a discharge of the debt as to all, unless the intention of the parties and the justice of the case require such a construction of the payment.

**Sureties—Payment—Subrogation.\***—A surety who pays the debt, is entitled to be substituted in the place of the creditor, as to all the security or means possessed by him, against the principal debtor, and all the co-sureties.

**Judgments—Mortgage Given by Third Person for Payment of Judgment in Instalments—Collection.**—A judgment creditor who has given indulgence to his debtor, for 1, 2, and 3 years, upon a mortgage being executed by a third person to secure the payment of such judgment, has a right to proceed on his judgment to collect the instalments as they become due.

**Deeds—Specific Consideration—Proof of Another—Admissibility.**—If a specific consideration be mentioned in a deed, proof of another consideration inconsistent with that mentioned, is not admissible.

**Same—Consideration.**—But under the words "divers good and sufficient considerations," any sufficient consideration may be shewn.

By DAVIES, Judge.

The bill in this case seeks to enjoin the defendants, from proceeding at law on a judgment, recovered by Jesse Ham against the intestate Jeremiah Pitman, in his life time, and which has been assigned to the other defendant, W. A. Pitman, and prays to have satisfaction entered on the judgment.

The facts disclosed by the bill and answers are, that one Thomas Garnett and Jeremiah Pitman, in his life time, made their promissory note, payable to Jesse Ham, for a debt due to him by Garnett. On this note judgments were recovered by Ham against Garnett, in the county of Chatham, and against Pitman, in the county of Putman. Pitman being pressed for the payment of the judgment against him, made an arrangement with Ham on the 25th October, 1825, by which the judgment against Garnett was assigned to him, and an indulgence was given to him for one, two, and three years, for the payment of Ham's judgment against him, in consideration of which, W. A. Pitman executed a

268 mortgage \*on six negroes to secure the payment. After the death of Jeremiah Pitman in September, 1828, Ham pressed W. A. Pitman for the payment of the judgment, and he pointed out two tracts of land as the property of Jeremiah Pitman for this purpose, and at the same time, he was informed by Ham, that the mortgage which he held would be foreclosed, for the payment of any balance which might remain due on the judgment, after the sale of the land; in consequence of which, W. A. Pitman determined to pay the judgment, which he accordingly did, upon

Ham's agreeing to give him the use of it for the purpose of indemnifying himself. W. A. Pitman having pointed out the land, it was sold in February, 1828, for seventy dollars, he being the purchasers. It appears that after the recovery of Ham's judgment against Pitman, he had made a voluntary conveyance of his land to W. A. Pitman, by whom it was sold to one Keating, for fifteen hundred and eighty dollars, payable at distant periods by instalments, and promissory notes were given for the amount. These notes, W. A. Pitman says, were delivered by him to his father Jeremiah Pitman, and at his death they fell into the hands of his widow, who delivered them up to Keating upon his executing to her a quit claim of the land. The circumstances connected with this land are by no means satisfactorily explained, and present the most embarrassing feature in the case. W. A. Pitman receives a voluntary conveyance of the land from his father, makes a sale of it for \$1580—and then delivers the notes to him. These notes are given up to Keating by the widow, upon his executing to her a quit claim, and the titles which were executed by W. A. Pitman are delivered to him and destroyed, he then living upon the land as his father's property, and becomes the purchaser for seventy dollars. There seems to be something wrong in the transaction, and an injury has been done to the estate of Jeremiah Pitman, but to whom the error is imputable, or who is liable for the injury cannot now be determined, since there is nothing in the bill which will enable this Court to afford

269 redress. \*Mrs. Pitman is unquestionably liable to her husband's estate for the assets which she has appropriated improperly, and if, as I believe, must be the case, Keating knew at the time he entered into the contract with Mrs. Pitman, that he was contracting with her for that which did not belong to her, but to her husband's estate, he may yet be made liable to the administrator. And if the sale of the land at so inadequate a price was effected by the fraud or misrepresentations of W. A. Pitman, it is possible that there are means by which he may be made to account for it at its full value. But I must decide the question now submitted for consideration upon the bill and answer only. It is contended that by the assignment of the judgment against Garnett, and the receipt of the amount by Pitman, the assignee, Ham was satisfied as to that judgment; and that a payment by one of several joint promissors or obligors, discharges the debt as to all. This is the legal principle, but in equity it is subject to many and great modifications. There the principle is this, the effect and operation of a release or discharge of one, will not be extended beyond the clear intention of the parties and the justice of the case. (6 John. Chan. 242, Kerby v. Taylor.) What were the circumstances of this case, and what was the intention of the parties? Ham never received payment of either of the two judgments, until he re-

ceived the amount of the judgment against Jeremiah Pitman from W. A. Pitman. If he had been paid by Garnett, it would have operated as satisfaction on both judgments, and there would have been an end of the transaction. If he had been paid by Pitman, both judgments would have been satisfied as to Ham, but Pitman would have had a claim to indemnity against Garnett. Ham having judgment both against Pitman and Garnett, the latter of whom was the principal debtor, and the other his surety, transfers the judgment against Garnett to Pitman upon receiving the mortgage from W. A. Pitman, thereby exchanging one security for another. And this was a contract which equity would enforce, for the transfer of the judgment against

270 Garnett to Pitman, was \*only what Pitman could have had a right to claim if he had paid the judgment against himself; and it was the same thing, if instead of paying it, he gave such security as Ham was satisfied with. The surety who pays the debt is entitled to be substituted in the place of the creditors to all the security or means possessed by the creditor to enforce payment of the principal debtor, (4 John. Chan. Rep. 129, *Hayes v. Ward*,) and the same principle is applicable to co-securities in relation to contribution. Co-securities in a bond have a right to call on each other to contribute to pay the debt of the principal who is insolvent, and to have the benefit of the judgment obtained by the creditor against them all, though satisfaction had been entered upon the judgment, so as to let them stand as judgment creditors against one of the co-sureties, who was dead and insolvent, but whose estate could pay his proportion of the debt if considered a judgment debt. (1 Dessaus. 409, *Burrows, et al. v. McWhann, et al.*) If therefore Pitman, the surety, had paid the debt, he could have claimed from Ham the benefit of the judgment against Garnett, for the purpose of indemnifying himself; and if he gave him the use of the judgment for this purpose without being paid, but merely on receiving security, it does not well become Pitman's legal representative to complain of it. Again, it is said that the mortgage given by W. A. Pitman, had the effect to suspend the operation of the judgment until the expiration of the time limited for the payment of the last instalment in December, 1828. But it seems to me, that when any one instalment became due, Ham had a right to proceed on his judgment for so much; and in March, 1828, when the levy was made, two instalments were due, except four hundred dollars, which had been paid by Jeremiah Pitman. It is objected also, that W. A. Pitman pointed out the land for levy on the 22d December, 1827, when in fact he had only paid the judgment to Ham on the 27th December, 1827. But he had executed the mortgage on the 21st October, 1825, and then stood in the place of a surety,

271 and was justified in seeking \*to obtain payment by means of his

father's property, rather than sacrifice his own. It is also objected, that the deed of assignment from Ham to W. A. Pitman is without consideration; but it seems to me a very adequate consideration is shewn, and the principle on this subject is, I think, this: if a specific consideration be mentioned in the deed, you may not be allowed to shew another consideration inconsistent with that mentioned, but under the words "divers good causes and considerations," you may shew any sufficient consideration. It appears to me, upon the whole view of the case, that the answers contain a sufficient defence to the case made by the bill, and deny the equity of it, and that the injunction must be dissolved. (*Eden on Injunctions*, 86; 1 John. Chan. Rep. 211, *Hoffman v. Livingston*.) The bill was filed in March, 1828, and an injunction granted. The first answers were filed in May, 1828, and the injunction continued upon exceptions. The amended answers were filed on the 23d August, 1828. There can therefore be no ground for continuing the injunction. It has been suggested that there was a mistake in calculating the amount due on the execution when the payment was made by W. A. Pitman to Ham. This does not affect the case, because W. A. Pitman can only obtain the amount of the judgment without regard to what he paid for it; if he paid too much it was his own fault, and he must bear the loss. But the four hundred dollars paid by Jeremiah Pitman and which are credited on the mortgage, are not, as I perceive, credited on the judgment.

It is ordered, that the injunction be dissolved upon the defendant W. A. Pitman's crediting on the executions the two sums of two hundred dollars which were paid by Jeremiah Pitman, in his life time, as of the days on which they were paid respectively, as appears from the credits given on the mortgage.

Jno. C. Nicoll, D'Lyon & De La Motta, for complainant—M. Sheftall, Senr., for defendant.

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\*The State v. Elias Fort.

February, 1829.

**Justices—Militia Duty.**—The Justices of the Inferior Court are not liable to the performance of militia duty.

**Militia Duty—Officers of Judiciary Department.**—And it seems, that such duty cannot be required from the officers of the Judiciary Department as organized by the Constitution.

By DAVIES, Judge.

From the return made by the officer to this writ of habeas corpus, it appears, that the prisoner has been arrested under a warrant issued by the Colonel of the first regiment of Georgia Militia, for a fine imposed by a Court of Inquiry, for neglecting to attend a regimental parade. The defendant is one of the Justices of the Inferior Court of the county of Chatham, and contends that



he is not liable to perform militia duty. The question presented for the decision of the Court, is, whether the Justices of the Inferior Court can be required to perform such duty.

The Constitution of the United States gives to Congress the power to provide for organizing, arming and disciplining the militia, and an Act was passed in May, 1792, for carrying this power into effect, the first section of which provides, that each and every free able-bodied white male citizen of the respective States resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five, except as hereinafter excepted, shall severally and respectively be enrolled in the militia. The exceptions referred to, embrace a variety of persons and officers, together with all persons who were, or might thereafter be exempted by the laws of the respective States, from militia duty. Under this exemption must be included, as well those persons who were exempted by the statute laws of the several States,

as those who were exempted by the  
273 common law in those States, \*where the common law had been adopted.

In December, 1792, an Act was passed by the Legislature of this State, to revise and amend the militia law, and to adopt the same to the Act of Congress of May, 1792, the 23d section of which enumerates a variety of exemptions, some of which were among the exemptions provided for by the common law, and others which were not. In December, 1792, another Act was passed supplementary to that of 1792, the 15th section of which, repeals so much of the former Act, as exempts from duty the several officers therein named, and all laws regulating the militia, passed prior thereto. It is contended, that the effect of this repealing clause was to destroy all the exemptions provided for by the Act of 1792, and from that only, and that the effect of this repeal was to render all those liable to the duty who had been exempted thereby. This is, I think, very doubtful. The 15th section of the Act of 1793, does not repeal the 32d section of the Act of 1792, in terms, but only repeals so much of the Act of 1792 as exempts the several officers therein named. Now these exceptions include persons who cannot be called officers, in the technical or in the literal sense of the term. It may, I think, be doubted whether the Legislature ever intended to designate as officers, either Legislative, Judicial or Executive, Ministers in orders, Practitioners of Physic, Public Printers, Ferry-men, Millers, Tutors and Students, Invalids, Post-riders, Madmen and Idiots. And the Legislature have themselves shewn that they made a distinction between the heads of departments and its officers, for they exempt members of the Legislature and their officers. If therefore, a strict construction were given to the repealing clause of the Act of 1793, it might follow, that many of the least important exemptions of the Act of 1792 were left,

whilst those were taken away which would seem to be necessary in the very nature of things. In the exemptions of the Act of 1792, were included Madmen and Idiots, but

if the construction contended for were  
274 to be adopted, they are now liable \*to do militia duty; and this, I think, would hardly comport with the good sense and wisdom of the Legislature of our State. I make these remarks, to shew how difficult it is to determine, whether the Legislature by the repealing clause of the Act of 1793, intended to leave all exemptions from duty, to stand upon the principles of the common law, limited or modified in such a manner, as would best adapt them to the state and condition of the country, and the form of our government; or, whether they intended to take away all exemptions, except those mentioned in the Act of 1792. The first supposition, I am aware, is liable to many objections, but the latter is so totally irreconcilable with good policy and sound Legislation, that I could not but adopt the former, and reject the latter. It may be said, that the Legislature themselves have shewn, that they intended by the repealing clause of the Act of 1792, to include under the description of officers all the exemptions contained in the Act of 1792, because by the 7th section of the Act of 1795, (M. & C. 568,) Ministers in orders are exempted, which shews that between 1793 and 1795, they were considered liable to militia duty. But this only shews what the Legislature of 1795 supposed was the intention of their predecessors of 1793, of which in fact they had as little means of information as we have, and about which they were as liable to err. On the other hand, by the Act of 1794, (M. & C. 153,) in addition to the members of the Fire Company, the Recorder and City Treasurer of Savannah, the Marshal, Messenger, and Clerk of Council are exempted. It may be asked if the Legislature ever intended to subject the judiciary department of the government to militia duty, whilst the inferior officers of a corporation were exempted. And by the Act of 1798, (M. & C. 682,) all persons engaged in carrying on iron works in the State are exempted. It we are, therefore, to be governed by the intention of the Legislature, by a reference to these various Acts of the Assembly, it seems to me that it would be difficult to arrive at any satisfactory conclusion, or one that might not be opposed  
275 on some plausible ground. But \*the

Act of 1818, (Prince, 324,) repeals all former Acts upon the subject of the organization of the militia, and the 43d section exempts all persons who are exempted by the laws of the United States, and all Clergymen regularly ordained. The question under consideration must therefore be decided with reference to this Act. It is admitted that by the common law all judicial officers are privileged from militia duty; and it must be admitted also, as a general principle, that the Legislature may at its pleasure abridge or extend this privilege, with reference to the persons who may

claim it; and whenever the will of the Legislature can be ascertained, either from positive and express enactments or by necessary inference, I will most cheerfully yield obedience, so far as I may, consistently with my duties and obligations. In the case of Bliss, (9 John. 347,) in which the question was whether Bliss, who was an attorney and counsellor of the Courts of New York, was privileged from serving in the militia, it was decided that he was not exempt. The law of the State of New York contained a number of exemptions, including the Lieut. Governor, the members of both houses of the Legislature and their respective officers, the Chancellor, the Chief and other Justices of the Supreme Court, Judge of the Probate, and all other judicial officers of the State. Upon the maxim that the expression of one person is the exclusion of others, it was held that attorneys who were ministerial officers of the Courts, were liable to do duty in the militia. And it seems to me to have been a correct construction of the law. But our Act contains the single exemption of Ministers of the Gospel. If, by extending the privilege to other persons, the manifest intention of the Legislature would be violated, or if by such construction the law would be rendered useless, I should be among the last to adopt such a construction; but if on the other hand the intention of the Legislature be doubtful and ambiguous, and if the construction contended for, would necessarily or probably involve a violation of principles, essential to the well-being of the

276 community, the good \*order of society, and interfere materially with the proper discharge of the duties of the officers of one of the distinct and independent departments of the government, then, I should by adopting such a construction, do an act of injustice to the wisdom and patriotism of the framers of our laws, and I am bound from respect to them, to reject it. The Constitution declares that the Legislative, Executive and Judiciary departments of the government shall be distinct, and that each department shall be confined to a separate body of magistracy. It follows that within the sphere of action prescribed to them by the Constitution, each department must be independent, because if they were not, some one of them might be destroyed by the other, or its operations so restrained and limited as to deprive it of the proper exercise of those powers which are delegated to it by the Constitution. The Inferior Court is an important branch of the judiciary, deriving its jurisdiction immediately from the Constitution. It has concurrent jurisdiction with the Superior Court in all civil actions, not involving the title to real estate. The Justices of that Court are ex officio Judges of the Court of Ordinary, exercising original jurisdiction in all cases usually confided to such Courts. The Justices, in the absence of the Judge of the Superior Court, are authorised and required to issue writs of habeas corpus,

and in all cases to discharge, admit to bail, or remand a prisoner, besides many other duties which are imposed upon them by various Acts of the Legislature. It must be obvious, that the important duties of this office are incompatible with those, to which individuals enrolled in the militia are subjected, according to the provisions of the law now in force, and allowing to those who are authorized and required to enforce its various provisions, the utmost prudence and discretion in the exercise of those powers. But it is the principle which is contended for that is objectionable, and not the manner in which that principle has been applied. If the Legislature can require of the Judges of the Courts, that they should perform five days' duty in each year, as militia men, they might require any greater service that they pleased, and

277 if they can impose a fine \*of five dollars for neglecting to perform this duty, they might impose any larger sum, and thus the duties of the Judge might be rendered so totally incompatible with the services of the soldier, that the one could not be discharged without a total neglect of the other. The eulogiums passed upon a well regulated militia force by one of the counsel, are by no means exaggerated, or extravagant. The militia is the bulwark and the best safeguard of our country; but without an independent judiciary, our government could not long be preserved, and without it, there would be little left which the citizen soldier should be proud of, or the soldier citizen should feel a desire to protect. The doctrine contended for by the counsel in this case, extends as well to the Judges of the one Court as of the other; to the Judges of the Superior, as well as to the Justices of the Inferior Courts. It seems to me, that the evil resulting from withdrawing from the effective force of the militia, the services of the Judges of the Courts, will be amply compensated by the advantages of having justice regularly administered, as well to the soldier as the citizen. But it is said, that the services required of militia men are not personal but pecuniary. If this were the case, the argument founded upon the importance and necessity of augmenting the militia force, even by drafts from the bench, loses much of its weight, since, as I believe, the fines imposed are not appropriated to the filling up of the ranks, but to the purchase of colors and procuring music. I consider it a personal service. The object of the Legislature is, by previous training to qualify every man enrolled in the militia, to perform the duties of a soldier when called into actual service. The payment of the fine does not relieve the delinquent from future services, but is a punishment for past neglect, and the means of inducing personal attendance for the future. Besides, when enrolled, the Judges of the Superior, or Justices of the Inferior Court, can claim no privileges beyond other men whose names are placed on the muster roll; they must be liable to a draft when any portion of the



militia is to be called into service; and if drafted, and they refuse or neglect to appear, they are by the 19th section of 278 the Act to \*be considered as deserters, and are subjected to the rules and articles of war; but in the case of privates they are allowed to procure substitutes; no commutation of money for personal services is allowed. It might frequently happen that a substitute could not be procured, or that the person drafted is unable to afford a sufficient sum of money to procure one. The consequence resulting from such a state of things must be obvious to every one. Upon the whole, and after the best investigation which I am enabled to give to the subject, I am constrained to believe that the Legislature was disposed to leave the subject of exemptions to be regulated by those rules and principles, which were of force before the passage of the Act of 1792, so far as they were applicable to the condition of the country and our system of government. I am not disposed to consider this question with reference exclusively to the common law principle, which is applicable to such questions—but to consider it, with reference to those principles which grow out of the existing state of things, and the form and structure of our governments, and the order and arrangement of its various departments. Without law, no government can exist, and unless the laws are regularly administered, they become a mere mockery and inefficient for the purposes for which they were designed. Subject those officers to whom the Constitution has given the power, and upon whom it has imposed the duty of expounding and administering the laws to the performance of militia duty, and you prostrate and render dependent one of the departments of the government, and deprive the citizens of that security for their lives and property, which it should be the object of every government to secure to them, and in no government in a more eminent degree than that under which it is our happiness, and should be our pride to live.

The defendant is therefore discharged.  
M. Myers & Ed. Harden, for the State—  
E. Fort, pro. per. contra.

WILLIAM LAW,  
Appointed Judge, May, 1829.

279 \*Marine and Fire Insurance Bank and al., Compl'ts, v. Eleazer Early and M. Brown, Def'ts.  
January Term, 1830.

Equity Practice—General Prayer of Relief.\*—Relief

\*Equity Practice—Prayer for General Relief.—In Steed v. Savage, 115 Ga. 101, 41 S. E. Rep. 272, it is said, it is true that the petition contains a prayer for general relief, but it is well settled that "where a specific prayer in an equitable petition is followed by a prayer for general relief, the plaintiff is not entitled under the latter

may be granted under the general prayer of a bill, where it is consistent with the case made by the bill, and not inconsistent with the specific relief prayed.

Same—Vendor's Lien.—The doctrine of the equitable lien of vendor of land for unpaid purchase money recognized, where no title had passed, and the intention of the parties to look to the property itself, was manifest.

Same—Same—Purchasers.—And where no title had passed, the lien will be preserved against purchasers by act of law, as assignees of a Bankrupt, and creditors claiming under a conveyance from vendee.

By LAW, Judge.

This is a bill filed to carry into effect an agreement for the sale of certain real property, in the city of Savannah, and to obtain the payment of the balance of unpaid purchase money. It alleges that the plaintiff, the bank, sold to Early in 1822; that \$2000 were paid in cash—that the balance of \$6000 was to be paid by certain instalments, and to be secured by bond and mortgage on the premises; that upon the execution of the bond and mortgage, titles were to pass from plaintiff to defendant, Early; that Early went into possession in pursuance of said agreement; that the bond and mortgage were never made, and titles never passed; that Early is insolvent, and his effects assigned to Brown, for the benefit of his creditors: it prays that the contract may be performed, by payment of the unpaid purchase money, and that if it be not paid, the property be sold for that purpose, and for general relief.

To this bill a general demurrer has been filed, and in support of it, it was argued, that the prayer of the bill was defect- 280 ive; that there \*could not be an alternative decree, and that the specific and general relief prayed, were inconsistent.

It appears to me that the special relief prayed, is obviously that to which the party is entitled, if any:—that it is in consistency with the case made by the bill, and the rule is, that relief under the general prayer will be granted if consistent with the case made by the bill, and not inconsistent with the specific relief prayed.†

It was argued that the doctrine of equitable lien, as recognized by the English chancery cases, could not be applied in this State.‡ Without intending to express an opinion, how far that doctrine would be applicable here, where the conveyance had

to any relief which is not consistent with the case made by the petition and with such specific prayer." *Hairlson v. Carson*, 111 Ga. 57, 59, 36 S. E. Rep. 319. See also, *Marine Bank v. Early*, R. M. Charl., 279.

†English. et al. v. Foxall, 2 Pet. S. C. Rep. 912, S. P.—(Ed. of Original Edition.)

‡The rule of the vendor's equitable lien, may be examined, under all its modifications and restrictions, in 2 Story's Equity, 462 et seq. and 4 Kent's Com. 151-154, (3d ed.) where all the cases are collected. See also, *Brown v. Gilman*, 4 Wheaton's Rep. 291-2 & note (a).—(Ed. of Original Edition.)

actually passed, considering, that with us, lands, equally with personal property, are subjected to the payment of debts, I can scarcely hesitate to believe, that where no title has ever passed to the purchaser by the execution and delivery of deeds, and the facts and circumstances of the case shew the intention of the parties to look to the property itself as security, that the lien would not be as much preserved in this State as any where else. And persons coming in under the purchaser by act of law, as assignees of a bankrupt, and creditors claiming under a conveyance from the purchaser, are all bound by the equitable lien where no title had passed.

It was contended that the plaintiffs had been guilty of such neglect, that if the lien might at one time have been asserted, it is now gone. This ground as well as the question of lien are so dependent upon the facts of the case, that they appear to me rather proper for adjudication at the hearing than upon demurrer.

Demurrer overruled.

281 \*Patrick McDermott, Compl't, v. James G. Blois, et al. Def'ts.

January Term, 1830.

**Equity Practice—Answer to Part of Bill.**—Where a defendant answers part of a bill, such answer will over-rule a demurrer on the record, or ore tenus, going to the whole bill.

**Pleading—Demurrer—Insufficient Cause.**—If the cause assigned on the record for demurrer be bad or insufficient, other cause may be assigned ore tenus.

**Fraudulent Conveyances—Right of Creditor at Large to Set Aside.**—A creditor at large, or one whose debt has not been carried to judgment, cannot call upon a Court of Equity to afford its aid in setting aside conveyance, alleged to be voluntary and fraudulent, made by the supposed debtor, of his property.

**Pleading.**—*Quære*, if a bill charges combination, must a demurrer so far answer as to deny the charge.

By LAW, Judge.

The bill in this case alleges the existence of a co-partnership between the complainant and the defendant, J. G. Blois, in 1824, and charges the defendant with fraudulent sales and appropriations of the goods and merchandise of the concern to his individual use, and with making improper entries in the books, and prays an account. It further charges, that certain conveyances made by the defendant, J. G. Blois, to the other defendants, of the individual property real and personal of the said J. G. Blois, were fraudulent and without consideration; and prays that they may be decreed to be fraudulent and voluntary; that they may be set aside, and the property subjected to the claims of complainant and others, the creditors of Blois, in the order of priority.

To this bill the defendant, J. G. Blois, has answered, denying the allegations on the subject of co-partnership, and improper con-

duct charged, and all the defendants demur to that part of the bill which relates to the conveyances; and assign on the record, for cause of demurrer, that there is nothing shewn by the bill as a foundation of equity, for this Court to interfere, by compelling a discovery of the consideration for which the conveyances were executed. The case before me is upon the argument of the demurrer; in support of which, several grounds were presented, some of which, it was contended, went to the whole bill and authorized its dismissal. Whatever force this argument might have been entitled to, under a different state of the pleading, the defendant, J. G. Blois, by submitting to answer as to part of the bill, such answer would overrule a demurrer on the record going to the whole bill, and must likewise overrule any cause assigned ore tenus in support of demurrer going to the whole bill. Upon what was urged against the demurrer, that the party was confined to the cause assigned on the record, the rule seems to be, that if the cause so assigned be bad or insufficient, other causes may be assigned ore tenus,\* and as it regards the change of combination, the rule was, as stated in Mitford, that as every bill charges combination, the demurrer must so far answer as to deny that charge. This rule is however denied by the later cases, and is not the modern practice. But if it were, the defendant, J. G. Blois, in his answer, denies all combination and confederacy, and this answer is referred to and adopted by all the defendants in the demurrer.

We come then to the question, whether a creditor at law, or one whose debt has not been carried to judgment, can call upon a Court of equity to afford its aid in detecting fraud and ferreting out property? It is well settled that he cannot. In most of the cases in England, where the creditor is pursuing real estate, an *elegit* is sued out before the aid of equity is asked for. In New York, it is said, the judgment creates the lien upon real property, and therefore after judgment, equity may be called upon. But in 283. \*relation to personal property, the lien

not being created by the judgment, the execution must be issued; and according to some authorities the return of *nulla bona* made thereon. Other cases say the return is not necessary. Now all agree that there must be a lien, and with us, by statute, the lien is given on both real and personal property from the date of judgment. It is this lien which gives the plaintiff the interest, that entitles him to ask for equitable aid. If this were a case, therefore, in which the demand could be established at law, it would not admit of a doubt. But the subject mat-

\*A demurrer ore tenus must be to that which the defendant has demurred to on the record. If the cause of that demurrer on the record is not good, he may at the bar assign other cause, but he cannot demur ore tenus, upon a ground, which he has not made the subject of demurrer on the record. *Pitts v. Short*, 17 Ves. Ch. Rep. 215. — (Ed. of Original Edition.)



ter of the demand authorizes the plaintiff to come into a Court of equity for the purpose of having that established. Yet he will not be permitted to go beyond that demand, and inquire into other and distinct matters in relation to which he has no interest until he has established his demand. Let the plaintiff proceed therefore to his decree, which creates a lien here like a judgment, and upon which execution may issue; and then he will be entitled to all the aid this Court can give him in subjecting any property which may be attempted to be concealed. The bill will have to be amended by setting forth the facts (which it will be in the power of the complainant to do after the hearing,) necessary as a basis or foundation for the discovery and relief, sought as to the conveyances. And it is obvious that if the bill must be amended, the demurrer ought to be sustained. Again, until a lien has been created and an interest established, this Court will not lend its aid for the purpose of hanging up property. The demurrer is therefore sustained, but expressly without prejudice, leaving it to the plaintiff to amend his bill after the decree, or to file a new bill.

T. U. P. Charlton, for compl't.—Jno. C. Nicoll, for def'ts.

**284 \*John H. Morel and E. Belcher, Com-  
pl'ts, v. Pat'k Houstoun and al., Def'ts.\***

January Term, 1830.

**Equity Practice—Case Proper for Relief—Demurrer.—**

If a case is made out in which a Court of Equity gives relief, a demurrer cannot be sustained.

**Same—Insufficient Statement of Equity.**—Secus where the equity of plaintiff is not stated with sufficient certainty.

**Deed of Personalty—Recordation.**—There was no law of Georgia in force in 1795, requiring a deed of personal property to be recorded.

**Same—Same—Effect.**—A purchaser cannot be bound by the constructive notice afforded by the record of a deed, not required by law to be recorded.

**Equity Practice—Demurrer.**—Where upon a bill for discovery and relief the discovery sought will afford no ground for equitable relief, a demurrer to the relief is good to the discovery also.

By LAW, Judge.

This is a bill filed to recover certain negroes and their issue, conveyed in 1795 by Robert Bolton to Phineas Miller, in trust for the complainant, Mrs. Belcher; and sold in 1803 by William Belcher, the husband of the complainant, (without the assent of Mrs. B. or her trustee,) to defendant, Houstoun, upon certain trusts. The bill alleges, that the deed from Bolton to Miller had been recorded, and that at the time of both conveyances Mr. Belcher was in easy pecuniary circumstances. It seeks a discovery of the identity of the original negroes, and of the

issue since born; and prays for relief by delivering up of the negroes and payment of hire, or the payment of their estimated value and hire. A general demurrer has been filed for want of equity in the bill.

The general rule is, that whenever a case is made in which a Court of equity gives relief, the bill cannot be demurred to for want of equity; but whenever no sufficient ground is shewn for a Court of equity to interfere, the defendant may demur for want of equity in the plaintiff's case to support the jurisdiction of the Court. (2 Mad. Ch. 287.)

**285** \*So also if the equity of the plaintiff is not stated with sufficient certainty a demurrer lies. (1 Ves. Jr. 287, 8 Ves. Jr. 398.)

If the case made by the bill be cognizable solely in a Court of common law, or in any other Court of ordinary jurisdiction, a demurrer lies. Now, it is quite clear, upon the face of this bill, that the plaintiff, if entitled and not barred by time, may recover this property at law in an action of detinue or trover. There is no one allegation in the bill, which in my view can give to this Court jurisdiction. It is true as a rule in equity, that all persons coming into possession of the trust property with notice of the trust, shall be considered as trustees, and bound with respect to that special property, and the execution of the trust. (2 Mad. Ch. 124.) But it is not alleged in this bill that the defendant, Houstoun, purchased with notice, either actual or constructive. Nor is any fact or circumstance set forth in the bill from which to infer notice to him, save only the fact that the deed from Bolton to Miller was on record; and this, it was contended by the complainants counsel, was constructive notice. It might be a sufficient answer to say, that there is no allegation in the bill charging notice, but if there were, I do not think that there would be any justice in compelling the purchaser to be bound by implied notice of the contents of that deed. The foundation of this rule in equity is fraud in the purchaser; to apply it to the defendant, he is to be considered as charged with a fraud in purchasing property which he knew did not belong to the vendor. But how is this charge of fraud to be supported, when Houstoun had no clue by which he was to be directed to look into the deed from Bolton to Miller. He was dealing with Belcher, and supposing the trust to be otherwise totally unknown to him, he might as well be required to examine the contents of every deed on record. Such is the reasoning of the Chancellor in Murray v. Ballou, (1 John. Ch. Rep. 574.) But at the time these conveyances were made, after duly considering the Act of

1768, it does not appear to me that there \*was any law of this State requiring a deed of personal property to be recorded,\* and the rule is well established, that the record of a deed not required by law to be recorded, cannot be considered as

\***Sheriff's Return—Amendment.**—It is, as a general rule, competent for a sheriff to amend his return before the court. So long as the sheriff is in office, and parties are protected by his official bond, he may amend his return. Hopkins v. Burch, 3 Ga. 225, citing the principal case.

\*But see Act of Dec. 21st, 1819, Prince's Dig. 2d ed. 215, and Act of 26th Dec. 1827, Prince's Digest 2d ed. 165.—(Ed. of Original Edition.)

furnishing constructive or implied notice of its contents to a purchaser.

The doctrine of the jurisdiction of the Court is this, you cannot attach upon the conscience of the party any demand whatever, when he stands as a purchaser having paid his money, and denies all notice of the circumstances set up by the bill. (2 Ves. 458.) This bill charges no notice, and states no facts or circumstances from which notice can be inferred. The defendant, therefore, appears as a purchaser for a valuable consideration without notice, and against such an one, this Court will not extend its jurisdiction to compel an answer, nor take the least step imaginable. The complainants, however, seek a discovery for the purpose of establishing the identity of the negroes and proving their issue. And it has been contended on this ground that this demurrer must be overruled. The old rule in England unquestionably was, that a demurrer might be good to the relief and bad to the discovery. But Lord Thurlow held, that a demurrer which was good to the relief, was good to the discovery also. And this rule thus introduced by Lord Thurlow, has been ever since the doctrine of the English Chancery Courts. It has been said by another eminent Chancellor in England, to be one of the wisest rules ever established.\* It proceeds upon the idea that a bill of discovery must state some purpose to which the discovery sought must be applicable, and the supposed hardship on a defendant, in compelling him to encounter expense and to answer, when the Court cannot give relief. I am aware that

this doctrine was not approved altogether †by the Court of Errors of New York.† But even in that case, it seems to be admitted that when in the complainant's case, from his own showing, no discovery or proof can make it a proper subject of equitable jurisdiction, the bill will be dismissed upon demurrer. Now there is no fact stated or alleged in this bill, to which an answer or discovery is sought, that can possibly authorize this Court to afford equitable relief. It is not alleged that Houstoun purchased with any knowledge of the trust in favor of Mrs. Belcher, and no discovery of that fact is sought by the bill. The discovery so far as it regards the identity of the negroes and their issue, cannot give to this Court jurisdiction.

I am, therefore, of opinion, that the demurrer in this case must be allowed.

288 \*Low, Taylor & Co. v. Samuel Goldsmith.

January Term, 1830.

Practice—Exceptions†—Written—When Presented.—

\*Master of the Rolls, for the Lord Chancellor (Rosslyn.) 3 Ves. Ch. Rep. 347. See Baker v. Mellish, 10 Ves. Ch. Rep. 553.—(Ed. of Original Edition.)

†Le Roy v. Veeder, (1 John. Cas. 423.) Laight v. Morgan, *ibid.* 429; Kimberly v. Sells (3 John. Ch. Rep. 471.) and see 1 Story's Equity, 82 et seq.; Rees v. Parish, 1 McCord's Ch. Rep. 56.—(Ed. of Original Edition.)

‡Bills of Exception—Time of Taking.—In Carey v.

It seems, that if a party seek to avail himself of an error of the Court, so as to carry up his case by certiorari, he must reduce his exceptions to writing at the time, and tender them, during the trial.

Same—Same—Irregularity of Proceedings.—And where no exceptions had been tendered during the term, but were presented to the individuals composing the court, separately, and on succeeding day, and were thus signed by them, and such exceptions were contradicted by a statement signed by the same Judges, the rule was refused "upon the great irregularity of the proceedings."

By LAW, Judge.

It appears in this case that no exceptions in writing were presented to the Court during the trial; that no note or memorandum in writing of any exception taken, was made by the Court at the time of the trial, or during the continuance of the term; and that they were not requested to make any; that after the adjournment of the Court, and on a succeeding day, exceptions were presented in writing to the Judges who composed that Court, separately and individually, and were thus signed by them.

It does not appear that any notice was given, or opportunity afforded the adverse counsel, of contesting the correctness of the exceptions thus presented. Whilst these exceptions are presented to me on the one hand, as containing a true statement of the occurrences at the trial, and furnishing the grounds upon which the writ of certiorari ought to issue; on the other hand, a certificate signed subsequently by the same Judges, contradicting in many respects the verity of the exceptions which they had signed, is furnished. Perhaps few cases could have occurred more strongly calculated to illustrate and enforce the propriety and even necessity of the construction given by the English Courts to the statute West. 2d,

upon which it was held, that although 289 the statute appoints no time \*when the exception should be reduced to writing, yet, upon the nature and reason of the thing, it must be when the exception is taken and disallowed. The substance must be reduced to writing whilst the thing is transacting. The statute of Georgia, like the English statute, does not appoint the time when, but requires that the party making such exceptions shall offer them in writing signed, &c. The facts attending a trial are extremely liable to be mistaken or forgotten, if they are not reduced to writing at the time, and presented distinctly to the Court during the continuance of the term. Convenience and the

McDougald, 4 Ga. 610, it is said, we are aware of the construction given by the English courts to the statute West. 2, upon which it has been held that although the statute appoints no time when the exception should be reduced to writing, yet upon the nature and reason of the thing, it must be when the exception is taken and disallowed. *Low v. Goldsmith, R. M. Charl.* 288. We are of opinion, however, that the act creating this court, contains no such provisions. The principal case is also cited in *Roser v. Marlow, R. M. Charl.* 546.



certainly and advancement of justice, seem to me absolutely to require such a construction of our Act. From a different view the most embarrassing difficulties would ensue, fatal to the ends of justice, and pregnant with inconvenience to the Judges themselves. Frequently in their extreme anxiety to promote, they would defeat the course of justice, by trusting too much to slippery memory, as to what did occur, rather than refuse the means of a hearing before a higher tribunal. But if fearful of memory, Judges should refuse to sign, it would be the source of perpetual applications for mandamus to compel them. It may be that if the exception be insisted on at the time, the party may have other testimony, and need not put the cause on that point, and hence again the necessity that you shall take it at the time, and not resort back to it when a verdict has gone. It is not the verdict or parol objection raised to the admission of testimony that can entitle to a bill of exceptions. It is the requisition then made, that the point may be reduced to writing, that it may not be the subject of mistake, and shewing that the party intends to stand upon his exception. And thus too, an opportunity is afforded the Court of having the point correctly stated in the presence of both the counsel. Regularly, the bill of exceptions ought to be tendered during the trial, but the practice is to allow counsel to put the points thus taken down in writing, during the trial, into form, or in other words, to draw the formal bill of exceptions \*and tender it afterwards.\*

So far as this particular case is concerned, the words of our Act in another particular, deserve to be noticed. It says, if such exceptions shall be overruled by the Court. This trial took place before a special Court convened for the particular purpose. It ceased to be a Court after its adjournment, and it may be worthy of enquiry how far the individual acts of the Judges who composed that Court can be considered as the act of the Court, after its final adjournment.† But without deciding this, upon the great irregularity of these proceedings as they have come up before me, I cannot entertain jurisdiction of the cause.

The rule to shew cause, is therefore, discharged, and the prayer of the petitioner refused. See the following authorities:

1 Salk. 288; Bull, n. p. 315; 2 Tidd's pract. 788; 1 Bos. & Pull. 32; 6 John. Rep. 281; 9 John Rep. 345.

M. Sheftall, for petitioner—R. W. Habersham & J. C. Nicoll, contra.

291 \*Footman, et al., Compl'ts, v. The Ex'ors of John Pray, Def'ts.

January Term. 1830.

**Equity Proceedings—Parties.**—All persons materially

\*As to distinction between the Constitutional and Judicial writ of certiorari, see *ex parte Simpson*, supra p. 117, and see also, *Roser v. Ex'ors of Dugger*, infra.—(Ed. of Original Edition.)

†See *Woodruff & Co. v. Dean & Mahoney*, Dudley's Rep. 215.—(Ed. of Original Edition.)

interested in the subject matter of the suit, must be made parties to a bill in equity.

**Same—Same—Exception.**—But this rule is to be enforced under the discretion of the Court, and is subject to exception and modification, according to the circumstances of the case.

**Same—Same—Same—Residuary Legatees.**—The common exception in favor of creditors and legatees, will not extend, unless under special circumstances, to residuary legatees or distributees, all of whom must be made parties.

**Same—Same—Discovery against One Executor.**—Where a bill seeks discovery and relief only against the acts of one of the executors of an estate, it is not necessary to make the other executor a party in the first instance.

**Same—Same—Same.**—But it seems, that the co-executor may be made a party, during the progress of the suit, if it shall prove to be expedient or necessary.

**Same—Same—Witness.**—A mere witness ought not to be made a party to a suit in chancery.

By LAW, Judge.

This is a bill filed by some of the devisees and legatees of James B. Maxwell, against the executors of Col. John Pray, who was one of the qualified executors of said J. B. Maxwell. It prays an account and settlement of the estate of Maxwell so far as the same came into the hands of defendant's testator, and was administered by him; for relief against certain sales and purchases of the property of said estate made under the administration of the said John Pray; that such of the effects of said estate in the hands of said John Pray at the time of his death undisposed of, or as have come into the hands or possession of defendants, since his death, may be delivered over to complainants and others, the legatees and devisees of the said Maxwell, and for general relief.

To this bill a plea and demurrer have been filed, for want of parties. The plea states that Genl. D. B. Mitchell was appointed an executor, and qualified upon the will of James B. Maxwell, together  
292 \*with John Pray, the immediate testator of these defendants; that it was by the advice, and with the consent of Genl. Mitchell that Pray acted in the management of the estate: that Mitchell had never been dismissed from said estate, but is still the executor, and submits the necessity of making him a party to this bill.

Who are necessary parties to a bill in equity, it has been remarked, is frequently a question of difficulty and embarrassment; and great care should be taken on this subject in framing a bill, or the plaintiff may be subjected to much inconvenience, expense and delay. The general rule is plain enough: it is that all persons, materially interested in the subject matter of the suit, ought to be made parties, plaintiffs or defendants. The reason of the rule is most satisfactory. It is, that the Court may be enabled to do complete justice by deciding upon, and settling the rights of all interested; that the order of the Court may be safely executed by those who are compelled

to obey it, and that future litigation may be prevented by rendering a multiplicity of suits unnecessary. But, as by the very reason assigned for the existence of the rule, it is apparent, that it is one adopted by the Courts for the convenient advancement of justice, it will not be permitted so rigidly to be urged as to impede the march of justice. Framed by the Court itself, it is subject to its discretion; introduced for the purpose of justice, it is susceptible of modification; for the promotion of justice, it becomes a question of policy.\*

Thus it is not an inflexible rule, but admits of many exceptions—as when a party is out of the jurisdiction of the Court, or they are very numerous and cannot conveniently be made. The case of a few creditors or legatees suing on behalf of themselves and others, and many other cases which form exceptions to the general rule, might be mentioned. In the case of *Cowslad v. Cely*, (Pr. in Ch. 293 \*83, 1698,) the plaintiff being a residuary legatee, brought his bill against the defendant, who was one of the executors (without his co-executor,) to have an account of his own receipts and payments. Defendant insisted at the hearing that his co-executor ought to be made a party. The Chancellor said, the cause shall go on, and if upon the account any thing shall appear difficult, the Court will take care of it. It does not appear in this case whether the co-executor was without the jurisdiction of the Court, but it may have been so, from the concluding remark of the Chancellor, in which he compares it to the case of joint factors, one of whom is abroad; but the decision as reported does not turn upon that. In the case of *Clifton* against the executors of *Haig*, (4 Dess. Eq. Rep. 343,) it was objected that Major Wise left other executors who should have been made defendants, as they may have possessed the estate in whole or in part, and may have made settlements and payments, all which ought to be disclosed, particularly *Gen. Harrington*, who certainly did qualify and act as executor. It appears by the facts in that case that *Gen. Harrington* had removed to North Carolina, and that the other executor was abroad, and the Court sustained the bill against the executors of *Haig*, the deceased executor of *Wiles*, who had principally acted on his estate. And whilst it is true that the other executors were without the jurisdiction of the Court, it seems to me that the reasoning was not confined to such a case. I may ask here, as the Court did then, *cui bono* is this objection? Why make *Gen. Mitchell* a party? who is to be benefited by it? It is expressly charged in the bill that the executor, *John Pray*, took upon himself the sole execution of the will of *Maxwell*—it charges nothing against *Mitchell*, and seeks no relief against him. It is not necessary that he should be made a party in order to the

defence of the other executor, *John Pray*, since each executor is responsible for his own acts, and no more. And the bill in this case seeks a discovery and account of the estate so far as they depend upon the transactions of *Pray*. But it is competent for the complainant to waive relief 294 against one even \*at the hearing, and thus obviate the necessity of making him a party. (2 Mad. Ch. 174.) The only benefit that could be obtained by making him a party, would be, that it would tend to throw light on the transaction; but under the circumstances, he could be made a witness—and it is a rule that a mere witness ought not to be a party. (Cooper's Eq. Pl. 41).†

From the great length of time since this estate has passed into the hands of the executors, and from the dispositions of the property charged in the bill, it is to be presumed that the debts are paid; but if the progress of the cause, when the accounts of the defendants shall be made, it shall appear that the interest of creditors requires this representative of the estate to be made a party, the Court would take care of it.

There is another difficulty in this case, presented by the demurrer which has been also filed, and which shews that the widow and the children of the testator, *Mr. Maxwell*, are equally entitled under his will, with the complainants, and submits the necessity of making them parties. The will, after giving various small legacies, in the 8th item says, "I give all the residue of my estate, both real and personal, share and share alike, unto my wife and all my children." He then directs his wife's part to be delivered to her after his debts are paid; that his sons shall draw off their proportion as they become of age, and his daughters at seventeen or day of marriage. I have already adverted to the exceptions to the general rule. When the parties are very numerous, as when the residue of an estate is left to the individual members of a large society, the abatement in the progress of the cause which frequently results from death and changes of situation, is so great, that the Court will dispense with the necessity of having all the parties before it. Justice would be delayed by it. But unless. 295 under \*some special circumstances like these, it is an established rule that residuary legatees must all be before the Court. All persons interested in the residuum must be parties to the suit. In *Parsons v. Neville*, (3 Bro. Ch. C. 365) bill by some of the residuary devisees on behalf of themselves and others, it was decided that all the devisees must be made parties. In *Sheritt v. Birch*, (3 Bro. C. C. 228,) bill as to moiety—one moiety limited to A. for life, and upon her decease to such persons as she should appoint, and in default of appointment, to other persons—all the persons interested under the limitations must be parties to a bill for the payment of the first

\**Mechanics' Bank of Alexandria v. Seton*, (1 Peter's S. C. Rep. 306.)—(Ed. of Original Edition.)

†*Whitworth v. Davis*, 1 Ves. & B. 550.—(Ed. of Original Edition.)



mentioned moiety. This rule is recognized by the master of the rolls, Sir Wm. Grant, (19 Ves. Jr. 399.) In *Cockburn v. Thompson*, (16 Ves. Ch. Rep. 325,) the Chancellor says, all persons interested in the residue must be before the Court, except when not necessary or inconvenient, which latter remark he illustrates by referring to the *Water Works Company*, (2 Vernon, 421,) where the residue was left equally among all the individual members of the company. The same doctrine is fully stated by Chan. Kent and by Judge Story.\* In which latter case, the whole learning upon the subject may be collected. In the case of creditors and legatees, other than residuary legatees, the Court will permit a few to sue on behalf of themselves and others, and the practice of the Court is framed with a view to the peculiar nature of the trust and duties of an executor, to prevent inconvenience in the administration of assets and burthening the fund to be administered, and will direct a general account of all the legacies of testator, and when it has pronounced a decree for an account and payment of debts or legacies, under which all creditors

296 or \*legatees may claim, it will restrain subsequent proceedings either at law or in equity by a separate creditor or legatee. (Mitford, 137.) But these are cases when the legacy is specific, or the suit for a sum certain on the face of the will, for there is nothing to controvert with the other cestuis que trust and they need not all be made parties. So it has been held that when a party is entitled to one aliquot proportion only of a certain sum in the hands of trustees, if the proportion and the sum be clearly ascertained, and fixed upon the face of the trust, he may file a bill to have it transferred to him, without making the persons entitled to the other aliquot shares of the fund parties. But when a distribution of the residue is prayed for; where the estate to be distributed is entirely uncertain and dependent upon an account of the estate, the rule in relation to residuary legatees must be applied, and all must be parties, for those not before the Court could not be bound by the account then taken, and could bring a bill after the decree, if they did not choose to come in; and it is the duty of the Court to protect the executors against further litigation. (1 Ves. Jr. 311, 2 Mason, 181; 3 Mad. Rep. 10.)

The case before me is strictly a case of residuary legatees. The plaintiff shews no cause or reason for not making them parties. He does not state that they refused to be made plaintiffs, or that they could not be made defendants. It is stated in a book of authority, (Cooper's Eq. Pl. 39-40,) that

\*Wendell v. Van Rensselaer, (1 John. Ch. Rep. 349;) Wiser v. Blachley, *ibid.* 437; Brown v. Ricketts, (3 John. Ch. Rep. 553;) Davone v. Fanning, (4 John. Ch. Rep. 199.) 2 Mason's Rep. 189; Coldwell v. Taggart, et al. (4 Pet. S. C. Rep. 202-3.) But see *Dandridge v. Washington's Ex'ors*, (2 Pet. S. C. Rep. 377.) See also, "Calvert on parties to suits in equity," *passim*. "Law Library"—for July and August, 1837.—(Ed. of Original Edition.)

one of the next of kin of an intestate, may sue for his distributive share, and the master will be directed to enquire and report all the next of kin who may come in under the decree. But if the plaintiff knows and states in his bill who are the other next of kin, it seems that he must make them parties to the suit. This has been questioned and doubted, but admitting it to be true, the present plaintiffs could not have the benefit of it, for they do know and have stated in the bill the next of kin.

297 \*The plea in this case is disallowed, but the demurrer is sustained. The plaintiff must amend his bill by making the other legatees and devisees parties.

By an Act of the General Assembly of Georgia, passed 29th Dec. 1836. (Prince's Dig. 2d ed. p. 475,) it is made lawful for any one distributee, or person interested in any estate, to institute his or her bill or other proceeding in equity, without joining as complainants, or making respondents, the other distributees, or persons having an interest in said estate, residing within the jurisdiction of the Court; but it is made the duty of the complainant to state the names of all persons interested in the estate, that the Court may be enabled to ascertain the amount of the distributive share, to which such complainant is entitled, as nearly as practicable.—(Ed. of Original Edition.)

## 298 \*Commissioners of Pilotage v. John Low and Others.\*

January Term, 1830.

**Jurisdiction Created by Statute—Review of Proceedings by Superior Court.**—Where a new jurisdiction is created by statute, proceeding according to the course of the common law, the Superior Court can cause its proceedings to be brought up, and correct its errors.

\*Pilots.—The principal case is cited in *Thompson v. Sprague*, 69 Ga. 419.

\*Courts—Jurisdiction.—Consent of parties cannot confer jurisdiction in a matter that is excluded by law. *Planters' and Mechanics' Bank v. Chipley*, Ga. Dec. pt. 1, p. 61.

In *Tyler Cotton Press Co. v. Chevelier*, 56 Ga. 495, it is said, that plaintiff cannot reduce his demand resting on contract so as to confer jurisdiction. See also, citing the principal case, *Stewart v. Thompson*, 85 Ga. 831, 11 S. E. Rep. 1030; *foot-note to Ex parte Gale*, R. M. Charl. 214.

In *Central Bank of Georgia v. Gibson*, 11 Ga. 458, it is said: "In the case of *The Georgia Railroad and Banking Co. v. Harris* we held, that a judgment obtained by consent in a county other than that of the defendant's residence, would be set aside in favor of a junior judgment creditor. We left the question open then, whether such a judgment would be valid as between the parties to it, when not in conflict with the rights of third persons. It will be seen by a perusal of that case, that the reasoning of this court goes very far to set aside such a judgment, as between the parties. (*Georgia R. & B. Co. v. Harris*.) 5 Ga. 527; (*Bostwick v. Perkins*.) 4 Ga. 50; (*Towns v. Springer*.) 9 Ga. 132; (*Commissioners of Pilotage v. Low*.) R. M. Charl. 300."

**Same—Summary—Certiorari.**—But where such newly created jurisdiction is summary, and does not proceed according to the common law, the Superior Court will, on certiorari, confirm or quash its proceedings.

**Pilots—Refusal to Board Vessel—Liability.**—The neglect or refusal of a Pilot to board a vessel, by which damage ensues to her, may be proceeded against under the 5th Sec. of the Act of 1799, if the claim for damage does not exceed \$100.

**Jurisdiction—Amount of Claim.**—And the claim, and not the measure of damages assessed by the Commissioners, is the test of the jurisdiction.

**Pilots—Refusal to Pay Fine Assessed—Right to Suspend.**—But the non-payment of the fine assessed under the 5th Sec. will not authorize the Commissioners to suspend the Pilot, from the exercise of his duties.

**Jurisdiction Created by Statute—Form of Proceeding.**—

Where a new jurisdiction is created by statute, without prescribing its form of proceeding, such jurisdiction may pursue its own forms and regulations, if not inconsistent with the laws of the land.

**Jurisdiction—Notice to Defendant.**—But notice to a defendant, is an implied and indispensable prerequisite to the exercise of jurisdiction.

**Same—Consent.**—Neither consent, nor the act of one party, can confer jurisdiction.

By LAW, Judge.

The return of the commissioners of the certiorari issued in this case, discloses the following facts:

That on the 7th of January, a fine of twenty dollars was severally imposed upon the said John Low and others, the petitioners for this writ; that this fine was so imposed for the purpose of discharging a claim which had been made by the master of the ship *Helen Mar*, for damages sustained by the ship, in coming over the bar and up the river, in consequence of the neglect of the pilots who were in sight of her, to come on board; that the said claim amounted to one hundred and sixty-nine dollars, eighty cents. It further appears, that on the twentieth January, the said pilots having been notified of the imposition of said fine, and required  
299 \*to pay the same, and having neglected so to do, the commissioners in consequence of such neglect, proceeded to pass a resolution declaring the said defendants suspended from the exercise of their said office, till the said fines were paid.

The question of jurisdiction has been raised, as to the power of this Court to bring up the proceedings of the commissioners by certiorari; and upon this, I remark, that when a new jurisdiction is created by statute, proceedings according to the course of the common law, this Court can bring up their proceedings and correct their errors. The jurisdiction becomes in fact transferred to this Court: but when such newly created jurisdiction is summary and does not proceed according to the course of the common law, this Court issues the writ of certiorari, and will confirm the proceedings if within their jurisdiction, or will quash them if they have not confined themselves strictly within the powers given them by statute.

After the most careful examination which I have been able to give to the 5th Sec. of the Act of 1799, (Prince's Dig. 438,) I have been led to the conclusion that the neglect or refusal of a Pilot to board a vessel, when he can, knowing her to be in want of a Pilot, from the exhibition of signals or otherwise, if damage ensue to her on that account, will subject such Pilot to be proceeded against, according to the provisions of the 5th section of said Act. So far then, as the order of the 7th January imposing the fine, is concerned, the only question is, have the Commissioners proceeded in obedience to the provisions of the 5th section? It is there declared in express terms, that they shall have jurisdiction only when the claim does not exceed \$100—but here the claim did exceed \$100, and it is most clear, therefore, that the Commissioners transgressed the limits prescribed to them by the statute, and acted without authority. The powers given to them are large, their proceedings summary, and the Legislature did not intend to subject the property of the citizen to such a jurisdiction where

300 the demand \*against it was large. In their discretion, they have fixed the limit, and it must be observed. It is true the award of the Commissioners does not exceed \$100, but the statute does not place it upon this, but upon the amount of the claim; the test of the jurisdiction is made to consist in the amount of the claim, and not the measure of damages assessed in the discretion of the Commissioners. It is well settled that consent cannot give jurisdiction, neither the act of one party; and that an item in an account cannot be stricken out after it has been presented to the Court, for the purpose of giving jurisdiction. On the 20th January, in consequence of the non-payment of the said fines by the said defendants, the Commissioners proceeded to pass the resolution of suspension. The 5th section points out the remedy for the non-payment of the fines so imposed. It gives in addition the penalty of not exceeding \$100, the whole to be levied by warrant of distress. This would seem to exclude the idea that the non-payment of the fine was also a ground of suspension and amotion from office. The Commissioners may have proceeded to suspend under the 7th section, for any of the reasons therein pointed out as grounds of suspension. This they have not done, but have used that Sect. to compass an object, the attainment of which is directed by other means in the Act. The two sections have in view totally different objects: the one is between Master and Pilot—the other vests a controlling power directly in the Commissioners, independently of any claim of damages. No notice whatever was given to the defendants of this proceeding; no opportunity afforded them of being heard in their defence. Where no form or mode of proceeding is pointed out by the Act creating a new jurisdiction, as in this case, the Commissioners indeed have the right to adopt their own form and mode, not contrary to, or violating the laws of



the land. Now the fundamental principle of justice, so essential to a free government, that every citizen shall be maintained in the enjoyment of his rights, is not to be understood, and more strictly acted upon in this country, than that other principle,

301 which affords him an opportunity \*to answer such charges, as would, according to the laws, justify a forfeiture or suspension of those rights. The statute in this case is silent, but the commissioners in obedience to this omnipotent principle of jurisprudence, ought to have notified the defendants, and it is to be understood as required, before they exercise the power of suspending, they shall give opportunity to the accused of being heard in support of his innocence. It becomes unnecessary that I should proceed to examine the many remaining points raised in this case, being of opinion that both in relation to the order of the 7th January and of the 20th January, the commissioners have not acted according to the provisions of the Act creating them, and that their proceedings, both in regard to the imposition of fines and the suspension, must be quashed—and it is accordingly so ordered.

M. H. McAllister, for plaintiff—Jno. C. Nicoll, for defendant.

302 \*John Low v. Commissioners of Pilotage.

January Term, 1830.

**Tribunals of Limited Jurisdiction—Proceedings.**—In tribunals of special and limited jurisdiction, every fact or thing essential to confer the jurisdiction, must in some manner appear in their proceedings.

**Tribunals of Summary Jurisdiction—Review of Proceedings.**—Tribunals of summary and extraordinary jurisdiction, are to be reviewed with the utmost liberality as regards regularity and form.

**Pilots—Revocation of License.**—The 7th Sec. of the Legislative Act of 1799, directs that the license of a Pilot shall be revoked by the Commissioners of Pilotage, "if he shall be found not sufficiently skilled, or shall become incapable of acting, or shall be negligent, or misbehave in his duty towards the Commissioners;" HELD that the neglect of a Pilot, in not boarding a vessel when he ought to have done so, would authorize his suspension under this section.

**Same—Same—Judgment—Necessity for.**—And it is not necessary to make the sentence of suspension legal, that a formal judgment should be entered up.

**Same—Office of.\***—The office of a Pilot is not a public one; it is a private profession, trade or calling.

**Evidence—Improper—Waiver of Objection.**—If a party

\***Pilots.**—A pilot is one who steers a ship or vessel, a guide, and in no sense exercises or discharges the functions of a public office. No portion of the sovereignty of the country attaches to his position or duty. It is neither legislative, executive nor judicial, and does not, therefore, fall within the scope of a *quo warranto* information as to public officers. *Dean v. Healy*, 66 Ga. 504, citing *Low v. Commissioners of Pilotage*, R. M. Charl. 302.

suffers improper evidence to be admitted without objecting at the time, it is a waiver of the objection.

**Irregular Adjournment—Waiver.**—So, if after an adjournment irregularly granted, he appears and goes to trial.

**Adjournment—Any Tribunal May Exercise Right.**—It seems, that the right of adjournment may be exercised by any tribunal, when essential to the ends of justice.

**Corporation of Savannah—Election of Commissioners of Pilotage—Regularity.**—The Legislative Act of Georgia, authorized the Corporation of Savannah to elect Commissioners of Pilotage: several of the Commissioners were afterwards appointed by the Corporation, by resolution: HELD, that as the statute prescribed no mode of election, this was a good exercise of the power conferred.

**Pilotage—Right of State to Regulate.**—The States retain the power to legislate upon the subject of Pilotage, within their own territories and over their own citizens, unless such legislation interfere with, or is contrary to an Act of Congress, passed in pursuance of the Constitution.

**Statutes—Constitutionality—Summary Proceeding.**—It seems, that the constitutionality of a legislative act cannot be decided on, on application for certiorari, or other summary way.

**Pilots—Negligence—Liability.**—The negligence of a Pilot, which authorizes his suspension, is not a "crime" or "criminal proceeding," within the meaning of the Constitution of the United States, or the amendments thereof.

**Same—Same—Same.**—Neither is the proceeding against him under the Legislative Acts of Georgia, a "suit at common law," within the meaning of the VII Art. of the amendments of the Constitution U. S.

**Constitution of Georgia—Trial by Jury+—Application—Commissioners of Pilotage.**—The provision of the Constitution of Georgia, which directs that "trial by Jury as heretofore used in this State, shall remain inviolate," does not apply to a summary jurisdiction, (such as \*the Commissioners of Pilotage) existing in Georgia,

303 before the adoption of the Constitution, and recognized by contemporaneous legislation, judicial exposition, and continual acquiescence.

**Constitutionality of Laws—Effect Where There Is a Doubt.**—If there be a doubt upon the constitutionality of a law, the law ought to be sustained.

By LAW, Judge.

This case comes before me upon the return of the Commissioners of Pilotage to a writ of certiorari, to bring up their pro-

+**Municipal Corporation—Violation of By-Law—Right of Trial by Jury.**—The term "criminal cases," as used in the 1st section, of the 3rd article of the Constitution, has reference to such acts or omissions as are in violation of the public laws of the state, and not to the violation of *local by-laws* or police regulations of a town or city corporations. "Trial by jury as heretofore used in this state" as mentioned in the 5th section of the 4th article of the Constitution does not apply to *pecuniary* penalties imposed by municipal corporations of towns and cities, for a breach of their *local by-laws* and police regulations, for the security, welfare and good government of such towns or cities. *Williams v. City of Augusta*, 4 Ga. 509, citing the principal case at page 515.

ceedings, suspending the petitioner, John Low, from acting as a pilot for the port of Savannah, and annulling the license heretofore granted to him for that purpose. A variety of exceptions have been taken and insisted on to these proceedings, as disclosed by the return, which it has become necessary for me to consider and to dispose of.

And first, it is said that the Board of Commissioners being a Court of special and limited jurisdiction, can take nothing by implication, but must show its authority upon the face of its proceedings in every instance. In the correctness of this proposition I entirely acquiesce, so far as the authority and jurisdiction of the Commissioners are involved. And that we may the better understand, and be enabled the more accurately to apply this principle to the present case, I remark, that these special and limited jurisdictions are circumscribed, either with reference to place or the local extent within which their jurisdiction is to be exercised: as a court leet in England, which is confined to some particular precinct, or a corporation whose jurisdiction is co-extensive with their corporate limits; or secondly, with reference to the person, or particular description of persons, who are subject to their jurisdiction, as in the case of the Marshalsea (10 Co.) where the authority of the Steward and Marshal, as Judges of the Marshalsea, is limited to those of the King's house; or the case of assignees under a commission of bankruptcy, proceeding against a victualler, or other person not liable to be a bankrupt, whilst their jurisdiction is limited to a trader. (2 304 Wils. 382.) Such jurisdictions \*are again circumscribed with reference to the subject matter of their jurisdiction. And here it is to be observed, that every fact or thing essential to make the case upon which the jurisdiction attaches, must in some manner appear in the proceedings. As in the case of a conviction by a justice of the peace for fishing in a fish pond, contrary to 5 Geo. 3, ch. 4, the Court all concurred in holding the conviction bad, because it was not shewn to have been upon complaint of the owner, (a fact required by the act,) and they held that it ought at least to appear that the fishing was without his consent. (Burr. 2281.) It is said by the Supreme Court of the United States, that where a Court exercises an extraordinary power, under a special statute, the facts which give jurisdiction, ought to appear, in order to shew that its proceedings are coram judice. It was consequently held, that (under a law of one of the States,) the return of the Sheriff, that there were no goods and chattels of the delinquent proprietor out of which the taxes could be made, was essential to the validity of the sale of lands for taxes, and that such return must appear on the record of the Court, by which the order of sale is made. Turning to the act from which the Commissioners of Pilotage derive at once their existence and authority, it will be found that their jurisdiction is limited to the Bar

of Tybee and river Savannah, and the Bars north of St. Catharine's Bar. Their authority embraces that description of persons who pursue the business or profession of a Pilot within these limits, and the right to suspend from the enjoyment and exercise of that profession, may perhaps be better understood by recurring to the 7th Sect. of the Act, 'If any of the Pilots for the ports aforesaid, for the time being, shall be found not sufficiently skilled, or shall become incapable of acting, or shall be negligent or misbehave in his duty to the Commissioners, or any one of them, then and in such case, the warrant or license may be annulled or revoked' &c. If therefore the Commissioners of the Pilotage give judgment or entertain jurisdiction of a cause arising, or an act occurring in another place, 305 and against \*persons, other than those specified in the Statute, or if they proceed to suspend for other matters or causes than those enumerated in the 7th Sect. their acts would be coram non judice, and void. But since they take nothing by implication, since nothing is presumed for the purpose of supporting their jurisdiction, all these facts must in some manner appear in their proceedings. It is however, to be observed, that as the Statute prescribed no form or mode of proceeding, the Commissioners, as I remarked upon a former occasion, must adopt their own mode of proceeding, having a due regard to the great principles of natural justice, which control the forms and proceedings of all Courts. Unversed in technical nicety and legal precision, the course pursued by them is of the simplest kind; no regular charge in writing seems to have been made out; and we are constrained to look to the summons served on the defendant, to the testimony taken in the case and reduced to writing, and which has been filed with the return, together with the sentence or order finally passed on the case. The case was entered upon the docket of the Commissioners (which was called by the chairman,) in the following manner: "Commissioners &c. v. John Low, (Pilot) for negligence and inattention to his duty as a Pilot, in not boarding the ship Helen Mar, on the 29th September 1829." The first summons served upon the defendant, required him to appear before the Commissioners of Pilotage for Bar of Tybee and river Savannah, at a particular time and place therein stated, to answer a charge of negligence and inattention to duty as a Pilot, in not boarding the ship Helen Mar, on &c. In obedience to the summons, Mr. Low appeared, was himself examined, and cross-examined the witnesses who appeared against him. By the written testimony it is shewn, that the ship Helen Mar was lying below, in the river Savannah, in want of a Pilot; that the defendant Low, passed her in the night, and neglected to go on board, although he had been informed that she wanted a Pilot.

Although evidence will not be received in this \*case for the purpose of investigating the merits of the case,



it may make a part of the transcript or return, for the purpose of shewing any fact necessary to sustain the jurisdiction. The character in which Low was proceeded against, abundantly appears from the whole of the return. It does appear to me, therefore, that every thing necessary to sustain the jurisdiction of the Commissioners, is apparent upon their proceedings. But whilst the charge of negligence sufficiently appears upon their proceedings, it remains to inquire, whether negligence is a cause of suspension under the 7th Sect. of the Act of 1799; and this is made a distinct ground of exception. "Not sufficiently skilled, or shall become incapable of acting, or shall be negligent or misbehave in his duty to the Commissioners." It has been supposed that the term "shall be negligent," is confined like the expression, "misbehave," to negligence in his duty to the Commissioners; and that this neglect or misbehavior or his duty to the Commissioners, is to be construed by reference to the definite ideas contained in the same section, viz: want of skill, and incapacity; from which it would result, that the Pilot could not be suspended for negligence merely, but for negligence in his duty to the Commissioners, arising from want of skill or incapacity, or to use the language of counsel, "an obstinate and sullen contumacy, amounting to a voluntary disqualification to act." After the most critical examination I have been able to make, I have taken a different view of this section. By referring to Mar. & Craw. Dig. the punctuation will be found different from that in Prince. The member of the sentence "shall be negligent," is separated by a comma from the other member, "misbehave in his duty to the Commissioners." By referring to the oath in the 4th Sect. of the same Act, the Pilot swears that he will, from time to time, truly observe, fulfil and follow, to the best of his skill, ability and knowledge, all such orders as he shall from time to time, receive from the Commissioners of Pilotage; in addition to this, he also swears that he will well and truly execute, and discharge the business and duty of a Pilot in the said port &c. according to the

307 \*best of his skill and knowledge; and that he will at all times (wind and weather permitting,) use his best endeavors to repair on board all ships and vessels, that he shall conceive to be bound for, coming into, or going out of, the said port or harbor, and that appear to want a Pilot. Now to construe the expression "shall be negligent," as restricted to his obedience of the orders of the Commissioners, when there are others equally important, and sworn duties, appears to me to be repugnant both to the spirit and letter of this Act. Why the summary remedy or punishment by suspension should be given in the case of negligence in obeying some special orders of the Commissioners, and should be denied for the non-performance of an equally important duty which he has sworn to perform, that of boarding a vessel in

want of a Pilot, seems to me unsupported by any good reason. From the relation which exists between the Commissioners and the Pilot, every acknowledged duty on the part of the Pilot in discharge of his business, as a Pilot, may be considered as a duty due to the Commissioners. The obligation to board a vessel in want of a Pilot, cannot be denied; it is specified among his sworn duties; the neglect to perform this duty is, in my view, a cause of suspension. It was suggested in the argument at the bar, that the Legislature had, to some extent, construed this 7th section, for as much as in the 10th section it is declared, that to encourage Pilots, as much as may be, to attend the bars, all and every licensed Pilot, bringing any vessel safe from sea, shall have the preference of bringing such ship or vessel up and down the river, and to sea again, &c. It does not strike me, that the encouragement, which is here offered to the vigilance of the Pilot, in attending the bar, can be considered as dispensing with punishment for the neglect of the duty. In other words, the offer of reward does not necessarily imply exemption from punishment. It was also insisted that the Commissioners themselves had so constructed the 7th section, because in the 6th of the old, and 12th of the new rules of the board, is to be found a similar provision with that already referred to in the 308 10th \*section of the act; and because in the 7th of the old, and 13th of the new rules, it is declared, that the neglect of the Pilot to go on board a vessel, when required, shall be punished by forfeiture of double the amount of the Pilotage of such vessel. The first is subject to the answer given to the argument based upon the 10th section of the act. And as to the second, however forcible the argument may be, if the legislature had annexed the punishment of forfeiture of a given sum to the neglect or refusal to go on board a vessel, the Commissioners cannot legislate away the act of Assembly, and it remains to enquire when the case shall arise, what effect can be given to this rule of the board. It was also contended that the negligence, charged in this instance, is punishable under the 5th section of the act, and reference is made in support of this argument, to that part of the decision of this Court, upon a former occasion,\* which declared "that the neglect or refusal of a Pilot to board a vessel, when he can, knowing her to be in want of a Pilot, from the exhibition of signals or otherwise, if damage ensue to her on that account, will subject such Pilot to be proceeded against, according to the provisions of the 5th section of the act." But as it was then said, these two sections have in view, totally different objects; the one is between Master and Pilot; it is a remedy given to the Master for the recovery of damages, which he may have sustained in consequence of the refusal of the Pilot to do his duty; the right under this section

\*Supra, page 299.

exists only where damages have been sustained. The 7th section vests a controlling power directly in the Commissioners, over the Pilot, a part from any question of damages. It is again argued that the proceeding under the 7th section, being a criminal nature, must be by indictment, information, or action on the statute. The tribunal by whom this sentence has been past, is one not proceeding according to the course of the common law. The act under which they proceed, prescribes no method by which the powers delegated to them are

to be carried into effect. There are  
309 certain principles, however, \*recognized by all judicial tribunals in our country, founded upon the obvious dictates of justice, which must be observed. Among them are these: that the party accused must know with what he is charged, that an opportunity be afforded him to attend his trial, and make his defence; that a reasonable time be allowed him to prepare for that defence, that the means be afforded him to compel the attendance of his witnesses, and of cross-examining the witnesses produced against him. Yielding obedience, (as it seems to me they have done in this case,) to the restrictions thus imposed by the principles of natural justice, the Commissioners must be left to adopt their own forms and mode of proceeding. An exception is taken to the form of judgment. It is contended that the resolution of suspension, though in the nature of a judgment, is not a judgment. Upon this subject, the return discloses, that the evidence being closed, the chairman referring to the charge upon the docket as is herein before stated, propounded the question, "Is John Low guilty of the charge above laid and declared against him?" when the board decided that he was guilty. It was then, upon motion, resolved that the warrant or license of John Low, a Pilot of this port, be annulled and revoked, and that he be henceforth totally suspended, and be deemed incapable to receive and take any fee, gratuity or reward, for the guiding or piloting any vessel or ship, inward to, or outward from, the port of Savannah. This, it is said, is nothing more than the opinion of the Court; it is their determination and sentence, and not the sentence of the law; that they should have proceeded, "therefore, it is considered by the Court," *ideo consideratum est per curiam*, which implies that the judgment is the act of law, pronounced by the Court after due deliberation. 3 Bl. Com. 396. Whatever strictness and technical precision may have existed at one time, as to the forums of pleading and entering verdicts and judgments, the practice and tendency of the Courts have been, to relax that strictness, and to disentangle justice of those more formal fetters which impeded her march, without rendering her progress more certain. In our own  
310 \*state, this has been carried very far by the legislative enactment of 1818, (Prince, 228)—which declares, that when there is a good and legal cause of action,

plainly and distinctly set forth, and a copy in substance is served, that every other objection shall be, on motion, amended without delay or additional costs, and that no special pleading shall be introduced or admitted. It is true, the discretion of the Courts, on the subject of amendment is limited whilst the proceeding is yet in paper, and that after it becomes a record, it can only be amended by some of the statutes of jeofails. But it was admitted that the 16 and 17 Car. 2, ch. 8, had brought the cases upon verdicts, within the statutes of jeofails. A judgment, therefore, of defective form, entered in a civil case upon a verdict, would be clearly amendable, or in other words, the effect of the statute is to dispense with this nicety of form in relation to the judgment. It is difficult in my view, to find a reason why this strictness should be departed from, in regularly established tribunals proceeding according to the course of the common law, and should be dispensed with rigor and exactness to summary and extraordinary jurisdictions. And the rule, as I understand it, is precisely the reverse. These tribunals are held with the utmost strictness, within the exact limits of the jurisdiction prescribed to them by Statute, but they are reviewed with the utmost liberality as respects regularity and form. Cowp. 19, Ld. Raymond, 80, and numerous cases in the different States. I have been considering this point, assuming as true, the other exception made in connexion with it, that the office of a Pilot is a freehold; that it vests such an interest in him, as cannot be taken away, but by regular judicial process. It does not appear to me, however, that the office of a Pilot is a public office: it is a private profession, trade, or calling, which the legislature has subjected to certain regulations and restraints; previously to which, any person who chose, might exercise the employment of a Pilot. The legislature by the act of 1799, have declared that such persons shall hereafter be  
chosen and licensed by the Commis-  
311 sioners, from their fitness and \*competency to act as Pilots. When so licensed, they acquire a right in this pursuit, which doubtless is a species of property, because a man's trade or calling is his property. But the right which is here acquired, is subject to all the restrictions imposed by the act, and liable to be forfeited for any of the reasons specified in it. It is taken, subject to all controlling powers vested in the Commissioners by the act. In 2 Burr. 740, the judgment was, "having taken the case into consideration, and fully weighed the same, said assembly did then and there order that the said T. I. B. W. should be removed and discharged from his said place and office of one of the capital Burgesses &c. and the said T. I. B. W. was then and there accordingly removed and discharged." In 2 Burr. 727, it was then and there moved that the said &c., should be removed &c. therefore having weighed and considered the charge, they did then and there, discharge and remove.



Numerous cases of this kind may be cited, where the judgment is only the resolution, order or sentence of the body acting. It has been adjudged in Connecticut, that a judgment by a justice of the peace, which answers the issue, and on which execution was granted, will not be reversed, because it did not say that the party should recover, and that execution should issue. 3 Day's Cases, 502. So also a judgment of the County Court, declaring all the estate of defendant forfeited to the State of Connecticut, rendered on legal and regular process, and on due enquiry into the facts, cannot be considered as void, but is valid in law, till reversed, although the entry of the finding of the facts should merely state, "that the Court having heard evidence relative to the defendant's going with the enemies of the United States, and considered thereof, are of opinion that the real and personal estate of the said defendant be, and the same is forfeit." *Allen v. Hoyt, Kirby*, 221. In the case in 6 Wheaton, 127, which was cited at the bar for another purpose, the order of the County Court, as disclosed by the transcript, was "on motion it is ordered, adjudged, and decreed." This is only equivalent with, "It is resolved."

312 \*Several of the exceptions go to the testimony. In consequence of the absence of some of the witnesses, as disclosed by the return, the meeting was adjourned to a further day, and for some reason not disclosed, the final decision, after taking testimony, was adjourned to the then next regular meeting. The defendant was summoned each time; the first and third summonses stated the charge in the same manner; the second was for negligence of duty, in not boarding ship *Helen Mar*, in want of a Pilot, on the 29th and 30th September last. It is objected, that these charges, being different, the evidence taken at one meeting, could not be read at another. There is some slight difference in framing the summonses, but the charge is substantially the same. It was one offence which was investigated throughout. Mr. Low attended the first and second meetings, and made no objection to the testimony; and if improper evidence be admitted and not objected to at the time, the party is concluded; he is taken to have consented, *qui tacet consentire videtur*. But at the third meeting, which the defendant did not attend, the evidence of Fortescue, which had been taken at the second, was read over to a witness who was under examination, and who confirmed it. This was certainly an irregular mode of proceeding. But the liberality extended to such tribunals as this, reaches as well the regularity, as the form of their proceedings. The defendant had been regularly summoned; he might have been present if he would, and might have objected to the course pursued. Defect and informality in the evidence, is not always a good ground for a motion for a new trial, in Courts whose duty it is to proceed regularly. It is further objected that the Commissioners were bound to dispose of the

case at the first meeting, and the power to adjourn is denied to them. The powers essential to the fair impartial administration of justice, are incidents of every Court. The right to adjourn, under peculiar circumstances, is sometimes essential to the attainment of justice. That a party is to be hurried to trial, unprepared, and without

even an opportunity of procuring the 313 attendance of his witnesses is so \*pregnant with injustice, that I have considered the principle, which requires this opportunity to be afforded, as pervading and controlling the jurisprudence of our country; and yet it is to this extent that the position contended for, would lead us. It requires that the cause should have been decided at the first regular meeting, at which the defendant below was summoned to appear. Now, however important it may have been to the defendant himself to obtain time, it could not have been granted him. If the right to adjourn exists for the convenience or even necessity of the defendant below, it must exist for any good and sufficient cause. At the adjourned meeting the defendant attended, and was asked if he took any exceptions to the examination of testimony, on the ground of its being an adjournment of a regular meeting, to which he replied that he did not. I take it to be pretty well settled, that if a party appear and go to trial, it is a waiver of any objection to an adjournment irregularly granted. There can, therefore, be no objection to the adjourned meeting, and the cause was finally disposed of at the second regular meeting after the defendant had received his first summons. The argument deduced from the delay of justice, in these summary jurisdictions, cannot be carried so far as to subvert justice.

The Act of the Legislature of 1825, authorises the Mayor and Aldermen of the City of Savannah, to elect Commissioners of Pilotage. Certain of the Commissioners who sat upon the trial, were appointed by the Mayor and Aldermen by resolution. It is objected that the election should have been by ballot; but I am inclined to believe, that in the absence of any prescribed mode of election pointed out in the statute, this was a good exercise of the power conferred on the Mayor and Aldermen by the Legislature. Various exceptions go to the constitutionality of the Acts of the Legislature regulating pilotage, and assert their violation of the Constitution of this State, and of the United States. It is said that the

Constitution of the United States vests 314 in Congress the exclusive \*right to regulate commerce, from which it is contended, flows the regulation of Pilots in sea-ports. But Congress has, expressly, by the Act of 1789, adopted the legislation of the different States upon this subject; still it is contended that whilst an existing law may thus be adopted, it is not competent to the Congress of the Union, prospectively to authorize the states to legislate upon a subject thus exclusively confided to Congress. But is it true that Congress has this

exclusive power? The States do not legislate upon this subject, by virtue of authority derived from Congress; they are found in the possession and exercise of the power, and they retain the right to legislate upon this subject within their own territories and over their own citizens. If I am to consider myself as bound by the decisions of the Supreme Court of the U. States, upon questions in which the Constitution of the United States is involved, the only limit which would be put to the right of the States thus to legislate, within their territories and over their own citizens, would be, when such legislation interfered with, and was contrary to an Act of Congress passed in pursuance of the Constitution. (*Gibbons v. Ogden*, 9 Wheaton 211.) In this instance there is no Act of Congress which can come into collision with the State legislation—the only Act which Congress has passed on the subject, being to adopt the Acts of the different States.

The next and last exception which I shall consider, suggests the violation of the Constitution of the United States, and of that of this State, relative to trial by Jury. I might, perhaps, with great propriety, content myself by putting the further consideration of these exceptions upon the ground taken at the bar, that the Constitutional validity of a Legislative Act, by which a special authority is delegated to Commissioners for special purposes, cannot be decided on, upon application for certiorari, or in any other summary way. The case of *Bullard v. Bennett*, (2 Bur. 775,) decides that the validity of a by-law cannot be questioned upon the return of a process, or in any summary way. This authority

315 was \*cited in a case brought up from the Mayor and Aldermen of the city of Savannah, some years ago, by a late learned member of our bar, distinguished for his soundness as a lawyer, who contended that if the validity of a by-law could not thus be questioned, a fortiori, the Constitutional validity of a Legislative Act, could not. I confess myself strongly impressed by the force of the reasoning, then urged in support of the proposition. [*State v. Noel*, 1 Charlton's Rep. 59.]

I proceed, however, to remark upon this exception, that I do not consider the act, for which the defendant below was proceeded against, as a crime within the meaning and sense of the 2d section of the 3d article of the Constitution of the United States, or the 6th article of the amendment thereto; nor as a criminal proceeding or prosecution embraced within any provision of the Constitution of the United States; neither do I consider it violative of the 7th article of the amendments of said Constitution.

The Constitution of this State of 1798, declares, "that trial by Jury, as heretofore used in this State, shall remain inviolate." In the Constitution adopted in 1777, and that in 1789, the expression "heretofore used" is omitted. As early as 1662, an Act was passed in this, then province of Georgia, for the regulation of Pilots,

(*Watk. Dig.* 75,) from which the Act of 1799 seems to have been copied, with those alterations which the wisdom of the Legislature at that time dictated. In the 2d section of the Act of '62, it was directed that the Pilot should be licensed by the Governor; and in the 6th section, that the Commissioners should apply to the Governor, to revoke, or annul the warrant or license, for the same causes which are pointed out in 7th section, Act of '99, as grounds of suspension. This Act continued in force, regularly revived, till 1783, when it was made perpetual. It is obvious, therefore, that the suspension of a Pilot for the very causes enumerated in the 7th section, without trial by Jury, was known, used and practised in

Georgia, anterior to the Revolution, 316 that it \*was the law of the land at the adoption of the Constitution, and that in the very succeeding year after its adoption, the Legislature, with this provision of the Constitution staring them in the face, passed the Act of 1799, which did no more in this regard than transfer the power of suspending from the Governor to the Commissioners. I am aware of the argument which has been sometimes used, that the trial by Jury being a common law right, all summary jurisdictions, newly created and unknown to the common law, which go to take away or abridge the trial by Jury, are infringements of the rights of the people. In England where this common law right exists, and from whence it was originally derived to us, various jurisdictions of this kind exist, not sanctioned by the common law, but resting upon statute; and apart from the Act in question, very many such jurisdictions, existed, and were in use in this State, anterior to the Revolution and at the time of the adoption of the Constitution. The argument would lead us to the abolition of all these, since the only summary jurisdiction which may be considered as fairly sanctioned and recognized by the common law, is that of Justices of the Peace. The proceedings of these inferior judicatories, have at different times, and under various circumstances, passed in review before the Superior Courts of the State. A contemporary exposition of the Constitution, practised and acquiesced under for a period of years, fixes the construction, and the Court will not shake or control it. So also, it is a sound principle, that where there is doubt upon the Constitutionality of a law, the law ought to be sustained: it should be a clear case in which a law is declared unconstitutional. When I reflect, that jurisdictions of this sort have been found necessary in all countries; were established and used in Georgia previously to, and at the time of adopting the Constitution; that the Act in question was passed the following year, and probably by many of those who framed the Constitution, and are to be presumed best acquainted with its meaning; that those jurisdictions have ever since been acquiesced in by the people, and acted upon; that by de-  
317 claring \*this Act unconstitutional,



the whole of these summary jurisdictions, (except so far as they exercise the powers of Justices of the Peace,) must at once be swept away, however useful and important they may have been found, I confess myself unprepared so to pronounce it.

Having given to this case the patient investigation which the proper construction of this statute seemed to require, and which was demanded by the learning and research displayed in the argument, I feel myself constrained, as the result of my best reflections, to pronounce upon these proceedings a judgment of affirmance, and it is accordingly so ordered.

Judgment affirmed.

Jno. C. Nicoll, for plaintiff—M. H. McAllister, for defendant.

318 \*Elias B. Crane v. James S. Bulloch.

January Term, 1830.

**Verdicts—Based upon Charge of Judge upon Point Not in Issue—Effect.**—Where the Jury, acting under the charge of the Judge, base their verdict upon a point not in issue, a new trial will be granted. **Same—Same—Substantial Justice Done—Effect.**—Secus, if substantial justice has been done by the verdict.

**Statute of Frauds—Subsequent Agreement to Answer for Debt of Author—Consideration.**—To support a collateral undertaking to answer for the debt, &c. of another, made subsequently to the original agreement, there must be some new consideration shewn, growing out of, or having reference to such original agreement.

**Same—Same—Same—Case at Bar.**—R. a feme covert, drew her draft in favor of C. on B. who accepted the same, payable when in funds. After this acceptance, J. S. B. the trustee of the drawer's separate property under a deed of marriage settlement, wrote upon the draft, "I will have this paid out of the next crop," and signed his name as Trustee. On action of assumpsit brought by C. against J. S. B. upon this promise, HELD, that there was no consideration for the promise, that the case was within the provisions of the statute of Frauds and Perjuries, and that the action was not maintainable.

By LAW, Judge.

The facts of this case are briefly these: Mrs. Rutherford, a feme covert, drew her draft on T. Butler & Co. in favor of the plaintiff, which was accepted by Butler & Co. payable when in funds. Subsequently to this acceptance, Bulloch, who was the trustee of the drawer's separate property under a deed of marriage settlement, wrote upon the draft, "I will have this paid out of the next crop," and signed his name as trustee. The Jury upon the trial of the appeal, returned a verdict for the defendant; and now a motion for a new trial is made, founded principally upon the following grounds.—That the presiding Judge misdirected the Jury in relation to the right of the defendant to resort to the trust prop-

erty, in the event of a recovery against him in this action.

That the Jury under the influence of that instruction, grounded their verdict upon a point not in issue.

And because the signature of the defendant, as trustee, showed the consideration of his promise.

319 \*I remark, that the Jury had been generally charged in the case by the Court; that they had retired, and after having been in their room some time, returned into Court, and requested the instruction which is now made a ground for this motion. The right of the defendant to resort to the trust property for indemnity against any loss he might sustain, in consequence of the foregoing undertaking, it seems to me, could only have relation to this case, so far as it might serve in aiding to make out a consideration to support the promise of the defendant, as by shewing some special contract to indemnify, a bond of indemnity taken, or the possession of the property, or funds passed at the time to the defendant, or permitted to be retained by him. Resting as the right must do in this case, from the testimony upon general principles, I acquiesce in the suggestion that it was a point not in issue. And therefore, without enquiring into the correctness of the instruction given, I would at once grant a new trial, were it not that I believe substantial justice has been done, and that, according to law, the same verdict ought to be rendered again if a new trial were granted. I proceed to state the reasons for this opinion.

Whatever diversity of sentiment may have existed as to the necessity of shewing a consideration where the collateral undertaking of a third party is simultaneous with, and forming a part of the original transaction; the weight of authority in England and in this country affirms the doctrine, that some further consideration growing out of, or having respect to such original liability, must be shewn, where the collateral undertaking is not connected in point of time with the original agreement, but made subsequently thereto. This doctrine is in fact acquiesced in by the counsel for the plaintiff, who based himself at the trial upon that count in the declaration which averred a consideration growing out of the character and relation of the defendant, as trustee, and who now contends for a new trial, because he says, the signature of the defendant, as trustee, shewed the consideration of his promise.

320 The only enquiry \*then, is whether such consideration has been shewn as will support this promise. The whole case comes to this: Whether the fact that Bulloch was trustee of the drawer and signed as such, is or is not a sufficient consideration for his promise. What is a consideration that will support an assumpsit? It is said to be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. A benefit to the defendant, or a prejudice to the

plaintiff. Ch. J. Marshall says, "it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction. (*Violett v. Patton*, 5 Cranch 150.)

It is, I think, extremely difficult to lay down any concise definition, or general rule, sufficiently comprehensive to embrace the variety of obligations, from which a sufficient consideration may spring for a promise. Lord Mansfield, (in *Hawkes v. Saunders*, Cowp. 290,) said of the definition I have first given here, that it was quite too narrow, and that the existence of a legal or equitable duty is sufficient for a promise. Mr. J. Buller says, "the true rule is, that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration." Taking this case upon the most enlarged view, it does not appear to me that there was any moral obligation on the part of Bulloch to pay this draft. There was no equitable liability. He was not a trustee for the plaintiff, and if this draft be considered in the nature of an appointment by the feme, it was not directed to him, and gave him no authority to dispose of her funds under his control. If Bulloch could have been considered as trustee for the plaintiff, then he would be under an obligation to pay, from which a new consideration personal to himself would arise, and the case would have nothing to do with the statute. Such was the case of *Williams v. Leper*, (3 Burr. 1886,) a broker to sell for the benefit of the creditors, and *Williams*, the plaintiff, 321 whose tenant \*Taylor had been distrained for rent. Lord Mansfield said, "the plaintiff enters to distrain, he has a legal pledge in his custody. The defendant agrees 'that the goods shall be sold, and the plaintiff paid in the first place.' The goods are the fund. The question is not between Taylor and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, and was obliged to pay the landlord who had the prior lien." Mr. J. Wilmot in this case remarks, "Williams, the plaintiff, is in possession of the goods, having entered with intent to distrain them. Leper was the agent for the creditors. He makes this promise, in order to discharge the goods of this distress. I consider this distress as being actually made. If you will quit the goods and disincumber the fund, I will pay you." Mr. J. Yates says, "he undertakes to pay this, in all events, peremptorily and absolutely." So too, in the case of an executor who having received assets, in consideration of such assets, promises to pay the legatee. Lord Mansfield, in *Hawkes v. Saunders*, (Cowp. 290,) says, he receives the money as a trust or deposit to the use of the legatee. He ought to assent if he has assets. He has no discretion or election. He returns what belongs to the lega-

tee, and therefore owes him the amount. The defendant having a full fund to pay the demand which the plaintiff had a right to recover, if he pleased, he in consideration of that fund promises to pay. I cannot think that this is not a sufficient consideration. And he distinguished this case from *Rann v. Hughes*, (7 Term Rep. 350,) in which there were no assets, and where *Ld. Ch. Bar. Skinner* who delivered the opinion of the Judges, says, the declaration states that the defendant being indebted as administratrix promised to pay when requested, and the judgment is against her generally. The being indebted is a sufficient consideration to ground a promise, but the promise must be co-extensive with the consideration, unless some particular consideration of fact can be found here, to warrant the extension of it against the defendant in 322 \*her own capacity. No sufficient consideration occurs to support this demand against the defendant in her personal capacity; for she desires no advantage or convenience from the promise here made. In the case before me, as I have already said, Mr. Bulloch was not the trustee of the plaintiff. He held no funds which it was his duty to pay to the plaintiff. He derived no advantage or convenience from his undertaking; there was no forbearance; the plaintiff had no lien upon the property, and had it even been in possession of the trustee, he could not have divested him of that possession. In *Keech v. Kennegal*, (1 Ves. 125,) Lord Hardwicke says, at law, if an executor promises to pay a debt of his testator, a consideration must be alleged, as of assets come to his hands; or of forbearance; or if admission of assets is implied by the promise; otherwise it will be but nudum pactum. If Bulloch had been in possession of the crop at the time of the promise, and if that possession be implied from the terms of the promise, still there was no moral duty or obligation resting upon him to discharge this debt to the plaintiff, for whom he did not receive the property in trust—the only principle upon which the decisions go in the case of executors. But Bulloch does not promise to pay peremptorily and absolutely in all events, as in the case referred to; it is a promise to pay out of the next crop, and in his character as trustee, making as it seems to me, in the absence of all personal consideration, the receipt and control of the crop a condition upon which his liability was to depend. Lord Hardwicke, in the case just referred to, says, even with regard to executors, "promises by executors to pay the debt of their testator must be understood with reference to assets, otherwise men might be drawn in." I have already remarked, that there was no benefit to Bulloch which appeared in this case—that there was no moral obligation, or equitable liability upon him to pay this debt, and it remains to observe that it does not appear that any prejudice accrued to the plaintiff, or that any thing valuable flowed from him,



which was induced by the promise. It is obvious, therefore, that there is no 323 \*new distinct independent personal consideration for this promise which could take it out of the statute of frauds. The case falls within that class of cases to which I have referred, of a promise made subsequently to the original transaction, and therefore requiring under the operation of the statute of frauds, some further consideration to be shewn, having an immediate respect to the original subsisting liability. The only consideration shewn here, is the fact, that Bulloch acknowledges himself to be the trustee of the drawer's separate property. This as has already been shewn, imposed no obligation upon Bulloch to pay this draft, and is consequently no consideration at all.

I believe that upon the trial of this case too much was left to the Jury, that the case is plainly with the defendant upon the law, and the motion for a new trial is therefore refused.

Motion denied.

### 324 \*Robert Forsyth v. Horatio Marbury.

October Term, 1831.

**Judgments—Lien of—Notice.\***—A judgment in Georgia constitutes a lien from its date on all the property of the debtor, and is constructive notice to all the world.

**Same—Same—Effect.**—And this lien is effectual against all subsequent claims to the property derived from and thro' the debtor.

**Same—Same—Property Sold under Junior Judgment—On What a Lien.**—Quære, if such lien is retained on property of debtor sold under a junior judgment, or attaches itself solely on the proceeds of the sale

**Ex Post Facto Laws—Application.†**—The words "ex post facto laws" are to be applied exclusively to criminal law.

**\*Executions—Levy—Sale—Effect.**—By this lien the plaintiff in execution does not acquire the legal title to the property of the defendant in execution. It gives him a special interest in it, which he has a right to assert, by levy and sale, and when the property is brought regularly to sale, the legal title passes to the purchaser, through the sheriff's deed. The lien gives a right to levy to the exclusion of all subsequent incumbrances. And by a levy and sale, the title of the purchaser relates back to the date of the judgment. The defendant may alien the property, but the title of the alienee, is subject to the incumbrance of the judgment lien. *Brace v. Duchess of Malborough*, 2 P. Will. 491; *Conard v. Atlantic Ins. Co.*, 1 Peter's R. 443; *R. M. Charl.* 324. *Bailey and others v. Mizell*, 4 Kelly, 123; *Kollock and others v. Jackson*, 5 Ga. 157.

**†Ex Post Facto Laws—Application.**—A clause of the constitution of the United States and of the state of Georgia which prohibits *ex post facto* laws, applies to criminal cases alone. *Wilder v. Lumpkin*, 4 Ga. 215, 218, citing *Forsyth v. Marbury*, *R. M. Charl.* 327.

**Contracts—Law Impairing Obligation of—Effect.‡**—A State law which impairs the obligation of a contract, made prior to its passage, is unconstitutional and inoperative.

**Same—Same—Judgment.**—And it is equally so, whether the contract exists in its original shape, or has been merged in a judgment.

**Statute of Limitations—When Constitutional.**—A statute of limitations to be constitutional and operative, must give an allowance of time in futuro, to commence the action.

**Law Prohibiting Levy on Property Previously Subject to Judgment—Validity.**—A law which prohibits a levy on a portion of the debtor's property, previously subject to an existing judgment, is unconstitutional, as it impairs the obligation of a contract.

**Statutes—Retrospective Effect—Validity.**—Quære, if a statute which acts retrospectively and divests a vested right, but does not impair the obligation of a contract, be absolutely void.

**Same—Construction. §**—A statute should be construed, (if consistent with its general scope,) so as to give it a prospective operation, where a contrary construction would divest a vested right.

**Same—Same.**—The act of 19th December, 1822, which protects the property of the debtor from levy under a judgment, where such property for a definite period, had been in possession of a purchaser for reasonable compensation, and without actual notice of such judgment, may properly be construed so as to refer only to levies founded on judgments obtained since its passage.

**Same—Same.**—Such statute introduces a new rule of law, and is not declaratory of the old.

**Levy of Execution—Right of Claimant to Set Up Outstanding Title. §**—A claimant in a claim case is con-

**‡Contracts—Law Impairing Obligation of.**—In the dissenting opinion of WALKER, J., in *Aycock v. Martin*, 37 Ga. 177, it is said the right to regulate the remedy in its own courts must be incident to each state but which may modify and change it as the welfare of society may require; and as a consequence of this the law changing or affecting the remedy only is not considered as impairing the obligation of the contract. *Forsyth v. Marbury*, *R. M. Charl.* 331. Every change or modification of remedy does not impair the obligation of a contract. The legislature may vary the nature and extent of the remedy, so always so some subsequent remedy be in fact levied. *Wilder v. Lumpkin*, 4 Ga. 220.

See also, citing the principal case, *McAfee v. Covington*, 71 Ga. 275.

**§Statutes—Construction.**—In *Harrison v. McHenry*, 9 Ga. 171, it is said, when a statute has, by a long series of decisions, received a construction which the people have acted upon and in which the legislature has acquiesced, we do not feel at liberty, in feeling it to be an imperious obligation, to disturb that construction—more especially in cases where, as in this, serious injury would result to citizens who have rights originating under that construction. We leave the error for the construction of the legislature. We recollect no instance, in this state, in which the rule has been settled different from the decision in this case. In the eastern circuit, which is the oldest in this state, upon the authority of JUDGE LAW, the decisions have been to this effect. *Forsyth v. Marbury*, *R. M. Charl.* 327.

**§Levy of Execution—Right of Claimant to Set Up Outstanding Title.**—In a claim case where the defendant

fined to his own right, and cannot set up an outstanding title in a third person, to defeat the levy of plaintiff.

**New Trials—Effect When Substantial Justice Has Been Done.**—Where substantial justice has been done by the verdict, a new trial will not be granted, although there may have been error.

By LAW, Judge.

The question which I am called upon to adjudicate in this case, as made upon the motion of the plaintiff in execution for a new trial, are two fold, viz: 1st, the validity and construction of the Act of the Legislature of Georgia, passed in 1822, 325 (Foster's \*Dig. 162,) entitled an Act to amend the 26th section of the judiciary act of 16th December, 1799, (Prince's Dig. 211,) and also to prevent a fraudulent enforcement of dormant judgments; 2dly, whether a claimant, in a claim case, under the statutes of Georgia, 1799, (Prince 213,) and 1821, (Foster 155,) can protect himself, or defeat the plaintiff's right to levy and sell, by resorting to an outstanding title in a third person, not a party to the issue, and with whom he claims no privity.

1. Then, the validity and construction of the Act of 1822.

It is a principle of the English law that lands are bound from the time of the judgment, so that execution may be of these, though the party alienes bona fide before execution sued out. The remedy afforded the judgment creditor however by the common law, merely enabled him to hold the land in trust until the debt was discharged by the receipt of the rents and profits. In 1732, was passed the statute 5 George II., c. 7, which made lands &c. within the English colonies, chargeable with debts and subject to be dealt with on execution, precisely as personal estate. The various statutory provisions in England, in favor of purchasers, are superceded by our own legislation. By the Act of 1789, (Watk. Dig. 391,) all the property of the defendant in execution, was bound from the signing judgment. By the Act of 1792, (Watk. Dig. 481,) all the property of the defendant was bound from the day of signing judgment. Then came the Act of 1797, (Watk. 630, Mar. & Craw. 280,) all the property bound from the day of obtaining the first verdict. And lastly, the Act of 1799, which bound all the property from the signing the first judgment. It is not apprehended, that the statute of 5 George II., c. 7, just referred to, touches the question of lien; it only enabled the land to be sold absolutely as personal property, but the execution had relation back, so as to bind from the judgment. The execution under which the levy is made, was issued upon a judgment recovered in 1791. Whether we look to the

English law, or to the various statutes of Georgia \*upon this subject, it is manifest that the judgment creditor in Georgia, acquired a lien upon all the property of his debtor in lands, as well as personal property. The nature and character of the interest thus gained by the creditor in the debtor's property, the duration and continuance of the lien, and its effect upon the subsequently acquired interest of third persons, as alienees, mortgagees, and junior judgment creditors deserve our consideration. It is not an absolute right in the property itself which the creditor obtains by his judgment. The legal title is not transferred from the debtor to the creditor. He has, however, a special interest, which although indefinite in extent, may be rendered definite by a levy; an equitable interest which is perfected by the sale, the Sheriff's deed completing the transfer of the property itself, and conveying the legal title. The master of the Rolls in *Brace v. Duchess of Marlborough*, (2 Pee: Williams, 491,) says, a judgment creditor has no right to the land, he has neither a jus in re nor ad rem. All that he has, is a lien upon the land. The Supreme Court of the United States, (in *Conard v. Atlantic Insurance Company*, 1 Pet. S. C. Rep. 443,) say, it is not understood that a general lien by judgment on land constitutes per se a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. He has no jus in re, but a power to make his general lien effectual, by following up the steps of the law and consummating his judgment by an execution and levy on the land. Thus, whilst the creditor acquires no absolute property in the estate of his debtor, he has an interest which is capable of being defined, and which cannot be defeated, save by some act of the party himself, by which it shall be lost or displaced. By pursuing the means pointed out to him by law, he is capable of converting his general lien into a specific title, which relating back to the date of his judgment,

327 must prevail over all subsequently \*acquired adverse interests and rights; and thus, this lien affords complete security against subsequent purchasers and incumbrances. Before this is done, the debtor having the legal title, it is true, may sell or incumber the property, but whoever takes it, must hold it subject to the lien, which lien growing out of matter of record is constructive notice to all the world. A purchaser can acquire no other rights than those which were vested in the seller, in whose shoes he stands. So if the property be levied on by a junior judgment; it is still subject to the lien of the elder judgment. In the language of Ch. J. Marshall, "the circumstance of not proceeding upon an elder judgment, until a subsequent

in *A. fa.* is in possession at the date of the levy, the claimant cannot defeat the plaintiff in *A. fa.*, by showing title in a third person not a party to the record. *Pierce v. DeGraffenried*, 43 Ga. 394, citing *Forsyth v. Marbury*, R. M. Charl. 334; *Robinson v. Schly*, 6 Ga. 615; *Beers v. Dawson*, 8 Ga. 556.



lien has been obtained and carried into execution, will not displace the prior lien." (Rankin, et al. v. Scott, 12 Wheat. 179.) Both these cases in the U. S. Supreme Court establish the position, that a purchaser under a junior judgment, at public sheriff's sales, would hold the property subject to the lien of the elder judgment. I forbear the expression of an opinion on this point, the practice with us, (at least in the Eastern Circuit,) having been to allow the senior creditor to claim the proceeds of sales.\* But in either event, the rights of the elder judgment creditor would be protected. It remains to observe that there being no limited period for the termination of this lien, it is indefinite in its duration and continuance—and being thus perpetual, can only be discharged by payment and satisfaction of the debt, or as before remarked lost or displaced by some act of the party himself.

It results from this view of the subject, that at the passage of the Act of 1822, the plaintiff in execution had a lien upon the property of the defendant, which followed it into the hands of purchasers, which was not barred by any statute of limitations, and which, \*consequently, could not be divested or defeated by any sale or transfer from the defendant in execution. The application of the statute of 1822 to the case before me, requires a construction by which it is made to retrospect, and by giving it operation anterior to its passage, to divest and take away from the plaintiff, this vested right and interest, which, as has just been shewn, had been acquired under the then existing laws of the State.

1. The enquiry for us is, whether there is any provision in the Constitution of this State, or of the United States, controlling and inhibiting retrospective legislation affecting vested rights in civil matters.

2. Whether apart from any express inhibition in the Constitution there be any universally admitted principle of natural right and justice, possessing a restraining influence over the Legislature and amounting to absolute prohibition to pass any law violative of its dictates.

3. Apart from the idea of absolute prohibition, we will consider the effect of such a principle upon the construction of a statute, where there is room for construction.

4. How far the act under consideration may be viewed as merely declaratory, and therefore susceptible of the construction maintained by the claimant.

In the Constitution of the United States it is declared, that no State shall pass any

ex post facto law, or law impairing the obligation of contracts. In the Constitution of the State of Georgia, it is said no ex post facto law shall be passed.

These words ex post facto, as defined by Blackstone, (1 vol. Com. 46,) and as understood and explained by all the judicial tribunals both State and Federal, have been so universally applied to criminal in exclusion of civil law, that however just and necessary the extension of their sense and meaning, to embrace the latter, might  
329 \*seem to me, I could scarcely feel myself at liberty so to adjudge.\* It is true, that in a late case an enlightened Jurist upon the bench of the Supreme Court, United States, (Mr. Justice Johnson in *Satterlee v. Matthewson*, 2 Pet. S. C. Rep. 414,) very decidedly expressed a different opinion, and has appended a valuable note containing some useful research and learning upon the subject at the end of the 2d vol. Peters' Rep. Yet the decision of that Court as made in the case of *Calder and wife v. Bull and wife*, (3 Dall. 386,) stands unchanged and has never been renounced by the Court, and it will, I presume, control the meaning of these words so long as it does remain.

No State shall pass any law impairing the obligations of contracts. However in the interpretation of these words, the most distinguished Jurists of our country have differed, when considering their effect in restraining the enactment of laws, which would, prospectively considered, impair the obligation of contracts, (as an insolvent law which discharges the future acquisitions of the debtor,) all have concurred in their entire efficacy to prevent such laws from operating upon contracts made before the passage of the law. If it shall appear, therefore, that the obligation of this original contract, although the contract itself be merged in the plaintiff's judgment, would be impaired by the construction contended for by the claimant, then it is obvious that the Legislature could not in the most direct terms pass such a law, and as a necessary consequence the Courts would not be authorized so to construe it, if it were susceptible of any other construction, by which the Act could be maintained. I say notwithstanding the contract itself be merged in judgment, for although it has been decided

that a judgment is no contract,  
330 (*Bidleson v. Whytel*, 3 \*Burr. 1548,) yet the expression in the Constitution is not to impair the contract, but its obligation. And this obligation, according to all the Judges of the Supreme Court of the United States, means the legal obligation as contradistinguished from the moral, or it is the liability to pay and to perform, which the law at once imposes as consequent upon the contract. Now whatever

\*A purchaser at Sheriff's sales under a judgment, does not take the land subject to a previous judgment, obtained against the former owner of the land, unless it was sold expressly, subject to such prior judgment. The proceeds are distributed, however, according to the priority of the liens. *Commonwealth v. Alexander*, (14 Serg. & Rawl. 257.) *U. S. v. Mechanics' Bank*, (Gilpin's Rep. 57.)—(Ed. of Original Edition.)

\**Calder v. Bull*, (3 Dall. Rep. 386.) *Fletcher v. Peck*, (6 Cranch 138.) *Ogden v. Saunders*, (12 Wheaton 266.) *Satterlee v. Mathewson*, (2 Peters U. S. Rep. 380.) *Watson, et al. v. Mercer*, (8 Pet. S. C. Rep. 110.)—(Ed. of Original Edition.)

shape the contract may assume, the obligation remains until it is actually discharged, or until the law will imply its discharge from circumstances. Any law, therefore, which impairs not the original contract, but this obligation, whether the contract remains in its original shape, or has been merged in a judgment, it seems to me, ought to be considered, as within the operation of this provision of the Constitution. And indeed upon the other view, the Constitution would be no protection, since a man would be compelled to carry his contract into judgment before he can enforce it. But how is this obligation impaired? Neither the original contract, nor the judgment is nullified, or rendered void. It will be recollected that at the passage of the Act of 1822, under consideration, the plaintiff in execution had, by virtue of his judgment, a lien upon all the property of the defendant, that this lien followed the property into the hands of a bona fide purchaser for valuable consideration, he being bound by the constructive notice afforded by the record of the judgment; that it continued to exist for an indefinite period of time, there being no limitation to bar it; in short, that the right of the plaintiff in execution to levy upon and sell the property of the defendant, although in the hands of a bona fide purchaser, was a perfect and a vested right, which could only be divested by satisfaction of the debt or some act of the party claiming it. The Act in question construed, so as to apply to this case, would prevent the enforcement of the judgment upon such portion of the defendant's property as had been sold to a bona fide purchaser, in whose possession it had remained for seven years, although such possession had been accomplished before the passage of the law. This law may be considered as a statute of limitation, which operates to

331 \*bar a judgment—for, whilst it quits the possession of the purchaser, it takes away from the judgment creditor the right to levy and sell. It is again, the suspension or denial of the remedy in toto upon a certain portion of the debtor's property, or what is in effect the same, it is the exemption of a part of the debtor's property from its liability to the payment of the judgment. Viewed as a statute of limitations, there is nothing to prevent the Legislature from fixing a time within which a judgment shall be enforced, as well as to pass any other act of limitations. But then, to make any statute of limitations constitutional, there must be an allowance of time in futuro to commence the action in the one case, or enforce the judgment in the other. Such statutes are then nothing more than a new rule of evidence which the Legislature have a right to impose. But if there be no allowance of time within which to enforce existing and vested rights, after the passage of the law, the effect is as completely to destroy the right, as if the contract were annulled or the judgment rendered void. Whilst the right to regulate the rem-

edy in its own Courts, must be incident to each State, who may modify and change it as the welfare of society may require, and whilst as a consequence of this, a law, changing or affecting the remedy only, is not considered as impairing the obligation of the contract, yet an absolute denial of the remedy amounting to an exemption of any portion of the property must necessarily impair the obligation of the contract. The distinction has often been asserted between a law changing or modifying the remedy only, and a law which so completely takes away the remedy as to destroy the right. In the great case of *Ogden and Saunders*, (12 Wheat. 213,) one of the Judges says, "a law which in any shape exempts any portion of a man's property, must impair the obligation of the contract." Obviously if you take away the means of enforcing the contract, the power of coercion, the legal obligation is gone. The act in question not only takes away the right to enforce the judgment upon the specific property, but it actually and in direct

332 terms confers an \*adversary right, by vesting it absolutely in the purchaser discharged of the lien. In the view which I take, therefore, upon this subject, the act under consideration is not susceptible in consistency with the Constitution of the United States, of the construction maintained by the claimant. If I am correct here, it would be unnecessary for me to do more than enquire whether the act be susceptible of a construction which might stand with the Constitution. But there are other considerations equally decisive, in my estimation, in rejecting the construction sought for. I proceed, therefore, to observe,

2. That the application of this statute to the present case, it has been seen, depends upon a construction which causes it to retrospect so as to take away a vested right. What is a vested right? One of the Judges of the Supreme Court, says, it is when a man has the power to do a certain action, or to possess certain things, according to the law of the land. It has been shewn that under the existing laws, at the time, the plaintiff in execution had acquired a right to levy upon and sell the property of the defendant, and thus to convert it, or its proceeds to his own use, in exclusion of every person in the world. The construction desired, takes away this existing right and imposes an absolute disability. In *Dr. Bonham's case*, (8 Rep. 118,) Lord Coke says: "It appears in our books, that in many cases, the common law will control acts of Parliament, and some times adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void." Perhaps more than a century and a half has elapsed since an English bench of Judges has ventured to declare an act of Parliament void, for being unconstitutional or against the principles of common right and reason.



This is the genius of the government, the absolute supremacy and omnipotency of Parliament. With us the separation of the different departments of the government, with their respective rights and powers, being defined by a written constitution, are better understood. There are acts which the Legislature cannot do, although not expressly prohibited by the constitution. An act of the Legislature, contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. In a late case, (*Wilkinson v. Leland*, 2 Pet. S. C. Rep. 658,) the Supreme Court of the United States say, "we know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary it has been constantly resisted as inconsistent with just principles by every judicial tribunal, in which it has been attempted to be enforced." Such a case, I remark, and others which might be enumerated, are so palpably unjust, that it shocks the common sense of every man, and leads to the conviction, that under such legislation, there would be an end of private property. Yet to determine upon the particular cases as they arise, which are obnoxious to these principles, is so delicate an exercise of authority, and the intrinsic difficulty of applying rules of construction to the Constitution so as to embrace cases within its spirit and equity, though not within its letter, so great, that I forbear to decide, as it certainly is not necessary I should decide in this particular case, that a retrospective act which takes away a vested right, but which cannot be construed to come within the provision of the Constitution as to contracts, is absolutely void.\* But I am prepared to decide under the third point proposed—That wherever an act is susceptible of a prospective operation which, although not favoured by the exact letter, may yet well stand with the general scope of the statute, it shall be so construed, rather than retroact, \*so as to take away a vested right. The rule established in England from the earliest history of the common law, as derived from Bracton and Coke is to limit the operation of the statute to the passage of the law; behind this period it may not retrospect. This is the sound rule of construction where there is room for construction. *Nova constitutio futuris forma debet imponere, non præteritis*, (6 Bac. Ab: 370.) The King's Bench in England would not construe the statute of frauds and perjuries so as to take

away an action brought after the period designated in the statute upon a parol promise made before. (1 *Helmores v. Shuter*, or as it is called in some of the books *Gillmore v. Shuter*, 2 Show. 17; 2 Mod. 310; 1 Freem. 466; 2 Lev. 227; 2 Jones, 108; 1 Vent. 330.) The same principle was again recognized upon another statute, by Lord Mansfield, (4 Burr. 2460.) The Supreme Court of the United States in 1804, (*Ogden v. Blackledge*, 2 Cranch. 277,) decided that a statute could not be construed retrospectively so as to take away a vested right. In 1811, was decided in New-York the case of *Dash v. Van Kleeck*, (7 John. Rep. 477,) which will be found an interesting case upon this subject from the enlarged and full view taken of it by the Judges. It was decided by a majority of the court, that an Act of the Legislature is not to be construed retrospectively so as to take away a vested right. In *Ogden and Saunders*, (12 Wheat. 213,) the Judges speak of retrospective laws as oppressive, unjust and tyrannical, and as such, condemned by the universal sentence of civilized men. I am not authorized to impute to the Legislature a violation of principles so often and so solemnly advanced; principles which lie at the foundation of the rights of private property, and which are "alike dear to freedom and to justice." It remains to enquire whether the statute under consideration be susceptible of a construction which will relieve it from this imputation. Statutes are not always to be construed according to the letter. General expressions may be some times restrained; and the statute made to bear a construction reasonable and convenient, and comporting with the probable intention of the Legislature.

335 \*The act of 1822, Sec. 4, provides, "that no judgment shall be enforced by the sale of any real or personal estate which the defendant may have sold and conveyed to a purchaser, for a reasonable consideration, and without actual notice of such judgment, Provided such purchaser or those claiming under him by such sale and conveyance, as aforesaid, shall by virtue of such sale and conveyance have been in peaceable possession of such real estate seven years, and of such personal estate four years before the levy shall have been made thereon." By the statute of frauds and perjuries, it was enacted that from and after the 24th June, 1677, no action should be brought to charge any person upon any agreement &c., unless such agreement be in writing. Here it will be observed, the words are positive, no action shall be brought. This statute too has ever had the most liberal construction; yet as we have seen in the case of *Gillmore v. Shuter*, though the action was brought subsequently to the 24th of June, 1677, the statute was held inapplicable, because the promise had been made before the passage of the Act. The Act of New-York, 1810, concerning escapes, enacts, that nothing contained in the Act relative to gaol and gaol liber-

\*"Retrospective laws which do not impair the obligation of contracts, or partake of the character of ex post facto laws are not condemned or forbidden, by any part of the Constitution of the United States." (*Satterlee v. Matthewson*, 2 Pet. S. C. Rep. 413;) (*Watson v. Mercer*, 8 Pet. S. C. Rep. 110, S. P.) But see 3 Kent's Com. (3d edit.) 455, and cases cited in note (d.).—(Ed. of Original Edition.)

ties shall be so construed, as to prevent any Sheriff in case of escapes, from availing himself as at common law, of a defence arising from recaption, &c. Judge Spencer (in *Dash v. Van Kleeck*, 7 John. Rep. 486), says, this act does not in terms notice suits then existing, or escapes which had then taken place; but it does what is tantamount. And yet the court decided, that it could not apply to an escape which had previously occurred. But the case which is most in point with that under consideration, is the case of *Society, &c. v. Wheeler*, (2 Galson, 141.) It was declared by the third section of an Act of the State of New Hampshire, "That when any action shall be brought against any person, for the recovery of any lands or tenements, which such person holds by virtue of a supposed legal title under a bona fide purchase, under which the occupant or the person under whom he claims has been in the actual peaceable possession and improvement \*of, for more than six years before the commencement of the action &c." The Act then goes on to declare that the jury which tries the action, shall find the value of the buildings and improvements made by such person, or those under whom he claims and that no writ of seizure or possession shall issue upon such judgment, until the plaintiff shall have paid such sum, &c. Judge Story says, "the present action was brought in 1807, and if, as the tenants contend, the Act applies to it, it must be upon the ground that the six years possession under a supposed legal title is to be calculated backwards, from the time of the commencement of the action, although that time should not have elapsed after the date of the Act, and in this view, the argument to support it, must be the same as though the action were commenced immediately after the passage of the Act." This construction the learned Judge rejects as being contrary to the constitution of New Hampshire, but gives it a prospective operation, so as to apply to improvements made after the statute, and when the possession has been for six years after the date of the Act. It will be observed that the language there "is six years before the commencement of the action." In the case before me, it is seven years before the levy shall have been made. Upon the authority of these cases, I do not hesitate to adopt the like construction for the Act of 1822, and to declare it susceptible of it in consistency with the rules of construction.

Lastly, the 4th section of the Act of 1822 cannot be considered as declaratory, but as introducing a new rule of law. Lord Coke considers the preamble as a key to open the understanding of the statute. But the learned Chancellor Kent, in his commentaries, (1 vol. 460-1, 3d edit.) says, they are generally loosely and carelessly inserted, and are not safe expositors of the law, and referring to Mr. Barrington's observations on the statutes p. 300, shews, by many instances, that a statute frequently

recites that which was not the real occasion of the law, or states, that doubt exist as to the law, when, in fact, none had existed. It is true that the preamble of this Act recites "a contrariety of decisions 337 having taken \*place in the different circuits in this State, as to the time when the property of the party against whom a judgment entered, shall be bound," &c. But the first and second sections of the enacting part of the Act points out in relation to what this contrariety of decision had occurred. It is where appeals were entered from the first verdict, and where different judgments were signed on verdicts rendered at the same time. Apart from these, there could have been no contrariety of decision upon that part of the 26th section of the Judiciary Act, which gives a lien from the signing of the first judgment upon all the property of defendant; nor upon any of the previous Acts upon this subject. And the 1st section of the Act of 1822, re-enacting verbatim and without explanation of so much of the said 26th Sec. Act of 1799, proves it.

A declaratory law is to remove some doubt which previously existed with regard to the law. But no doubt ever did exist, that all the property of the defendant in execution was bound from signing the first judgment, or under the Act of '97, the first verdict, and that such lien was unlimited in duration, unless lost or displaced by some act of the party holding it. It was equally certain and well established, that constructive notice from the record was sufficient notice of such lien to subsequent alienees, judgment creditors and mortgagees. The Act of 1822, therefore, is not explanatory in this Sect. but introduces a new rule of law, by limiting the enforcement of the judgment and by requiring actual notice in the place of constructive. Suppose this levy to have been made immediately upon the passage of the Act, upon the construction asked for, we would calculate the seven years back. Could that possession bar the levy? No, because during all that time, constructive notice was sufficient. But you insist the statute requires actual notice. Is it not perceived that you require what was impossible to be performed before the passage of the Act in obedience to its provisions? that an entirely new rule is introduced, and consequently, this Act must be viewed as 338 any other \*Act introducing a new law. When the argument of this motion took place, I apprehended that the construction contended for might be maintained, by considering this as a declaratory Act. I was momentarily misled by the preamble. I am satisfied it cannot be so received.

2. Whether a claimant in a claim case under the statutes of Georgia of 1799 and 1821 can protect himself or defeat the plaintiff's right to levy and sell by resorting to an outstanding title in a third person, not a party to the issue, and with whom he claims no privity.



What is the issue in a claim case? The statute prescribes, "that where any sheriff shall levy an execution on property claimed by any person not a party to such execution, such person shall make oath to such property, and it shall be the duty of the sheriff to postpone the sale &c., till the next term of the court from whence the execution issued, and such court shall cause the right of property to be decided on by a jury, &c." The first step, therefore, necessary in interposing a claim is an affidavit asserting the property to be in the claimant. Now the object of pleading is to bring the alternate allegations of the parties to some specific point or matter affirmed on the one side and denied on the other. This result being attained, the parties are at the end of their pleading, and the question thus revoked for adjudication, is the issue. (Stephen on Pleading, 30.) Here the claimant comes in, and swears that the property is his. We have therefore a fact affirmed on the one hand. It is denied on the other that the property does belong to the claimant. The claimant holds the affirmative, the plaintiff in execution the negative of the issue. It is true the form of the verdict as adopted in our practice is, "We find the property subject or not subject to the execution." And it is also true that the plaintiff in execution is required to give prima facie evidence of property in the defendant in execution in the first instance. But this cannot change

the state of the pleadings, or alter  
339 the question \*submitted by them.

How this form of verdict got into practice, I know not, and its propriety, in strictness, might perhaps admit of a question. The claimant was no party to the execution, and he makes himself a party to the proceeding by affirming a distinct fact. As soon as the plaintiff has given prima facie evidence of title in the defendant, the burden of proof is shifted, and the claimant is required to prove what he has affirmed, that is, to make out his own title. It is true also, the Act says, "shall cause the right of property to be decided on;" but this must also be understood to be in subordination to the issue. What right of property? That, I answer, involved in the question submitted by the pleadings. The issue being thus understood, it may be permitted me to remark, for the purpose of illustration, that formerly, when the Jury consisted of persons who were witnesses in the case, and taken from the vicinage, the issue was distinctly stated in the venire facias, that the Sheriff might be enabled to summon persons acquainted with the facts. Now the parties being required to prove their case before the Jury, must provide themselves with the necessary documents and witnesses; and hence the absolute necessity that they, like the Sheriff formerly, should be apprised of the specific question to be tried. The plaintiff comes in this case, prepared to dispute the title of the claimant to this property: unexpectedly and by surprise, he is required to litigate

the title of a third person between whom and the claimant there is no privity.

This case has been supposed obnoxious to the rule which governs in England, viz. that although the plaintiff has a possessory title, which is better than that of the defendant, yet if the defendant can show a superior title in a third person, with whom he claims no privity, the plaintiff cannot recover. This rule has perhaps been too long considered as settled with us now to be questioned, even if this were a proper case in which to do so. A collection of authorities may however be found in a note in 3 Wheat. 224, in which the adjudications are not supposed to sustain the doctrine to this extent. Possession may constitute a good title, \*and the tenant may stand upon his mere naked possession till a better title be shewn. And as the plaintiff must shew a subsisting possessory title, the defendant may shew that the title under which the plaintiff seeks to recover, has been conveyed away to a third person. Thus far the propriety of the rule in ejectment is well supported. Without intending to disturb the rule in ejectment, as I believe it to have been understood here, I cannot acquiesce in its applicability to the present case. The proceeding by claim was given in the place of the remedy by action for damages, against the officer selling the property of a third person. None but the owner of the property could be endangered by its sale, and he only could support his action. The claim law only designed to give him another remedy against the same injury. It never contemplated that under a claim interposed, the claimant might protect the property of any other person. In ejectment an outstanding title, that will protect the defendant, must be a present, subsisting and living title, and available. But the law requires the claimant to make oath that the property is his. With what consistency can he show title subsisting at the time in another? There seems to be an obvious repugnancy.

The law requires the claimant to give bond conditioned to pay the plaintiff all damages which the Jury, on the trial of the right of property, may assess against him, in case it should appear that such claim was made for the purpose of delay. To permit a claimant to protect the rights of all the world under his claim, it strikes me, would be going very far to evade this salutary provision of the law. What benefit to him, or what interest has he in the titles of others? What motive for interposing his claim? When the motive was solely delay, he could escape from its consequence. The plaintiff would necessarily be delayed, because after disposing of the claim, the true owner asserting title in himself, might immediately interpose another claim, and the previous trial could not bar his right, because he was neither a party nor privy to it.

341 \*I am consequently of opinion that upon both grounds made in the mo-

tion, viz: The applicability of the Act of 1822 to this case, and the admissibility and effect of the evidence of title in a third person, the plaintiff in execution is entitled to a new trial.

It will be perceived that I have considered this case upon the assumption that the execution under which this levy was made, issued upon a regular judgment. In the manner in which the case has come before me I have been bound so to consider it, and indeed I have felt constrained in deciding this motion, to confine myself to the two points made by it, and insisted on in the argument of the plaintiff's counsel. The principle advanced on the part of the claimant that a new trial will not be granted, although there may have been error, if it is believed substantial justice has been done by the verdict, is recognized. But no statement of the evidence in the case, as agreed on by the parties, has been furnished me; no notes of the Judge who presided at the trial, and I am left to infer the testimony from the ex parte statement, or occasional reference of counsel to it in the course of the argument. The legal conclusions which I am required to draw, upon the grounds taken in the argument for the claimant, upon the merits of the case, are so dependent upon the facts of the case, upon the evidence in the case, that I am totally unable, without a full view of that evidence, to decide upon the consistency of the verdict with the justice of the case.

The motion for new trial is granted.

342 \*Ex dem. The Mayor and Aldermen of the City of Savannah v. The President, Directors and Co. of the Steamboat Company of Georgia.\*

October Term, 1830.

**Highways—Rights of Owner of Land.**—The owner of land appropriated for a highway retains the freehold in the soil, and subject to the easement, and not interfering with it, may use the land in any manner, and may maintain ejectment, trespass or waste for any exclusive appropriation of it by another.

**Same—Public Entitled to Easement.**—And the statute of Georgia, which directs compensation to be made to the owners of land laid out for a highway, must be taken to provide for the purchase of the easement, and not of the land.

**Same—To Whom Freehold Belongs.**—As a general rule, the freehold in the highway must be taken to belong to the proprietors of the adjoining soil.

**Same—Same—Presumption.**—But this rule being founded on the presumption, that such way was originally taken out of the lands of the party who hath other lands adjoining, is not applicable when such presumption cannot arise from the facts shewn.

**Land Appropriated to Public Use by Legislature—Effect.**—A Legislative Act appropriating property

to the public is an irrevocable grant of such property.

**Municipal Corporations—Control by Legislature.**—A political corporation, created for the purpose of municipal government, is liable to the superintendence and control of the Legislature, which may enlarge, modify, change or restrain its charter.

**Same—Right of Legislature to Deprive of Property.**—But the Legislature cannot divest such corporation, without its consent, of the property legally acquired by it.

**Same—Right to Aliene Property.**—Nor can such corporation aliene or grant the public property, for purposes different from the objection of its original appropriation.

**Same—Re-organization—How Particular Powers Transferred to New.**—Upon a re-organization of a corporate body, which is essentially changed thereby, in order to transfer to the new, the particular powers of the old corporation, there must be an enabling clause empowering the new corporation to act in the particular case, or a general clause which might embrace the particular case.

**Same—When Ejectment May Be Brought to Recover Street.**—Where the legal title to the soil is in a corporation, (or the public,) it may maintain an action of ejectment to recover the possession of a street.

**Same—Easement in Street in Public—How Possession Recovered.**—But it seems, that where only the easement, and not the freehold is in the public, the only remedy for a violation of the right is by public prosecution.

**Town of Savannah—Statutes Regulating Ownership of Property—Case at Bar.**—By a Legislative Act passed in 1760, the town common, streets, lanes, &c. in the town of Savannah, were declared to be the common property of the lot-holders in said town, and Commissioners were appointed to carry the Act into execution. By an Act of 1787, a President and Wardens were directed to be chosen, with power to make bye-laws, assessments, and to lease or sell any public lots, &c. By act of 1789, the town is styled the city of Savannah, and a Mayor and Aldermen were directed to be elected, and were declared to be a body politic, with the power of acquiring and holding property, real and personal, for the benefit of said city;

343 \*HELD, that by the Act of 1760, the legal title to the town common, streets, &c. vested in the lot-holders or public, in their collective capacity, and as a corporation sub modo, which became transferred by the Act of 1787 to the President and Wardens as the legal representative of the public, and for its benefit, and finally, by Act of 1789, became vested in the "Mayor and Aldermen of the city of Savannah."

**Same—Same—Same.**—HELD, further, that if the legal title did not pass by the Acts of 1760 and 1787, to the public or lot-holders, as a corporation, sub modo, then as it could not vest in them individually, and there was no one capable of taking and holding at the time of the grant, such grant of the town common, streets, &c. must be considered as a dedication to public uses, which by operation of law became vested in the Mayor and Aldermen of the city of Savannah, as soon as they were incorporated.

**Same—Same—Ejectment.**—HELD, further, that for the purpose of sustaining the action of ejectment, the term "lots" used in the Act of 1787 and which

\*The principal case is cited in Savannah, etc., R. Co. v. Shiels, 33 Ga. 614.



the Wardens were authorized "to let, lease or rent," might be construed to embrace the streets, town common, &c. so as to enable the corporation of Savannah to make a demise of a public street.

**Same—Same—Same.**—And it seems, that the corporation having the legal title and possession of the street, might therefore, (apart from the construction given to the Act of 1787) have made a demise of it, for the purpose of sustaining ejectment.

By LAW, Judge.

This is an action of ejectment brought by the Mayor and Aldermen of the city of Savannah, to recover the possession of a piece of ground in said city, which is claimed by them as a part of the public street, and extending down to the water, so as to embrace a part of the public dock or slip between two wharves. The questions which have been argued and submitted to the court for decision, are, 1st. Whether the action of ejectment will lie to recover the possession of a street? 2d. Whether there is such title in the plaintiffs to the public streets in the city, as will sustain this action?

1. It has been repeatedly adjudicated, that the original owner of land, which has been appropriated for a highway, retains a freehold in the soil; that the public acquires nothing but an easement or right of passage; and that subject to this servitude, and not inconsistent with the full enjoyment of this right by the public, the owner may use the land in any manner which his convenience, benefit or advantage may require. That consequently for any exclusive

appropriation of it by another, he may maintain ejectment, \*trespass or waste. This is undoubtedly the law of England, (2 Strange, 1004; 1 Burr. 143, 147; 1 East. 69.) The late case in Carr and Payne, 340, is so obviously a hurried and inconsiderate decision, that I do not view it as at all disturbing the authorities in England on this subject. I see no sufficient reason why the doctrine should not also prevail with us. The Constitution of the United States recognizes the right to appropriate private property to public use, upon just compensation. It has been thought by some, that when land is thus taken, the absolute title or fee in the soil passes to the public. And doubtless when the public wants require the land itself, and not a mere servitude, the fee does pass to the public, upon compensation. But in laying out a highway, nothing more than a right of passage is wanted: the public have no use for the land itself, that is, for the freehold in the soil; whilst it might be productive of great inconvenience to the original owner, in possession of the adjoining land, to be divested of his title to the soil in the highway. Our statute directs, when any person is aggrieved by reason of any road being laid out through his ground, that damages shall be assessed, (in the manner prescribed by the Act,) which shall be paid by the Inferior Court. I consider this statute as merely directing compensation for the injury sustained by the indi-

vidual, in consequence of the subjection of his land to this servitude, and as by no means intended as a purchase of the land. In many of our sister States this question has been adjudicated in conformity with the decisions in England; and in some instances, by Judges so venerated for legal learning, that whilst their decisions possess not here the obligatory efficacy of authority, they are entitled to our most respectful consideration, (6 Mass. Rep. 454; 2 John. Rep. 357; 15 John. Rep. 447, 583; 1 Conn. Rep. 103.) It is also a rule of the common law, "that the freehold in the highway must be taken to belong to the proprietors of the adjoining soil." This rule is founded upon a principle of policy which proposes to protect him, owning the adjoining soil, in the full benefit of his

land, against the acts of another  
345 \*who should acquire title to the highway, and who might use it in a manner destructive of the interests of the adjoining proprietor. And because as Lord Coke says, the law presumes the way was first taken out of the lands of the party, that hath other lands adjoining. It is only where the last reason exists, that the first can operate; for sound policy could never adjudge the land of A. to B. against a good title in the former. If upon principle this rule could be extended to the case of Lot holders, adjoining a street in a city, where the land, through which the street ran, was originally owned by individuals, it is manifest that no such title can be set up in a case in which the facts do not warrant the presumption upon which the rule is founded. In the case before me, the land, as will presently be seen, never was owned by individuals; and the lots which the proprietors adjoining the street own, were granted by precise quantity and fixed boundaries which define the thing granted, and exclude all idea of a conveyance of the street as incident.

2. I proceed now to the investigation of the plaintiffs' title. In the original laying out of the town of Savannah, certain lots, squares, streets and passages, and town common were reserved and appropriated for public purposes and uses. These reservations, apparent from the plan of the city, have been recognised and confirmed and expressly set apart for public use, by various legislative enactments. By the Act of 1760, the town common, squares, streets, lanes and passages are declared to be and continue the common property of the lot holders in the said town, and that they shall not be aliened or granted away for any purpose whatever, than by Act of the General Assembly. Commissioners are appointed to carry this Act into execution. By the Act of 1761, various lots are specially set apart for the public uses to which they had been applied; and the water lots at the end of every street, together with 16 acres called the spring, are to be held, deemed and reputed as public lots and lands, and reserved for the use of the  
346 \*public only. By the Act of 1787, a

President and Wardens are to be chosen, who are empowered to make by-laws and regulations for the government of the town, to lay assessments and taxes, and to let, lease or rent at public sale any lot or lots of land, &c.

By an Act of 1789 the town is named and styled "the city of Savannah," a Mayor and Aldermen are directed to be elected, who are styled and named "the Mayor and Aldermen of the city of Savannah and hamlets thereof," and who are declared to be a body politic and corporate (with the usual incidents of such a body specified), and with power of acquiring and holding real and personal property for the use and benefit of said city and hamlets. By virtue of these Acts the original reservations for the public use have been expressly recognised, declared and confirmed.

It is interesting now to enquire, where is the title to this public property? In whom does it rest? Did it remain in the sovereign power; or did it pass out and vest in the lot-holders or public of Savannah?

It could not remain in the sovereign power, because a legislative resolve, or an Act of the Legislature appropriating property to the public, is a grant of such property. It does not carry a title, only *durante bene placito*, but indefeasible and irrevocable in its nature. (9 Cranch. 50; 1 Wheat. 482.) It is true, that the Act of 1760 says, the property shall not be aliened or granted away for any other purpose whatever, than by Act of the General Assembly. This was only a restriction or limitation perfectly consistent with an entire and irrevocable grant, resulting from the necessary relation between a community considered with a view to municipal government, and the legislative authority of the country. There being at the time, no political body to represent the public of Savannah, capable of taking and holding lands, the title to this public property passing from the sovereign power, must have vested in the lot-holders or public itself. But did it

vest in them as individuals\* and as tenants in common? No—because this would be destructive of the very end and object of the grant, since each one would be entitled to partition, and as a necessary consequence the thing granted, instead of being held together for the public good, would be severed and become individual property. It was then in their collective and aggregate character that the property, so reserved for public use, vested in the public or lot-holders of Savannah. For persons may have corporate powers *sub modo* and for certain specified purposes only. A town may be considered as a legal community, or body politic, for certain purposes. (2 John. Ch. Rep. 325.) When therefore, a grant was made to the town in its collective and aggregate character, when Commissioners were appointed, and afterwards a President and Wardens, with plenary powers for the government of the town, I am disposed to consider, that for these purposes they were constituted by the Leg-

islative Acts, which so treated with them, a corporation, and in their corporate character to have become the grantees of the public property. The object of incorporation is to bestow "the character and properties of individuality on a collective and changing body of men," (4 Peters' S. C. Rep. 562.) When, by the Act of 1789, the town was regularly incorporated, and expressly declared to be a body politic and corporate, with all the powers and incidents usual to such a body, the public property, which before vested in the public in their aggregate capacity, became, by operation of law, transferred to, and vested in this artificial person, legally constituted their head and representative. This being a political corporation for the purpose of municipal government, a superintending and controlling power over it, was reserved in the sovereign power or legislature. They may "enlarge, modify, change or restrain its charter," but the property acquired by it, under the powers given by its charter, or vested in it by legislative Acts, cannot be rightfully taken from it, even by the Legislature, without the consent of the corporation: so too, on the other hand, the corporation cannot aliene or grant the public property for purposes different from \*the object of its original appropriation. The positive restriction and limitation in the Act of 1787, I apprehend, therefore, is only in unison with the legislative power as derived from their relation to a political corporation.

Again, let us consider the property as vested in the lot holders in their collective character, (which I contend is the only character in which it could vest,) as incident to the office of President and Wardens, created by the Act of '87, and exercising under the authority given them by that Act, the high powers of legislating for, and taxing the inhabitants of the town and leasing the public property in their discretion, with general power to apply the monies to the purpose of carrying said Act into execution, it is thought that the legal title to the public property, ought to be held so far transferred to and vested in this body, as to enable them to assert and maintain the rights and interests of the lot holders collectively, as their legal representative. If this suggestion be correct, and it is believed, notwithstanding, the different character of the cases, that it will derive support from the principles laid down in *Terrett v. Taylor*, (9 Cranch. 43,) and the town of *Pawlet v. Clark* and others, (in 9 Cranch. 292,) then it is considered that the powers, authorities, duties and rights of that body have been legally transferred to the lessors of the plaintiff. It is admitted that upon the reorganization of a corporate body, if it be essentially changed, there must be, in order to a transfer of particular powers, "an enabling clause empowering the body to act in the particular case, or some general clause which might embrace the particular case." (3 Peters' U. S. Rep. 408.) The Act of '89,



incorporating the city of Savannah, professes to be amendatory of the Act of '87, and empowers the Mayor and Aldermen of the city of Savannah and hamlets thereof, to carry into execution the powers intended by the said Act of '87. This general clause is deemed sufficiently comprehensive to invest the present corporation with all the powers, rights and duties which before

vested in the President and Wardens.  
349 \*There is another view of this subject—Should the idea of considering the lot holders as taking in their collective capacity and as sub modo a corporation, be deemed unsatisfactory and be rejected, since we have seen that the property could not vest in them individually and as tenants in common, consistently with the object of the grant, it would follow, that there was no one capable of taking and holding at the time of the grant in whom the legal title could vest, and the reserved property for public appropriation, could then only take effect by way of grant or dedication to public uses; and upon the incorporation of the town of Savannah, "by operation of law, and without further act," the legal title would vest in such corporation. (*Town of Pawlet v. Clark*, 9 Cranch. 331, 332; *Lade v. Shepherd*, 2 Strange, 1004; 1 Kyd. Corp. 29; 30 Com. Dig. Abeyance A. 1.) These latter authorities are remarked upon by Judge Story in delivering the opinion of the Court in the case in Cranch. This view of the subject would leave us the same result as the former. Quacunque via data, therefore, the legal title is in the lessors of the plaintiff.

Ejectment is a possessory action: its object is to recover possession. It presupposes as indispensably necessary to the maintenance of the action, a legal right of entry in the lessors of the plaintiff. Where the legal title is shewn to be, there the law presumes the possession to be. The right of entry, then, accompanies the legal title, till that is shewn, which takes away the right of entry or possession, and turns the same into a right of action, by which, the remedy by ejectment is gone, though the legal title remains. Having shewn, as I trust, that the legal title is in the plaintiffs, the question now recurs, can they have a right of entry or possession to a public street? There is a distinction, as it strikes me, important in the solution of this question, between a grant or appropriation of the easement only to the public, reserving the fee in the grantor, and a grant of the land itself. To illustrate. The public could not maintain ejectment for a street or highway, the freehold in the soil of which remained in an individual

350 —\*in such case it is a mere dedication of the easement to public use which vests no where—in the language of Judge Story, commenting on *Lade v. Shepherd*, "there is, strictly speaking, no grantee of the easement." In such a case the remedy which the public have for a violation of rights, is by public prosecution. In the case before us, the corporation have title to

the land itself. It is sufficient in ejectment, if the possession be required for any purpose whatever. We have seen that in the case of an individual, owning the freehold in the soil of the highway, he may maintain ejectment, and recover the possession subject to the easement. He may bring ejectment and recover for the express purpose of abating a nuisance; it may be the object for which he seeks to enter. The propriety of distinguishing between the corporation, when the legal title to the land is in them, and an individual, does not occur to me. The public may abate a nuisance by indictment; and an individual may recover in an action, by shewing special damage. It is asked of what is the Sheriff to deliver possession? The answer is, of the ground itself to be held and appropriated to the purposes of the grant. The case of the Mayor, &c. of Northampton v. Ward, (2 Strange 1238, 1 Wil. 107,) was an action of trespass by the plaintiffs against the defendant, for erecting a stall in a public market place. The Court held that the action was sustainable, and was the proper remedy. Now to enable a party to maintain trespass he must have actual and lawful possession of real property. Yet this was a public market place into which every one had a right to enter for the purpose of buying and selling, though no one had a right to encumber it with a stall without license, and the possession was considered in the corporation so as to enable them to bring trespass.

It is asked, can the corporation of Savannah execute a demise of the locus in quo? The whole action of ejectment is a fiction; the demise is fictitious, but still it must be consistent with the title of the lessor of the plaintiff; that is, as Mr. Adams in his treatise defines it, such a demise must be supposed, as if made, would have

351 \*transferred the right of possession to the lessee. The Courts are extremely liberal, however, in considering this action, and if by any possibility of law, the demise can be adjudged good, they will give effect to it. Hence, since the fiction of lease, entry, and ouster, tenants in common who have several freeholds, have been adjudged capable of executing a joint demise. (2 Caine's Rep. 174.) So, a lease made by a guardian to try the title of an infant is good: for though such lease may be avoidable as to the infant, yet a stranger cannot defeat it: and if the lessee should not be allowed to maintain his ejectment on such a lease, the minor would be denied the common right and privilege of other subjects. (Bac. Ab. 429.) The case of Zouch and Parsons, (Bur. 1794,) determined that an infant might make a lease without rent, to try his title. So too, under the restraining statute of 13 Eliz. C. 10, upon a lease made by an ecclesiastical person, it was formerly held that the declaration should state that there was a rent reserved—this is no longer required. (Adams 195.) So also, all the peculiarities which surrounded a demise by a corporation aggregate, are now dispensed

with, and the demise is laid in the general way. If by any possibility, therefore, the demise may be sustained, effect will be given to it to try title, and where even under the restraining statute referred to, the lease was declared by the Act absolutely void, it was held voidable only, and subject to confirmation.

I am disposed to extend every principle of law, in relation to what is a mere matter of form, a fiction, to enable this corporation in the pursuit of its rights to avail itself of that remedy, which belongs to all. The legal title is in them, and the right of possession is presumed to belong to them, and it would be strange to lose their remedy by what is in effect a mere formality. But in point of fact the Act of 1787 authorizes the Wardens to let, lease or rent "lot or lots" &c., including the lot called the Springs, containing sixteen acres. The water lots at the end of the streets are embraced, it is presumed, within the expression "lot or lots," and in relation to them

there can be no difficulty. In what sense did the Legislature use the term "lot or lots"? Did they intend to confine it to those portions of ground which had been admeasured off and set apart as lots in the plan of the town designated by numbers and boundaries, or in the more popular or ordinary sense as embracing any piece of ground? For the purpose of sustaining this demise, we may consider the latter, and this conclusion is strengthened by the fact that the ground called "the Springs," and which contained sixteen acres, is designated by them as a lot. Suppose one to enclose a part of the town common, the corporation could not eject him upon the principle assumed, for in that sense, the common is no more a lot than is the street. In conclusion, if by any construction, their demise can be held good, the Court will not look behind the declaration to see that those things were done which would render their lease valid, when the question is simply upon a demise to try title.

I am therefore of opinion that this action may be maintained by the plaintiffs.

W. H. Bulloch, Recorder, and R. R. Cuyler, for plaintiffs—M. Hall McAllister, for defendants.

353 \*Watts and Joyner v. Isaac Norton.

May Term, 1831.

**Process of Court Used Oppressively—Relief on Motion.**

—When the process of the Court is attempted to be used oppressively, and against justice, as by levying an execution after judgment had been satisfied, the Court will grant relief upon motion. **Same—Same—When Issue Directed.**—And if it requires information of matters of fact, it will cause an issue to be made up for that purpose.

**Same—Same—Rule to Show Cause.**—And where the party moving, was not prepared with his proofs, and modified his motion by asking for a rule on the plaintiff to shew cause at the next term, the

Court granted the motion, but without stay of proceedings.

**Same—Same—Jurisdiction.**—A Court of Equity under such circumstances, is the proper tribunal to grant relief.

By LAW, Judge.

Two motions were presented to the consideration of the Court in this case. The defendant in the execution has made an affidavit of illegality, under the provisions of our Judiciary Act of 1799, upon which the Sheriff returned the execution to this Court, from whence it had issued. The plaintiff in execution moves to set this affidavit aside, upon the ground, that the execution issued legally, and that the objection stated in the affidavit to the enforcement of the execution, is founded upon the allegation of subsequent payment and satisfaction.

It is unnecessary that the Court should decide upon this motion, since the defendant, having been unprepared to sustain the facts set forth in his affidavit, has virtually abandoned that proceeding, and submitted to the Court a distinct motion, founded upon affidavit, for an order nisi upon the plaintiffs, to shew cause at the next term of the Court, why satisfaction should not be entered up, upon the judgment. When the process of the Court is attempted to be used oppressively and against justice, as by levying an execution, after the judgment had been satisfied, the party was formerly driven for relief to the writ of audita querela, and subsequently, by an indulgence of the Courts, almost every case in which audita querela was necessary, is now disposed of upon motion, and if the Court requires information, it will direct an issue to be made up for that purpose.

It is therefore perfectly regular and proper that the defendant should come before the Court upon motion for relief in this case; but he is not prepared to shew the payment stated in the affidavit, and therefore has modified the motion which he ought to have made, by asking for a rule upon the plaintiffs in execution to shew cause, &c. at the next term. There can be no objection to granting this order; it is perfectly harmless, and can only operate upon the plaintiffs as a notice, unless it be extended in its terms, to stay in the mean time all proceedings upon the execution; and it is asking too much of a Court of law to suspend its proceedings, and hang up a party after judgment, upon an affidavit like this. If the defendant had been prepared with his proofs, from the controlling power which a Court retains over its own judgments, he could have found relief here upon the motion. But as it is, he must apply to a Court of Equity, if his object be to suspend the proceedings upon the execution; which Court, whilst it stops the plaintiffs, can put the defendant upon terms, and require him to give security for any sum that may be found due.

The defendant will therefore take his order, restricted simply to a rule upon the plaintiffs to shew cause at the next term of



this Court, why satisfaction should not be entered upon the said judgment.

See the following authorities: 2 Cain. 254; 10 Mass. Webb v. Lovejoy; 17 Mass. 153; 1 John. 532; 1 Strange, 40; 2 Saun. 148, c.; 1 Boss. & P. 429; 1 Wil. 331; Doug. 196; 1 Salk. 93; 4 Burr. 2287; Barns, 130; Cowp. 727.

John C. Nicoll, for plaintiffs—John Mil-len, for defendant.

355 \*William Read and Others, Compl'ts,  
and John I. Dews and Others, Def'ts.

1831.

**Injunctions\*—To Restrain Payment of Money by Sheriff  
—Cause Pending to Determine Priority of Liens.—**

Injunction granted to restrain the Sheriff from paying over money made on sale of an estate, under executions issued by individual creditors thereof, where such injunction was prayed for by bill in the Superior Court, alleging that complainants had filed a bill in the Circuit Court of the United States, for the District of Georgia, claiming a specific lien on said estate, and preference over individual creditors, which claim was still pending and undetermined.

By LAW, Judge.

The complainants allege by their bill, that they are entitled to a proportion of property, or in lieu thereof, a sum in money, under a deed which they allege to be a conveyance in trust from the Hon. James Read to the late Gen. Jacob Read: that to establish and recover this claim, they have filed their bill of complaint in the Circuit Court of the United States for the District of Georgia, which is now pending and undetermined: that by the said bill they claim to be preferred to the individual creditors of Gen. Jacob Read, because, they say they have a lien upon the specific property which passed into his hands, under the said trust deed, by virtue of said deed; and that they are also entitled to a preference under the Act of Georgia, passed in 1799, entitled an Act for the better protection and security of orphans and their estates. It also appears that the defendant John I. Dews, the Sheriff of Chatham County, by virtue of sundry executions, issued upon judgments against the estate of said Gen. Jacob Read, in favor of the other defendants, has levied upon all the negroes of the estate, and advertised them for sale. It is alleged, that, unless by the interference of this Court the sale is arrested, or the monies arising therefrom sufficient to satisfy the claim of complainants be stopped in the hands of the Sheriff, the complainants will be defeated in their rights.

356 \*It has been decided by the Supreme Court of the United States, that a Circuit Court of the United States, could not enjoin proceedings of a State Court. It results, that unless this Court interferes in

\*Injunctions.—The principal case is cited in *Habersham v. Carter*. R. M. Charl. 530.

a case like that which is presented by this bill, there may be a failure of justice. Before the complainants can establish their rights in the tribunal, in which they have elected to prosecute them, the means of responding to their claim will have passed away from the estate of Gen. Read, and it be totally defeated. It is not now that a positive opinion is to be formed upon the merits of the claim exhibited by this bill. It is not by an indirect adjudication of their title that the complainants are to be put in a situation, which will defeat probable rights that may hereafter be established by a competent tribunal, before whom they are proceeding. It has been decided in the Supreme Court of the U. States, that it is enough on an application for injunction to shew a colorable title—or as one of the Judges expresses it, "the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition." This is not the case of a creditor at large; (remarked upon at the bar,) if it were, I would at once refuse the application. But the distinction is founded on the fact, that the present complainants claim to be preferred to the creditors of Gen. Read, upon the ground of lien, under the trust deed, and the statute of Georgia already referred to. This is an obvious distinction exemplified by all the cases, and which forms in fact, the very basis of the present application. I am therefore of opinion, that this is a proper case for the interposition of this Court by the writ of injunction. The point has been raised as to the law of the State requiring security before injunction could be granted. I strongly incline to the opinion that this law is only applicable to a particular class of cases; and that to give it a different construction, would impute absurdity to the Legislature, since there are many cases proper for injunction, in which there is no condemnation money, unless the mere costs of the application be so considered.

357 The law however is general, \*and in the case of *Massie* and the Bank of Georgia which was not dissimilar to this, the late Judge Davies directed security in the amount of money stopped in the Sheriff's hands. I subsequently granted an injunction in that case, without security, but as I now recollect, the question was not raised or considered in the case. Until a construction can be put upon this law by the Judges in convention, which I shall endeavor to effect, I must require security to be given in the sum ordered to be retained by the Sheriff in a bond conditioned, according to law. Upon a compliance with which, it is ordered that a writ of injunction do issue to the defendant John I. Dews, enjoining and commanding him to retain in his hands, and not to pay over the sum of fifteen thousand five hundred and fifty-seven dollars and forty cents, monies arising from the sales to the property of the said Gen. Jacob Read, now advertised by him under said executions, if there shall be

so much money remaining in his hands, after payment of the costs and expenses of levy, advertising and other lawful expenses incidental to the said sales, and the same to retain till the further order of this Court.

R. W. Habersham, & G. W. Owens, for complainants—John C. Nicoll, for defendants.

358 \*Dr. William Read and Others, Comp'ls, and John I. Dews and Others, Def'ts.

1831.

**Injunctions—Dissolution in Vacation.**—The Judges of the Superior Courts of Georgia have the power in vacation, to dissolve an Injunction.

**Same—Dissolution—Before Answer Filed—Affidavit.**—Under the rule of Court, which directs that all Injunctions shall be granted, "until further order," an Injunction may be dissolved before answer filed, on mere affidavit denying the equity of the Bill.

**Same—When Dissolved on Motion.**—And an Injunction will be dissolved on motion, when it appears to have been improvidently granted.

**Same—Bill Showing Probable Right.**—An Injunction will be granted, if the bill shews a probable right, and a probable danger to such right without the special interposition of the Court.

**Same—When Conditionally Dissolved.**—Where it appears that the defendants have an established and legal right, which might be delayed and hindered unnecessarily, by retaining an Injunction absolutely, it may be dissolved conditionally, and on terms which will protect both parties.

**Same—Amendment of Bill to Add Parties Defendant.**—Where the bill was filed, merely for the purpose of obtaining Injunction, and after it was granted other persons really and beneficially interested in the judgment at law enjoined, applied to be made defendants, the Court compelled the complainants (on pain of dissolution of the Injunction if they refused,) to amend their bill, by making the applicants defendants and parties, without prejudice to the Injunction.

By LAW, Judge.

This case comes before me, now, upon a motion to dissolve the injunction heretofore granted, restraining the Sheriff John I. Dews from paying over the sum of fifteen thousand dollars, raised upon judgments in favor of the other defendants in the bill against the estate of the late Gen. Jacob Read. The motion is made by William Whiteman and Benjamin F. Hunt, who, by affidavit, represent themselves to the Court as assignees of the judgments upon which the money was raised. That this opinion may be intelligible, it is necessary briefly to advert to the allegations of complainant's bill. (Omitted here, see them stated in the foregoing opinion.)

The present motion to dissolve the injunction is founded.

359 \*1. Upon facts disclosed by affidavit on the part of Whiteman and Hunt.

2. Because they say, in effect, that the injunction was improvidently granted, there being no equity in the complainants'

bill, which should entitle them to this special interposition.

Various objections to the motion, not founded upon the merits, have been urged by the complainants' counsel, which require to be considered and disposed of. And first, it is denied that the Judge of the Superior Courts possess the power to dissolve an injunction in vacation. In support of this objection, we are referred to the practice of the Court, which it is contended, has never been to dissolve out of term time. Mr. Eden lays it down in his treatise on injunctions, that a motion to dissolve must be made in open Court; and so in New York, it is stated in Blake's Chancery. But the Chancery is always considered open for these purposes, and it would be hard and productive of great inconvenience, that whilst the Judge of the Superior Court might grant the injunction in vacation, he could not dissolve it till term time. In the absence of Reports, and a controlling tribunal over the changing opinions of the successive individuals, by whom the laws are administered, it is difficult satisfactorily to ascertain a settled practice in our Courts. But in truth, no adjudication upon this point is relied on or pretended, and the argument, at most, is simply that such a motion is not recollected to have been made in vacation. Apart from the uncertainty in which the fact is involved, as to what the practice has been, if it were conceded, it ought not, I think, to be permitted so to operate, as to deny the exercise of a power strongly called for by considerations of justice and convenience. Take the case of an injunction, granted in the first instance from the pressing necessity of the case for relief, upon the equity apparent in the bill; but upon the coming in of the answer, the whole of that equity is denied; the ground upon which the writ was granted, and on which alone it could rest, is thus with-

360 drawn, and according \*to the authorities, the writ goes with it, and the dissolution is but a matter in course; unless there are circumstances in the nature of the case, addressing the discretion of the Court, which require its continuance, it would be manifestly a practice at variance with justice, that the party should be hung up till the meeting of the Court in such a case. When it is considered too, that the injunction is but in the nature of an interlocutory order, and in the first instance not necessarily granted by the Court, but by a Judge at Chambers; that the granting or continuing this writ, is but the exercise of a discretionary power to be regulated by the justice and circumstances of the case, I should be inclined to hold that the authority which imposed the clog, might remove it, unless the power were denied more plainly than by an inference deduced from a practice, heretofore acquiesced in.

These remarks are also deemed worthy of consideration in constructing the 7th Sec. of the Act of 1811, which has also been relied on as denying the exercise of this power anterior to the first term of the Court.



In the view which I take of this section, instead of acting as a prohibition upon the Judges to dissolve an injunction anterior to the first term after it was granted, it seems to fix that as a period, when it shall be the right of the party to be heard in course; a right of which he shall not be deprived by the terms of the order. The object of this section of the Act is obviously rather to facilitate than delay; to avoid hanging the party up till the second term, when the bill would be ripe for hearing and argument upon the merits. This construction is in accordance with other sections of the same act, which negative the idea of delay, and with those views of convenience and justice, which have been just given.

The next objection presented by the complainants affirms, that the injunction is never dissolved till the coming in of the answer. This, I apprehend, depends very much upon the nature of the order. By the English practice the usual order

361 was till answer and \*further order. By the more modern practice in England, as established since Lord Eldon's time, this form of granting injunction has been modified till answer or further order. When the injunction is granted till answer and further order, it is never dissolved till the answer comes in. But where it is till answer or further order, it allows the defendant to move its dissolution before filing the answer, upon an affidavit denying the equity of the bill. This difference in the manner of granting injunctions distinguished the common injunction to stay execution, and the special injunction, which under peculiar circumstances, stopped the proceedings at some anterior stage. The special injunction always being, till answer or order and which has always been held liable to a motion to dissolve upon affidavit. The rule of Court under which we practice, as established by the Judges in convention requires that all injunctions be granted till further order, and in compliance with this rule, was the order in this case. In the case of *Read v. Consequa*, (4 Wash. C. C. Rep. 174,) Judge Washington says, that the motion to dissolve without answer filed, is altogether unprecedented. The uniform practice in that Court, he says, has been to require an answer. Yet, he remarks, that the Court might under particular circumstances, grant the injunction until answer or further order, and in that case, listen to a motion to dissolve upon an affidavit of the defendant denying the equity of the bill. Upon the distinctions which have been made in the English practice, and the manner of granting injunctions under our rule of Court; aided by the consideration that the answer in this case is not important to the complainants, nothing being sought to be discovered from the defendants for the purpose of supporting the bill, I think I am bound to listen to this motion, although the answer has not been filed. This would naturally lead us to the affidavit which has been filed, but I postpone its consideration for a moment, to

advert to an objection, made to the second ground upon which the motion is made, viz. it is said that the Court having 362 already heard argument \*upon the rule to shew cause, against the original motion to grant the injunction, and having thus virtually decided upon the equity of the bill before the injunction was granted, will not now entertain this motion upon the ground of a want of equity in the bill. Applications for injunctions are frequently made at the last moment, when from the pressing necessity of the case, the Court is obliged to act immediately. Cases occur therefore, which afford no opportunity either to the counsel or the Court, for that reflection and examination, which might consist with the advancement of justice; and although an argument was heard in this case upon the rule to shew cause, the notice was necessarily too short to admit of careful preparation. It does not seem to me, that there is any good reason why the Court should not allow the defendant to go into the question of a want of equity in the bill, for if it can be made to appear that the Court has improvidently issued the writ, it ought to be discharged. It is true, that the question whether the bill presented a case for the equitable jurisdiction of the Court, might be brought up by plea or demurrer; but as the bill prays no ultimate relief, and seeks no final decree, but its whole object is confined to the injunction, I do not see why the defendant should not be allowed to present it upon this motion. In the case of *Minturn v. Seymour*, 4 John. Ch. Rep. 173, the motion was to dissolve the injunction, although the defendant had not answered, on the ground of a want of equity in the bill. The injunction had been allowed by the Chancellor. It was objected to the motion, that the defendant had not answered, and it was insisted, that except in cases where the injunction had been allowed by a master, the defendant is not entitled to move to dissolve before he has answered. The Chancellor overruled the objection. It was replied to this case, that according to the New York practice, the injunction is allowed without argument in the first instance. But with us, although it is usual to grant a rule to shew cause, yet the argument is often so hurried, as to render more deliberate investigation desirable. In the case of *James' adm'or v. Jefferson*, 4 Hen. & 363 *Munf.* 483, \*the motion was to discharge the injunction as improvidently granted. The Chancellor said, "I had very great doubts at first about granting the injunction, but as the defendant is in contempt, the bill having been taken for confessed after injunction granted for want of answer, the motion comes from him with rather a bad grace."

I proceed now to consider the ground upon which this motion rests. The affidavit which has been filed, simply brings to the notice of the Court the interest of Whiteman and Hunt, as assignees of the judgments, and represents the claim of the

complainants as one of long standing, over which they have slumbered and delayed for a great length of time, whilst the defendant's claim is stated to be one, founded on recent contract, for valuable consideration, without notice, and reduced to judgments. These are the principal facts stated in the affidavit. The general denial of equity of the bill founded upon the ignorance of the defendant as to the facts stated in the bill, can have no effect whatever. The equity of the bill is founded in a right derived from an alleged lien, growing out of the deed of trust and the Act of 1799. This basis upon which the complainants' claim rests, is not removed by the affidavit. Whatever effect may be given to the neglect and delay of the plaintiffs in enforcing their claim at an earlier period, on a final decree upon the merits, I am not disposed, under the circumstances of the case as disclosed by the bill, to consider it as authorizing the dissolution of the injunction. The general principle to be collected from the books is, that a person applying for an injunction, must shew an actual or probable right to the estate. This doctrine gathered from works on Chancery jurisdiction, was most explicitly stated in the case of *Georgia v. Brailsford*, (2 Dall. 402, 415,) where Judge Johnson says: "In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated, without this special interposition of the Court." Judge

364 Iredell says: "It is too \*early upon a motion for injunction to express an opinion upon the title in collision; it is enough on a motion of this kind to shew a colourable title." In a case in *South Carolina*, *Wilson v. Wilson*, (1 Dess. Rep. 224,) the Court said it would not give any opinion upon the merits of the case, that whether the bond could be supported or should be defeated by the defeazance, must remain to be decided when the whole merits should be gone into. But that there did appear upon the face of the bond a right in the complainant, and that to give an opportunity to go into the whole merits, it was necessary to grant an injunction to prevent in the mean time any disposition of the property.

It is said in *Dick*. 149, that a party applying for injunction must shew a specific right in the property, and that it is in danger.

In the case of *Birch v. Corbier*, (1 Brown, Ch. Rep. 571,) the plaintiff filed a bill claiming an equitable lien on stock. The Bank hearing of suit refused to permit a transfer. It was moved that the Bank might be ordered to transfer. The Lord Chancellor said, this was in fact requiring a decree in the cause, by an interlocutory order, for the defendant must undertake to prove that the complainant has no lien on the stock.

The simple inquiry in this case is, whether it appears from the allegations of the bill, that the complainants have a prob-

able right, and that this right is in danger of being defeated unless the Court interposes.

The complainants, as has already been stated, contend for a lien upon specific property under the deed of trust and also by virtue of the Act of 1799. It is insisted by the defendant, that the deed is not a conveyance in trust from James Read to Gen. Read, but that it is an absolute conveyance with a confidence reposed, which does not entitle the plaintiffs to any lien; and they further say that if the Act of 1799 has any application to this case, it merely secures a priority in payment, but gives no lien.

365 It is not my intention \*to express any opinion upon these points and many others raised in argument against the merits of complainants' claim, but believing, as I do, that the complainants have presented "a fair foundation for future judicial investigation," that they have exhibited a colourable right upon which they may obtain a decree, that will entitle them to be paid in preference to the present judgment creditors, when the whole merits are gone into, upon plenary hearing, it only remains to inquire, whether that right is in danger of being defeated, unless this Court interposes.

If the money now detained in the hands of the Sheriff, be permitted to be drawn out by dissolving the injunction absolutely, how will the complainants enforce their decree, should they succeed in establishing their lien? It was argued for the defendants, that if the plaintiffs had a lien, it would follow the property into whatever hands it might go; and as the land could not be eloiigned, the plaintiffs needed no assistance. I have looked carefully to this suggestion, and after giving to it the best reflection of which I am capable, I cannot acquiesce in the propriety of leaving the complainants to the chance of reaching this property in the hands of third persons. Besides they may succeed in establishing a lien under the trust deed, upon the specific property, which consists of negroes and fail under the Act of 1799. The motion to dissolve the injunction absolutely, is therefore overruled.

Whilst the jurisdiction of the Court as to injunction, is a most useful one, without which the benefit of an equity against proceedings at law could not be had, it is necessary to be extremely careful, that this power be not used to delay justice and unnecessarily to hinder the enjoyment of a legal right. The sum of money now detained in the Sheriff's hands is large, and the annual interest upon it considerable. Although it be true that the Court would dissolve the injunction unless the complainants used every diligence in their power to speed their cause in the Circuit Court, yet the money is detained indefinitely, and

366 it may be necessary, \*notwithstanding the best exertions of the complainants, to retain it for some time. The defendants represent themselves as judgment creditors, and consequently as having



an established and legal right. All that the plaintiffs can ask for, is that the Court should so far interpose, as to enable them ultimately to enforce their decree should they succeed in establishing their lien. That the defendants should not be unnecessarily hindered in the enjoyment of a right which they have established at law; that this large sum of money might not be held in a situation wholly unproductive and for an indefinite term, and at the same time, that the plaintiffs may be protected in any right which they may succeed in establishing, I have come to the conclusion to dissolve the injunction conditionally; and the condition is, that the defendants Whiteman & Hunt, who are understood to be highly responsible individuals, and purchasers of the property of Gen. Read, do give a bond with good and sufficient securities to be judged of by this Court, payable to the complainants in the sum of \$17,000 conditioned for the forthcoming of the property to answer such decree as the plaintiffs may obtain, and for the payment of which they shall be decreed to have a lien upon the specific property, under the trust deed, or upon the general estate of Gen. Read, under the Act of 1799; and upon failure to produce the property, then conditioned to pay to complainants the amount of their decree so established. In order to this, it is necessary that the defendants, Whiteman & Hunt, be made parties to this bill; and in this there is some difficulty.

They represent themselves by their affidavit, as assignees of the judgments, and as willing to be made parties, and move to be made defendants in the bill. This is not a regular motion. But as it is a case simply of injunction, and the motion is made to a Court of equity by those really and beneficially interested in the judgment at law, the Court will compel the plaintiffs to amend their bill by making Whiteman & Hunt defendants, without prejudice to the injunction, as it now stands by the amendment, and upon their refusal

367 \*to do so will dissolve the injunction. This course was adopted in the case of *Harrison v. Morton*, (4 Hen. & Munfd. 483.)

Should these defendants thus made parties to the bill decline to give the security required, in which case the injunction will stand continued, they will be entitled to the benefit of the bond which was ordered to be given by the complainants upon granting the injunction. To this end, a new bond must be executed by the complainants, payable to these defendants in a like sum and conditioned as the former bond.

Habersham & Owens, for complainants—  
B. F. Hunt, Nicoll & Gordon, for defendants.

368 \*Stephen C. Green v. The Mayor and Aldermen of Savannah.

January, 1832.

**Inspection Laws—Constitutionality—Imports and Exports.**—Inspection laws may be constitutionally

applied not only to the produce of the country to be exported, but to imports brought in for the purpose of sale within the State.

**Same—Same—Same—Case at Bar.**—And therefore, an Ordinance of the city of Savannah made under the authority of an Act of the Legislature of Georgia, inflicting a penalty on any person who should sell domestic liquors within the limits of the city, without having them gauged and inspected by the City Inspector, to whom a small compensation was to be paid by the vender, was held to be an inspection law, and constitutional, both as to the thing to be done, and the compensation to be made, and that its penalties might be properly enforced against the importer of the liquors, in the original casks, who had sold the same, without having them gauged, &c.

**Statutes—Title—Descriptive Generally of Purposes of Act—Effect.**—The Constitution of Georgia declares that no bill or ordinance shall pass containing any matter different from what is expressed in the title thereof; *Held*, that although under this clause so much of a statute as contains matter different from what is expressed in the title thereof, will be void, yet that it was enough if the title was descriptive generally of the purposes of the Act, and that it was not necessary that it should particularize the several provisions and amendments contained in the body of the act.

By LAW, Judge.

Under an Ordinance of the city of Savannah, the petitioner S. C. Green was fined in the sum of thirty dollars for a violation of said Ordinance, by vending certain casks of liquors, which he had imported from the State of Rhode Island, without having them gauged and inspected according to the provisions of said Ordinance.

The grounds stated in the petition and alleged as error, are 1st. that the Ordinance did not give the corporation the power of finding, in as much as the petitioner was the importer of the articles, and sold them in the original casks.

2. That if the Ordinance does confer such power, it is not authorized by any Act of the Legislature.

3. That if any such Act exists, it, 369 together with the Ordinance, \*violates the provisions of the Constitution of the United States, which prohibit a State from laying imposts on exports or imports; and which give to Congress the power to regulate commerce with foreign nations and among the several States.

**\*Statutes—Title—Descriptive Generally of Purposes of Act—Effect.**—In *Howell v. State*, 71 Ga. 237, it is said: "None of the decisions made by our courts ever went further than to require that it would be sufficient 'if the title was descriptive generally of the purposes of the act, and that it was not necessary that it should particularize the several provisions contained in the body of the act.' All that was essential to its validity was that it should not contain matter 'different from what is expressed in the title.' *Green v. The Mayor, etc., R. M. Charlton's R.* 368; *Smith and Wife v. Oliver, Dudley's R.* 191, and numerous decisions of this court and the courts of other states whose constitutions contain a similar provision, cited in note, 7, *Cooley's Const. Lim.* p. 178."

The Ordinance subjects all persons who sell within the city of Savannah any domestic distilled liquors, without having the same gauged and inspected by the city gauger and inspector, to the payment of a fine not exceeding \$30. It requires the payment of a small compensation to the officer for the service performed. The Act of the Legislature of 1825, Sec. 16, enacts, that the said Mayor and Aldermen shall have power to pass ordinances (among other things,) for the inspection of all articles and produce sold within the limits of the city of Savannah and hamlets thereof, and to appoint inspectors, gaugers, &c. for the purpose of carrying into effect all such ordinances as may be passed by virtue of the authority hereby granted, and to fix their fees, &c. The 11th Sec. of same Act and the 3d Sec. of Act of 1787, authorises the corporation to inflict or impose such pains, penalties or forfeitures as shall be conducive to the good order and government of the city.

The question for the consideration of the Court, then is, whether this Act and Ordinance, when applied to a sale made by the importer of the articles in the original casks or packages, violate the provisions of the Constitution referred to? And first, with reference to that provision which declares, that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, &c. Under the provisions of the Ordinance, there are two things to be considered, viz: 1. the requirement to have liquors sold within the city gauged, under the penalty prescribed; and 2. the fee allowed to the officer for the service performed. It is not strictly necessary, that I should consider the latter in order to the

370 adjudication of every principle directly presented \*by this case; the injury complained of is not the payment of the fee allowed the officer, but it is the fine imposed for refusing to allow the liquors to be gauged. As however, it may be important and desirable to have the question, as to the right to impose the tax for the purpose of the fee decided, I have determined to decide the whole at once. It is obvious from the very words of the exception to the prohibition upon the States in the 10th Sec. 1st Art. of the Constitution of the United States, that the right in the States to pass inspection laws is recognised by that instrument itself. And whilst they are passed in good faith for the purposes for which they were rightfully designed, that is, to improve the quality and condition of articles to be exported, and thus to facilitate their sale, and acting upon articles imported and to be sold within the State, to prevent impositions from being practised on them, whilst these are their objects, and they are not resorted to as a means indirectly of raising revenue, they are unquestionably protected by the exception. The law under consideration is of this class, it is an inspection law, whether we test it by

the general signification of the term, or by an examination of its nature, tendency and object. Its direct object is, to improve the quality of liquors vended in the city, and to prevent impositions in the sale of them. Almost every exercise of police power, intended to promote health or to improve or facilitate commerce within the State, is considered as falling under this class of laws, and embraced in the exception to the prohibition relied on. Inspection laws are not confined, as was supposed in the argument of this case, to the produce of the country to be exported, but apply as well to imports brought in for the purpose of sale within the State. The inspection laws of other States act as well upon importations as exportations. Such is the understanding of the Supreme Court of the U. States in regard to them, as is apparent from its remarks in the case of *Brown v. State of Maryland*, (12 Wheat. 438.) And it appears to me from the very nature of the power to be exercised, in order to attain the

object of inspection laws, they must 371 frequently \*act upon imports as well as the products of the country, otherwise the community would be subjected to all the consequences of unsound and deleterious articles, without the possibility of detection or prevention. But when it is said "No State shall without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," I apprehend the right to tax imports as well as exports, for the purpose of executing inspection laws, is admitted. It results, that so far as this prohibition in the Constitution affects the question, a State has the right to lay a tax upon imports, the object of which is to pay for services performed in inspecting the articles. I consider it unnecessary to enlarge. I entertain no doubt of the constitutionality of the Ordinance, both as it regards the thing directed to be done and the compensation to be made.

Another ground of error, assigned in the petition, is, that the Act and Ordinance are violative of the right of trial by Jury, as secured to the citizens by the Constitution of the United States and of this State. The question here presented was considered by the Court in the case of *Low and the Commissioners of Pilotage*,\* and its opinion fully expressed upon it, in the decision made in that case. As it regards the Constitution of the United States, there is no question; and I adhere to my views then given upon the words of the Constitution of Georgia, until the opinion of the Judges in convention can be known. There are various grounds taken by the counsel for the petitioner, and which were not stated in the petition. Our rule of Court declares that no other grounds shall be insisted on at the hearing than those stated in the petition for certiorari. I will nevertheless advert to the principal points suggested,

\*Supra p. 314.



as doubts and difficulties have been raised upon the Act of 1825, upon which it may be desirable to have the opinion of the Court.

1st. It is said that the Act of 1825 is violative of the 17th Sec. of the 1st Art. of the Constitution of Georgia, because its title is at variance with the body of the Act. There is no doubt that under this provision of the Constitution, so much of a statute as contains matter different from what is expressed in the title, is void. The title to the Act of 1825 is professedly to amend and consolidate the several acts which have been passed in relation to the privileges and powers of the corporation of Savannah. It can hardly be supposed necessary, I apprehend, to a compliance with the Constitution that every amendment intended to be made should be particularized in the title, or that all the particular amendments, as enacted in the body of the Act, should be specified in the title. An Act, the title of which declares it to be for the better regulating the town of Savannah, or to amend or enlarge the powers of the corporation thereof, it is thought, would be sufficient, without enumerating the particulars in which those powers were to be enlarged or extended. And if this be not so, there is no general Act incorporating a town in Georgia, which is a compliance with this section of the Constitution. There is no matter contained in the 16th Sec. of the Act of 1825, different from what is expressed in the title, and it is that which the Constitution prohibits.\*

2d. It is said that the fining power in the 11th Sec. of the Act of 1825, cannot be carried into effect, because there are pencil interlineations in the original enrolled Act in the Secretary of State's office. The difficulty of rejecting such interlineations and giving effect to the Act, if enough remained, does not strike me, and this section is perfect, as I understand it, to the proviso. But the third Sec. of the Act of 1787, confers upon the corporation, in almost the same words, with the Act of 1825, until we reach with the proviso in the latter Act, the power to inflict fines and penalties for a violation of city ordinances. The amount of the fine in this case does not render it necessary to resort for its authority to the 11th Sec. of the Act of 1825.

373 3d. It is said that the Act only authorises the inspection of merchandise sold within the city; and that the Ordinance directs them to be inspected as soon as they are brought in. It is a rule well understood, that laws of this kind must be construed strictly and according to the letter, and if a case were to occur in which a fine was inflicted, for refusing to suffer the inspection before any sale of the article was made, I do not perceive how the operation of this rule could be avoided—I mean to be understood, that it is the act of subsequent sale, in connexion with the

omission or refusal to have the articles inspected, which renders the seller obnoxious to the fine. In the present case the petition itself sets forth the fact that the liquors were sold by the petitioner, and consequently no such question can arise here. I am of opinion that the proceedings of the corporation in this case, ought to be affirmed, and the petition for certiorari is therefore discharged.

M. H. McAllister, for plaintiff—John C. Nicoll, for def't.

374 \*Charles Seton v. James R. Hanham.

January, 1832.

State—Meaning When Used in Constitution.—The term "State" when used in the Constitution of the United States, is confined to a member of the American Confederacy.

Federal Statute Prescribing Mode of Proving Decisions of Court of Territories—Constitutionality.—So much of the Act of Congress of 27th March, 1804, as extends the provisions of the Act of 1790, (regulating the mode of proving in one State the judicial proceedings, &c. in another State,) to the Territories of the United States, so as to prescribe the mode of proof or the effect to be given to a judgment of a Court of a Territory, in the Courts of a State, is unconstitutional.

Same.—Same.—The States possess the right of legislating on the subject.

By LAW, Judge.

A verdict for the plaintiff was rendered in this case, upon the evidence afforded by an exemplification of a decree in Chancery from a Court of the Territory of Florida, proved according to the Act of Congress of 1790. A motion is made for a new trial upon the ground, (among others,) that this evidence was improperly admitted, because, it is contended that the Act of Congress of 27th March, 1804, extending the provisions of the Act of 1790, to the Territories of the United States, and Countries subject to the jurisdiction of the United States, is unconstitutional.

After the most careful examination of this subject, which I am capable of giving to it, I have come to the conviction that the term "State," when used in the Constitution of the United States is confined to a member of the American Confederacy; that it does not embrace a Territory of the United States; and that consequently, Congress had no authority under the Constitution to pass the Act of March 1804, extending the provisions of the Act of 1790 to the Territories of the United States, so as to prescribe the mode of proof, or the effect to be given to a judgment of a Court of a Territory, in the Courts of a State of the

375 Union. So much of the Act of March 1804 is therefore held to be unconstitutional and inoperative upon the Courts of a State. The States possess the right to legislate upon this subject.

The determination of this question, renders unnecessary the consideration of the

\*See *Smith & Wife v. Oliver, Adm'r*, (Dudley's Rep. 191, S. P.)—(Ed. of Original Edition.)

other grounds, upon which this motion was based.

It is ordered, that a new trial be granted.

C. S. Henry, for plaintiff—J. W. Jackson & John C. Nicoll, contra.

See *Hepburn v. Ellzey*, (2 Cranch. 445;) *Corporation of New York v. Winter*, (1 Wheat. 91, 1 Kent's Com. 349, 385, 3d edit.) *Sturges v. Davis*, decided in the Supreme Court of New York, (not reported.), cited in 1 *Paine & Duer's Practice*, 11, 12, 2 Bibb, 334. —(Ed. of Original Edition.)

376 \*Joseph C. Habersham, Comp't, and James D. Huguenin, Adm'r, and William Weightman, Def'ts.

May, 1832.

**Equity Practice—Liability of an Estate for Medical Services Rendered Negroes.\***—Where the bill alleged that complainant had performed medical services for negroes belonging to an estate, on the faith of such estate, and at the instance of the executor thereof, who had since died insolvent; HELD, that in equity such creditor had a right to resort to the estate, in the hands of the administrator de bonis non, for payment.

**Executors—Individual Note Given Contract Creditor—Liability.**—Quære, if the individual note of the executor of an estate, by a simple contract creditor thereof, would operate to charge the executor personally, and to discharge the estate from such debt.

By LAW, Judge.

The bill in this case alleges that the complainant, as a practising physician of medicine, attended upon the negroes on the plantation of the late Gen. Jacob Read, prescribing for them in sickness and furnishing medicines for several years, commencing in 1825, and ending in October, 1830; that these services were rendered and performed at the instance and request of the executor, and upon the faith and credit of the estate. A small part of the account, is for services rendered after the death of the executor, and when the plantation was under the control of the overseer. The bill states that Gen. Read died largely indebted

\***Trust Estates,—Liability for Services Rendered.**—In *Wylly v. Collins*, 9 Ga. 223, it is held that trust estates are liable to pay out of their income for goods and services furnished or rendered and such as are necessary and proper. The court in its opinion on page 233, says, JUDGE LAW in *Habersham v. Huguenin*, R. M. Charl. 376, examined this doctrine, particularly in reference to this description of trust property, consisting in plantation and negroes, and requiring, as necessary to their utility and even existence, supplies of utensils, food, clothing and medical attendance, and came to the conclusion that upon principle, as well as the authority of adjudicated cases, the Carolina decisions, which he cites as authority for holding trust estate liable for such claims, are perfectly just and equitable and in accordance with sound policy.

to Weightman, and that the executor confessed judgment in the Circuit Court of the United States for fifty-seven thousand dollars in 1824, which was renewed by scire facias in 1827; that Huguenin qualified as administrator at the instance of Weightman, as principal creditor; that Huguenin received into his possession the whole of the estate, which remained unadministered, and which it charges, was sufficient to pay all the debts. The bill further charges that Huguenin did, with a view to give a preference to Weightman, and contrary to the statute of Georgia, confess a judgment, not only for the original principal, but also for

the interest, being twenty-eight thousand, seven hundred and ninety-three dollars and eighty-two cents. The bill prays an account of the debt and of the assets of the estate: that the assets may be applied in a course of administration, and that what shall remain after paying debts of a higher degree, shall be decreed to satisfy complainants' demand in whole or pro rata, with the open account creditors—to the exclusion of the judgment for interest confessed to Weightman; and that if Huguenin has already paid that judgment, he may be decreed to be personally liable.

To this bill a general demurrer has been filed. Many grounds have been assigned in support of it, but the decision of it must depend in my judgment upon a single point. If upon principles of law, the services rendered upon this estate, create no charge or debt against the estate: if, as contended by defendants' counsel, the complainant is to be considered as having contracted with the executor who is personally liable to him for compensation, and who has his remedy against the estate for any advances made, or liabilities incurred in his behalf, then it is clear that the plaintiff could be entitled to no relief upon the facts of his bill, and the demurrer would have to be sustained. But if, on the other hand, these services can, consistently with principles of justice and equity, and supported by adjudicated cases, create a charge upon the estate, and constitute the complainant a creditor thereof, then it is equally obvious that the bill must be answered, and the demurrer consequently overruled. It is not necessary to go into any question affecting Weightman's judgment on the right of the plaintiff to stand in the place of the executor, and come here for a lien upon the estate; for, considering him only as a simple contract creditor of the estate, he is entitled to have his bill answered and to have an account of the assets from the administrator. When the answer comes in, and the precise condition of the estate is ascertained, should it be rendered necessary, it will then be time enough to

adjudicate the other questions raised in the case, and considered as a case between a creditor of the estate, and the legal representative, for an account of assets in his hands, liable to the payment of debts. I see no necessity for making



other persons parties than those before the Court. I proceed to the consideration of the point stated. It is contended as a general principle, that an executor has no power of charging the effects in his hands to be administered, by any contract originating with himself; that he cannot upon his own contract render the estate liable to be taken in execution. And this does appear to me to be the result of the cases on this subject at law. But there is a class of cases where the estate has been charged in equity at the instance of the creditor, for supplies furnished, and services rendered, which were necessary to its existence. Many cases of this kind have occurred in South Carolina, growing out of the description of property consisting in plantations and negroes, and requiring as necessary to their utility, and even existence, supplies of utensils, food, clothing and medical attendance. The case of *Carter v. Eveleigh*, (4 Dess. Eq. Rep. 19,) was a case in which a saw gin was purchased for the use of the separate estate of the wife, by the husband, the manager of it. The bill was filed by the seller to make the trust estate liable. The Chancellor decreed, that as the gin was bought for the trust estate, as it belongs to it, and has not been paid for, it is but just that the complainant's demand should be satisfied out of the estate. The Court of Appeals unanimously confirmed this decree—overruled the demurrer, and ordered the defendants to answer. In the case of *James v. Mayrant*, (4 Dess. Eq. Rep. 591,) a factor had furnished supplies to a plantation: the Court referring to the foregoing case, re-affirms the decision. *Montgomery v. Eveleigh* and others, (1 M'Cord's Ch. Rep. 267.) The plaintiff was the endorser upon a note given by Wm. Eveleigh for the purchase of corn, for the subsistence of the negroes belonging to a trust estate of his mother. Ch. Desaussure decides, that the trust estate is liable. It would, he says, be a fraud on the public, to protect a trust estate from such a demand. It would

379 be destructive to such \*estates if they were not so liable, as it would take away all credit, when the slaves might be perishing for want of food, or dying for want of medical aid. The case of *Douglass v. the Ex'or of Fraser*, in 2 M'Cord's Ch. Rep. 105, was that of a debt partly owing by the testator in his life time, and in part contracted by the executor for goods, &c. for which the executor had given his own note. The executor was insolvent, and the bill was filed against him to subject the estate in his hands to the payment of the debt. The Chancellor decided the estate to be liable; upon appeal that decree was confirmed, Judge Nott remarking, that the mere circumstance of the executor having liquidated the demand, cannot exempt the estate from the payment of a debt otherwise chargeable upon it. The previous cases are again referred to and approved. In relation to this last case, I do not intend to be understood as intimating any opinion upon the question, how far the taking of a prom-

issory note from an executor, considered as an admission of assets, would go to bind him personally, and to discharge the simple contract debt for which it was taken. In the case before me the simple enquiry is, whether the estate of a deceased person is liable for necessary food, or clothing or medical aid furnished for its benefit. The decisions referred to are those of a sister State in which principles have been applied, that considered with reference to the necessities of this kind of property in particular, appear to me perfectly just and equitable, and in accordance with sound policy. In this case the bill charges that the executor is dead and insolvent, and the plaintiff must lose the labor of several years bestowed upon this estate for its benefit and preservation, if his only remedy be against the executor. I think it right, upon the facts stated in this bill, that as the estate has had the benefit of his services, it should respond to his claim. The demurrer, therefore, is overruled.

Habersham & Owens, for plaintiff—John C. Nicoll, for defendants.

380 \*John Shellman, Trustee, and Eliza C. & Robert H. Pettigrew, Compl'ts, and Benjamin F. Scott, Def't.

May Term, 1832.

**Bonds—Interest Payable Annually—Mortgage to Secure—Proviso for Foreclosure upon Failure to Pay First Year's Interest—Validity.**—A Bond was made payable at a distant day, with lawful interest payable annually, to secure which, a mortgage was given with a proviso, that in default of payment of the principal sum, or the interest, at any time when the same should become due, it should be lawful to foreclose the same: **Held**, that the mortgagee had the right, from the contract of the parties, to foreclose the mortgage, and collect the whole debt, principal and interest, on the failure of the mortgagor to pay the first year's interest when it became due.

**Injunctions—Special Circumstances.\***—An injunction may be retained under the special circumstances of the case, though the defendant has filed his answer, fully denying the equity set up by the bill.

**\*Injunctions—When Granted.**—As a general rule, it is undoubtedly true, in a court of equity, that, if the answer of a defendant denies all the equity contained in the complainant's bill, an injunction, if permitted to issue, will be dissolved, upon the coming in of the answer; otherwise it will be continued to the hearing. *Eden on Injunct.* 86; *Hoffman v. Livingston*, 1 John. Chan. 211. But there are some particular cases, in which the court of equity will continue an injunction, even although the defendant may have fully answered the equity set up in the bill. But this must rest in the sound discretion of the court, and is governed by the peculiar nature and circumstances of the case. *Roberts v. Anderson*, 2 John. Chan. 205; *Shellman v. Scott*, R. M. Charl. 381; *Cornwise v. Bourghum*, Ga. Dec. pt. 2, p. 16.

By LAW, Judge.

This is an application to dissolve an injunction upon the coming in of the defendant's answer.

The object of the bill was to restrain the defendant from proceeding upon the foreclosure of a mortgage on personal property. The mortgage was foreclosed for the whole debt, principal and interest; and it is now urged against the motion to dissolve, that the principal is not yet due, and that the right to foreclosure and to collect the whole debt did not accrue upon a default to pay one instalment of interest due. This depends upon the construction to be given to the following provision in the mortgage, viz: "and if default shall be made in the payment of the principal sum aforesaid, or in the payment of interest at any time when the same shall become due, then in any such case, upon any such default, it shall and may be lawful to and for the said Benjamin F. Scott, his heirs &c. to grant, sell, &c." The bond to secure which the mortgage was given, was payable in 1836, with lawful interest payable annually. But these parties were capable of making their own contract, and affixing such conditions as they thought proper. They have expressly declared in this instance, that upon  
381 failure to pay \*any instalment of interest when due, it shall be lawful for the mortgagee to foreclose, &c. It is manifest that by the agreement of the parties themselves, upon default to pay the interest due, the principal debt became due, and consequently that the right exists to collect the whole debt.\*

It is further objected that the answer in this case, is not such a denial of the whole equity of the bill, as will authorise this motion. The general rule, that an injunction is to be dissolved when an answer comes in and denies all the equity of the bill, is too well understood to require affirmation, and yet, even to this, there are exceptions; for in particular cases the Court will continue an injunction, though the defendant has fully answered the equity set up, (3 John. Ch. Rep. 105; Wyatt's P. R. 236; 2 Ves. 19.) In the former of which cases the Chancellor says, the granting and continuing to the process, must always rest in the sound discretion, to be governed by the nature of the case. The undenied fact in this case, that two of the negroes for whom the debt was incurred, are so diseased as greatly to impair the real value; the expression of the defendant's belief and opinion in one case, that derangement was feigned, and the omission wholly in the other to communicate the existence of a disease which could not be detected, which greatly reduces the value, and from which I apprehend there is seldom an entire recovery, present a case in which I think the complainants entitled to the interposition

of this Court, until they can have a hearing upon the merits. The defendant acquits himself in his answer of all intentional and designed concealment, but legal consequences may notwithstanding attach. I design to communicate no opinion upon the merits, further than may be absolutely necessary to disclose the ground upon which the injunction is continued. The motion  
382 is refused, and the injunction is continued, \*with the intimation to the plaintiffs that they must speed the cause and bring it to a hearing at the next term.

Injunction continued.

M. H. McAllister & R. R. Cuyler, for compl'ts—Wm. W. Gordon, for def't.

383 \*Howland, Ward & Spring v. John I. Dews, Ex'or of W. C. Butler.

May Term, 1833.

**Fraudulent Conveyances—Possession Taken after Death of Vendor—Liability to Creditors.**—It seems, that where possession of goods is taken by a vendee, after the death of vendor, under a deed fraudulent as to creditors, the vendee is liable to the creditors of deceased vendor as executor de son tort.

**Same—Possession Taken before Death of Vendor—Liability to Creditors.**—And where the vendor remained in possession of the goods after the execution of the deed, and the vendee took possession the day before the death of the vendor, and whilst he was in extremis, and the Jury found by their verdict that such deed was fraudulent; HELD, that the vendee was chargeable to the creditors of deceased vendor as executor de son tort.

**Same—Same—Same—To Legal Representative.**\*—But it seems, in such case, that the vendee can only be charged at the suit of creditors of vendor and that his legal representative has no remedy.

**Same—Same—Mistake.**—And it seems, that the vendee is not chargeable as executor de son tort, if he took possession under mistake, or without fraud.

**Executor De Son Tort—What Constitutes.**†—If one takes possession of the goods of a deceased person, claiming to be executor, or does those acts which only an executor can do, he may be charged as executor de son tort, though there be a rightful executor or administrator.

**Same—Same.**—So if the intermeddling be before pro-

**\*Fraudulent Conveyance by Testator—When Executor May Set Aside—Creditors.**—In the case of fraud committed by the deceased in his lifetime, it has been held that while his creditors may set the transaction aside on that account the executor or administrator cannot do so in any case where the testator or intestate had no authority to bring an action. *Fouche v. Brower*, 74 Ga. 270, citing *Crosby v. DeGraffenreid*, 19 Ga. 290; *Clayton v. Tucker*, 20 Ga. 452; *Beale v. Hall*, 22 Ga. 431.

**†Executor De Son Tort—Right to Give Third Person Control of Estate.**—An executor *de son tort* can give to a third person no legal control of the decedent's property. *Wyllie v. King*, Ga. Dec. pt. 2, p. 13, citing *Ward v. Dews*, R. M. Charl. 388.

\*See *Goodtitle v. Notitle*, (11 Moore, 491; 22 En. Com. Law, Rep. 420;) *James v. Thomas*, (5 Barn. & Adol. 40; 27 En. Com. Law, Rep. 26.)—(Ed. of Original Edition.)



bate, or grant of administration to rightful representative.

**Same—Liability—Case at Bar.**—D. sued as executor of B. pleaded. 1st. "Ne unques executor; 2ly. Outstanding debts of equal dignity with plaintiffs." The acts done by him having made him executor de son tort, and the Jury having therefore found the first plea against him; HELD, that having plead a plea false within his own knowledge, he was liable to plaintiffs' demand, however small the assets in his hands; that he was not entitled to reduce the plaintiffs' verdict against such assets, by proof of outstanding debts of equal dignity, and that the verdict of *de bonis testatoris, si vel non de bonis propriis*, for the whole of plaintiffs' demand, was proper.

By LAW, Judge.

It appears from the evidence adduced upon the trial of this case, that W. C. Butler, being indebted to one Shaw, made and executed a bill of sale to him of all his stock in trade: that Butler remained in possession, and continued to sell and dispose of the goods: that a new set of books was opened in the name of Shaw: that shortly after, upon Shaw's leaving the State, he gave to Butler a power of attorney to act for him, in selling and disposing of the said goods. It further appeared that Butler was indebted to the defendant in a

sum of money, for certain promissory  
384 \*notes of the defendant which he had loaned to Butler to raise money upon; or for liabilities by indorsement under which the defendant had come for him, Butler: that in consideration of this indebtedness on the part of Butler to Dews, an inventory or list of the articles in the store was taken and made out, and Butler, as the agent of Shaw, acknowledged by his receipt at the bottom of said inventory, to have received from the defendant, a certain sum of money in payment for the said articles. In other words, that Butler, as the agent of Shaw, conveyed the stock to Dews, to pay or secure the debt due from Butler to Dews, and which transaction was evidenced by the bill of parcels and receipt before stated. It also appeared that Butler remained in possession and continued to sell and dispose of the goods until the day before his death, on which day, whilst Butler was in extremis, Dews shut up the store; and subsequently to Butler's death, sold a part of the goods at private sale to a commercial firm in the city, and sent the balance to auctions where they were sold by his directions, and the proceeds paid to him.

The present action was brought by the plaintiffs who were creditors of Butler, against the defendant, as his executor. The defendant pleaded *ne unques executor*, and (among other pleas), various outstanding debts due by Butler, of equal dignity with the plaintiffs'. The Jury returned a verdict for the plaintiffs, and this motion is made for a new trial, upon various grounds, which I will now state and consider. 1st. It is said that the defendant took possession of the goods before the death of Butler, and

was therefore only a trespasser and not liable to be charged as *ex'or de son tort*. In order to determine this point, our enquiry is directed to the effect of a possession, taken under a fraudulent conveyance as against creditors. It is conceded, that, when a man takes possession under colour of title, though he had failed to make out that title completely in every respect, yet he shall not be deemed *ex'or de son tort*. Such was the doctrine affirmed by Lord Kenyon in *Flemings v. Jarratt*, (1 Esp.

Rep. 335,) where Peat the deceased  
385 \*had assigned a ship to Jarratt in consideration of engagements under which Jarratt had come on account of the ship, and under which assignment he claimed a lien, and took possession after Peat's death. Flemings had furnished sails for her, and thought to charge Jarratt, as *ex'or of Peat*. Such were the facts in that case. But in the case of a gift or conveyance to defraud creditors, the rule established in England upon the 13 Eliz. C. 5, has been, to construe such gift or conveyance void as to creditors, and the debtor to have died in full possession, with respect to their claims. In 3 Bacon's Abridgment, (Fraud C. p. 314,) it is said, "if a man make a deed of gift of his goods in his life time, by covin to oust, his creditors of their debts, yet after his death, the vendee shall be charged for them." Buller, J., in referring to this authority in *Edwards v. Harben*, (2 Term, Rep. 597,) asks, "in what manner shall he be charged? He can only be charged as executor, because any intermeddling with the intestate's effects makes him so." In this case of *Edwards v. Harben*, the facts were, W. J. Mercer was indebted to Harben, to secure which debt, he gave the bill of sale, with an understanding that the defendant, Harben, should enter upon the effects and sell them after the expiration of 14 days, in case the money should not be sooner paid. Mercer died within the 14 days and Harben entered and sold, and he was held liable, as *ex'or de son tort* at the suit of the plaintiff, another creditor of Mercer. In the case of *Hawes v. Leader*, (Cro. James 270,) it was ruled, that one who took possession of goods under a conveyance fraudulent as to creditors, was liable as an executor *de son tort*, and the same is ruled in *Yelverton 197*. In *Shep. Touchstone 488*, it is said, "Where I take any of the deceased's goods into my hands by mistake, supposing them to be mine own, or under colour of title, as when I have a good deed of gift or sale of them, without any fraud or covin, such an intermeddling will not make a man chargeable as executor of his own wrong, neither may I be so charged in these cases."

Thus it is most clear, according  
386 \*to the English authorities, that where possession is taken under a deed which is fraudulent as to creditors, the vendee is chargeable as *ex'or de son tort*; and the latter authority shews most clearly the difference between such a conveyance and a colour of title free from fraud and

covin. I remark further upon the authority of the case of Edwards and Harben, and the case of Hamilton v. Russel, (1 Cranch 309,) by the Supreme Court of the United States that under the statute 10 Eliz. C. 5, which is in affirmance of the common law, where an absolute conveyance of personal property is made and the vendor continues in possession, this is a circumstance which per se makes the conveyance fraudulent as to creditors. There has been, however, much diversity of opinion as to this. I have been referred in the argument, to the case of King v. Lyman, reported in 1 Root's Rep. 104, in which it was held, in the State of Connecticut, that intermeddling with the goods of a deceased person, held by a bill of sale from the decedent, although it be fraudulent, will not make a man an executor in his own wrong. I have not been able to see the report of this case, and do not know the reasoning upon which the adjudication is based. It seems to me to be opposed by all the English cases, and there is a directly contrary decision in another State in the case of Dorsey v. Smithson, reported in 6 Har. & John Rep. 61. It is thus, I think, most obvious, that if this conveyance was fraudulent as to creditors, and the possession of the property was taken after the death of Butler, the defendant would be liable, as executor de son tort. But it is urged, that the defendant took possession, by shutting up the store the day before Butler died. It will be observed in the citation from Bacon's Abr. that the possession was delivered to the vendee, (and yet he was chargeable,) and as Buller, J., says, he could only be charged as executor. In Edwards v. Harben, possession was delivered at the time the bill of sale was executed, by the delivery of one corkscrew in name of the whole. In the case of Osborne v. Moss, (7 John. Rep. 161,) Osborne had recovered a judgment against the intestate in his lifetime, \*and obtained execution and caused the goods to be levied on by an officer, and gave notice of sale for a day certain. Before that day the intestate died. The sale took place, Osborne purchased the chattels, and the officer delivered them to him. It nevertheless appearing that the judgment was fraudulently confessed to defeat creditors, it was held that Osborne might be sued as executor de son tort. In cases of bills of sale, the question of fraud for the most part, has turned upon the fact of a remaining possession in the vendor, inconsistent with the absolute character of the conveyance. And hence, to give effect to the construction upon the statute Eliz. which makes property so attempted to be conveyed, assets of the deceased vendor as much as if no attempt to alien them had been made, the vendor may be charged if he takes possession after the decease of the vendor, as executor de son tort; and although a possession may have been taken, as in this instance, immediately before the death, yet the remaining possession in the vendor from the time of sale until the illness of the party, caused a resort to the

act of shutting up the store, (as the remaining possession for 14 days in Edwards and Harben,) would render the conveyance void as to creditors, and the subsequent intermeddling with the goods by sale private and at auction, and receiving the proceeds, would make the defendant liable to be charged as such executor. The principle is, that a fraudulent bill of sale as to creditors is void, and that any interference with the goods conveyed after the death of the vendor, will make the vendee chargeable. In these cases there can be no remedy in favour of the rightful executor or administrator, because the conveyance is good against grantor. It is the creditors only who can charge the vendor.

The second ground upon which this motion is placed is, that the property was not Butler's, his interest having been divested by his conveyance to Shaw. The law applicable to conveyances made to defraud creditors was fully stated to the Jury, 388 and the \*construction placed upon our statutes of 1818, (to prevent fraudulent assignment, &c. by which one creditor is preferred,) by the convention of Judges, in the case of Claghorn & Wood, plaintiffs in execution, and L. Lamb, claimant, was explained and given in charge to the Jury—and I see no reason to be dissatisfied with the conclusion at which they arrived, upon the testimony, in relation to this transaction. The bill of sale to Shaw was introduced in evidence by the defendant as constituting a link, and in fact, the basis of his title; and the Jury were compelled to decide directly upon the validity of Shaw's bill of sale, because if that had been good, the conveyance to the defendant by his agent would have protected him in this suit. The whole arrangement, therefore, as well the conveyance to Shaw, as that to Dews, must have been considered fraudulent in regard to the other creditors of W. C. Butler.

The third ground maintains the proposition, that there cannot be an executor de son tort, when there is a rightful executor or administrator; and this is generally true, for in such cases any intermeddling makes the person a trespasser to such legal representative. But to this, there are exceptions, as where a stranger takes the deceased's goods and claiming to be executor, pays or receives debts, or pays legacies, or otherwise does those acts which none but an executor can do, in such case he becomes executor in his own wrong, though there be a rightful executor, or administration has been duly granted. So where the intermeddling is before probate, or administration granted, he may be charged as executor de son tort. (5 Co. 33, 36; Salk. 313; 3 Bacon's Ab. 22.) The reason upon which the doctrine here contended for is based, will not hold where mere letters to collect have been granted. And the facts in the case shew, that the acts relied on to constitute the defendant a wrongful executor, were done anterior to the grant of administration.

The fourth ground alleges the fact,



389 that the defendant's plea of "outstanding debts of equal dignity with the plaintiffs' demand, was not allowed. It contends that the verdict should have been for the plaintiffs, rateably with the debts of equal degree in the defendant's plea pleaded. An executor *de son tort*, differs from a rightful executor only in this, that he can derive no benefit to himself from his wrongful act. He cannot charge commissions, he cannot maintain an action; he cannot exercise the right of retainer. But in every other respect, he is considered and treated as executor, and all lawful acts which he does, or payments which he makes in a due course of administration, will be sustained and allowed him. The same form of action is used against him, he is not described as a wrongful executor, but simply alleged to be the executor; he may be joined with the rightful executor in an action against them. He therefore, can plead any plea which a rightful executor may; and this question could not have arisen but for the fact, that the defendant has filed a plea of *ne unques Executor*. (See the statute of Georgia, allowing as many different pleas to be joined as the party pleases.) And the effect of that plea, if found against him, is to make him liable to the plaintiffs' demand, however small the amount of assets in his hands, upon the ground, that it is a false plea within the knowledge of the party pleading it. It is said in the books that where the assets are very small and inconsiderable, and the debt large, relief may be had in equity. But in this case there was but one of the outstanding debts pleaded supported by evidence, that was a note on which Butler was indorser for \$1000, and the assets found in defendant's hands, I think, was between \$1500 and \$2000. The form of the judgment upon the plea of *ne unques executor* found against him, is *de bonis testatoris si vel non, de bonis propriis*. How then could the defendant be benefited by a plea which would diminish the assets in his hands liable to the plaintiffs' demand, and by which his own property would be subjected? Or how can a new trial be granted upon this ground, when upon the pleading if found against the defendant, he would be liable to the plaintiffs' debt without regard to the amount of assets in his hands?

390 \*Upon the whole, having bestowed upon this case the most careful reflection, I am constrained by my apprehension of the principles of law applicable to it, or refuse the motion for a new trial.  
New trial denied.

Wm. W. Gordon, for plaintiffs—Millen & Charlton, for defendant.

391 \*John Jewitt, et al. v. Joseph F. M'Gowen.

April Term, 1834.

Mortgages—Subsequent Judgment—Out of What Sat-

isfied.\*—A creditor who has obtained judgment against his debtor, and levied his execution upon property mortgaged to another person anterior to his judgment, and which mortgage has been properly recorded, can only sell the equity of redemption, of his debtor.

Same—Same—Same.—And therefore, such creditor, and not the mortgagee, is entitled to the proceeds of the sale under such execution.

Same—Foreclosure—Surplus—To Whom Belongs.—A foreclosure of a mortgage, under the statute of Georgia, does not vest the absolute estate in the mortgagee: it only authorises a sale of the property, and the surplus, after payment of the mortgage and costs, belongs to the mortgagor.

By LAW, Judge.

The plaintiffs in the above cases having obtained judgments and issued executions, levied on and sold the negroes and cattle of the defendant to satisfy the same. The Sheriff having declined to pay over the moneys arising from the sale in consequence of notices served upon him, to retain the proceeds subject to the order and distribution of the Court, a rule was taken against him to shew cause. In answer to which, it appears, that the negroes levied on and sold, were mortgaged to F. D. Petit De Villers, who became the purchaser of the property at Sheriff's sales, and contends, that as mortgagee, (his mortgage being foreclosed before the sale, and the execution lodged in the Sheriff's hands,) he is entitled to the money arising from the sale of the mortgaged property, in preference to the plaintiffs in the above cases. As by the shewing made, the negroes only were mortgaged, there can be no reason for refusing the application for payment over to the plaintiffs of the amount arising from the sale of the cattle, being \$120, and which is accordingly so ordered.

To determine the conflicting claims between the mortgagee and plaintiffs in execution, to the proceeds of the  
392 mortgaged property, \*it is necessary to enquire what was the interest in the mortgagor in the negroes, capable of being sold. As a specific lien was created by the mortgage upon the negroes, intended to be a pledge or security for the debt due from the mortgagor to mortgagee, no subsequent judgment obtained against the mortgagor could defeat that lien—the property then could only be sold subject to the lien of the mortgagor, which mortgage could subsequently follow the property wheresoever and in whosoever hands it might be found, and re-sell it. It is then obviously only the equity of redemption of the mortgagor which could be sold. The mortgage was recorded, and besides this, which would have been sufficient notice, the attorney of

\*Mortgages—Rights of Junior Mortgagee.—The junior mortgage has an equitable claim on the fund raised by the sale, after the elder mortgage is satisfied. *Habersham v. Bond*, Ga. Dec. pt. 2, p. 46, citing the principal case at page 51.

The principal case is also cited in *Howard v. Jones*, Ga. Dec. pt. 2, p. 199.

the mortgagee attended the sale and gave express notice of the mortgage. If a stranger or third person had purchased, and the mortgagee had previously agreed to abandon his lien and suffered the entire interest in the property to be sold, coming in for distribution of the proceeds according to priority of lien, there could be no objection to it; and in that case he would be paid according to the date of this mortgage. But in this case, the property is sold subject to the mortgage, by which only its value above or beyond the sum for which it was mortgaged, would be obtained; the mortgagee becomes the purchaser of the equity of redemption, by which the whole estate becomes united in him, and if he may retain the sum bid for the equity of redemption, it must be at the manifest expense of the rights of the judgment creditors. If the property is worth more than the sum for which it is mortgaged, the judgment creditors are entitled to it, and when sold subject to the mortgage, the amount which it brings is, for this purpose, its excess value above the mortgage. None of the rights of the mortgagee are affected, he stands precisely in the situation in which he did, excepting that he has united the whole estate in himself by purchasing the equity of redemption.

In the case of *Jackson v. Hull*, (10 Johnson's Rep. 481,) the creditor sued on the bond, (to secure which he held a mortgage) and obtained judgment and execution. He levied upon the mortgaged premises, and sold them under his execution upon the judgment, it was held that nothing was sold but the equity of redemption, and that the mortgagee might afterwards maintain ejectment against the purchaser for the same premises.\*

In the State of South Carolina, there have been several cases upon the subject. The first is the case of the *Ex'ors of Ashe v. Ex'ors of Livingston*, in 1797, (2 Bay's Rep. 80.) That case would seem to establish the rule in favor of the mortgagee to receive the money in this case, but as it is explained by the Constitutional Court of South Carolina, in a case in 1 McCord's Rep. 399, ex parte the City Sheriff in 1821, it is made to turn upon the preference given to a mortgage over a subsequent judgment by the executor's Act of South Carolina, regulating the distribution of a decedent's effects. And the mortgage in that case having been made prior to the year 1791, when the Carolina statute was

passed affecting the rights and interests of mortgagees, it was considered that upon default of payment, the estate became absolute in the mortgagee, whose estate it was at the time of sale, although ostensibly sold as the property of the mortgagor. In the case under adjudication, the mortgage was foreclosed after the levy and before the sale. It cannot, I think, however, be pretended, that the effect of a foreclosure under the statute of Georgia, is to vest the absolute estate in the mortgagee—it only authorises a sale of the property, and directs the surplus after discharging the debt and costs to be paid to the mortgagor. The

case of ex parte Jacob Stagg, 394. \*in 1 Nott & McCord, 405, would seem also to favor the claim of the mortgagee upon this motion, but it will be remarked in that case, that the only question raised was the priority of lien between the mortgage, and the judgment confessed on the same day, and the reason for that is assigned in the case already referred to in 1 McCord's reports, viz: that both parties had agreed that the whole interest in the land should be sold by the Sheriff, and that the money made should be paid as the Court should decide in favor of the lien. This was agreed to, because the property was not sufficient to satisfy the mortgage, and the equity of redemption was worth nothing.

In the case ex parte, City Sheriff, in 1 McCord, 399, we have a case altogether analogous with the present; certain lots were mortgaged, and it (the mortgage) was recorded, subsequent to which, several suits were commenced against the same mortgagor, and judgments were obtained and executions lodged, and the lots in question were levied on and sold, and at the sale the mortgagee purchased them. The question was, whether the mortgagee or the other creditors were entitled to the money. In that case, after reviewing all the previous decisions, the Constitutional Court of South Carolina decided, that the judgment creditors were entitled to the money. For the reasons here assigned, aided by the authorities cited, I am of opinion, that the plaintiffs in the above cases, are entitled to the money in this case in the Sheriff's hands. It is therefore ordered, that the rule be made absolute, and that the Sheriff do forthwith pay over to the plaintiffs the proceeds of said sales.\*

Counsel—Millen & Charlton, for plaintiffs.—C. S. Henry, for mortgagor.

\*See *McGraw v. McLanahan*, (1 Penn. Rep. 44.) Contra, (cited in 4 Kent's Com. 184, note (a) 3d edit.)

It seems, that the mortgagee may be prohibited from proceeding at law to sell the equity of redemption. *Tice v. Annin*, (2 John. Ch. Rep. 125.)

The New York Rev. Stat. have since the case of *Tice v. Annin*, carried the suggestion therein contained into effect, and the same rule prevails in Massachusetts and North Carolina. *Atkins v. Sawyer*, (1 Pick. Rep. 351;) *Camp v. Cox*, (1 Dev. & Badg. 52; 4 Kent's Com. 184, note (a) 3d edit.)—(Ed. of Original Edition.)

395 \**John S. Coombs v. Isaac Low & Co.*  
May Term, 1834.

**Writs—Amendments.**—A Court has the discretion to

\*JUDGE HENRY at the December Term, 1837. of the Liberty Superior Court, (in the case of *Maxwell, sheriff v. Barnard, adm'r of Law, et al.*) decided, that after foreclosure of a mortgage of personal property, the legal title was in the mortgagee, and that there was no equity of redemption to levy on.—(Ed. of Original Edition.)



allow a Writ to be amended, by the insertion of the name of a party, as defendant, even after plea of abatement filed for the want of proper parties.

By LAW, Judge.

In this case a plea in abatement was filed for want of proper parties, alleging that a co-partner of the firm of Isaac Low & Co. had not been joined in the action. The plaintiff at the term at which the plea stood for trial, moved for, and obtained an order to amend his declaration, by adding the party suggested in the plea. The defendant now moves to set that order aside, as having been improvidently granted.

It is contended, that under the judiciary Act of Georgia of 1799, this amendment cannot be allowed. That statute simply declares, that no petition, or other proceeding, in any civil cause, shall be abated, for any defect in matter of form, or any clerical mistake or omission, not affecting the real merits of the cause; but the Court on motion, shall cause the same to be amended, without any additional costs, at the first term, &c. This statute prescribes as a right, and without terms, in cases of formal defects, what before was discretionary with the Court, and which might be allowed upon terms. But it is a provision applicable only to defects in form, and cannot be construed to divest the Courts of the common law right to amend in matters of substance, according to the discretion of the Court, and upon such terms as justice might seem to require. At common law then, amendments in all cases, are entirely in the discretion of the Court, and are allowed only in furtherance of justice. (See 2 Arch. Pr. 231; 7 Term. Rep. 699.) At common law the Court may amend in all cases, whilst the proceedings are  
396 \*in paper, that is, until judgment signed. (2 Burr 756; 1 Salk. 47; 2 Salk. 566; 3 Salk. 31.)\*

The declaration may be amended at common law in the title, in the venue, in the names of parties, and in the body of the declaration, in form or substance. And with the exception of penal actions, the Court will allow a new count to be added, upon payment of costs. (See 2 Arch. Pr. 235, 6, where the cases in support of these several particulars are collected.) The Court have entertained the application for an amendment in these respects, even after a plea in abatement for the mistake sought to be amended. (1 Str. 11; 3 Maule & Selwyn 450; 7 Term Rep. 698.) Tidd says, upon the authority of many cases collected, that the declaration may be amended, in form or in substance, even after a plea in abatement. (1 Tidd's Prac. 653.) It will be seen by reference to some of the authorities cited, that the Courts have allowed amendments, under particular circumstances, after two terms had elapsed, after issue joined, and even after verdict,

under peculiar circumstances. And the modern practice has certainly been more liberal in allowing amendments than formerly. The order to amend, was taken in this case, under peculiar circumstances. The plea was called for trial, and in the absence of defendant's counsel, was at the disposal of the counsel for the plaintiff. The order was therefore taken without being opposed, and no terms were imposed. The present motion to set aside that order, is opposed upon the ground, that the defendant upon whom service was effected, resides in England, and has left this country; that, consequently, if the suit abates, the plaintiff will have to go into a foreign Court to obtain his rights. It does appear to me, to be a case in which the amendment ought to be allowed. The motion to set aside the order granted, is therefore refused.

John C. Nicoll, for pl'ff—Wm. W. Gordon, for def'ts.

JOHN C. NICOLL,

Elected Judge, November, 1834.

397 \*The State, on the Relation of the Mayor and Aldermen of the City of Savannah v. John I. Dews.

January Term, 1835.

**Public Offices—Power of Legislature to Regulate\*—**

**Case at Bar.**—An Act of the Legislature of Georgia passed in 1834, appointed the Mayor and Aldermen of Savannah, commissioners of the Jail of Chatham County, with power to appoint a Jailor. The custody of the Jail before the passage of this Act, was vested by law in the Inferior Court and Sheriff of the County. The Corporation of Savannah having appointed the Jailor, D. the then Sheriff who had been elected before the passage of the Act of 1834, refused to deliver the possession of the Jail and the custody of the prisoners therein, on the ground that his terms of office had not expired; that he was entitled by law to the

**\*Public Offices—Right of Legislature to Regulate.**—In

*Lyon v. Norris*, 15 Ga. 482, it is said: "In the case of the *State v. Dews* (R. M. Charlton's R. 397), it was held, in what CHANCELLOR KENT has been pleased, and we think justly, to compliment as 'the very able and elaborate opinion delivered by JUDGE NICOLL,' (3 Kent's Com. 454, 5th edition, note b,) that the power of regulating and prescribing the nature of public offices—their duties, powers, privileges and emoluments, was purely legislative, and within the legitimate powers of the General Assembly—and that if the legislature increased their duties and responsibilities, or diminished their emoluments, they must submit, except in those instances in which the constitution, itself, had declared the duty and fixed the compensation; because, in the nature of things, these are the subjects of such regulations as the general welfare may, from time to time, dictate; and offices, therefore, are conferred and accepted, subject to such regulations."

\*But see *Casnard v. Eve*, et al., *Dudley's* (Geo.) Rep. 108.—(Ed. of Original Edition.)

possession of the Jail during such term as incidental to his office, and that the Act of 1834 was unconstitutional, so far as it related to him: HELD, (on application by the Jailor appointed by the Corporation for Mandamus, to obtain possession.) that said Act was not the exercise of judicial power, and therefore did not infringe the Constitution of the State, and that it did not violate the Constitution of the United States, by impairing the obligation of a contract; and Mandamus granted.

**Legislative and Judicial Powers.**—Definition of, and distinction between legislative and judicial power.

**Public Officers—Right of Legislature to Change.**—

Public officers under our Government, are but the naked agents of the body politic, and act only for its benefit. Such officers have no proprietary interest in their offices, and their duties, and rights which are the mere consequence of such duties, may be changed during their continuance in office, by the Legislature, without violating that clause of the Constitution of the United States, which forbids the passage of a law impairing the obligation of a contract.

**Sheriffs—Power of Legislature to Contract or Enlarge**

**Duties.**—A sheriff in the State of Georgia is entirely a ministerial officer whose province is to execute duties prescribed by law, and which duties may be contracted or enlarged at the will of the Legislature.

**Ordinary Acts of Legislature—Not Contracts.**—Laws

passed in the exercise of the ordinary legislative power of a State, are not contracts within the purview of the Constitution of the United States.

**Same—Repeal.**—And laws which repeal or amend them, do not fall beneath the constitutional inhibition.

By NICOLL, Judge.

In the year 1791 the Mayor and Aldermen of the city of Savannah were appointed commissioners of the Court House and Jail of

Chatham County, (Watk. 433,) and, in

1801, they were vested "with full

power and authority to appoint a

Jailor, and such other officers as might be

necessary." They continued in the undisputed enjoyment and exercise of this

power until after the passage of the Act of

1822 "to confirm certain conveyances of the town common of Savannah, made by

the Mayor and Aldermen, and to invest in the Inferior Court and Sheriff of Chatham

County the direction of the County Court House and Jail," by the second section of

which it was, among other things, provided "that from and after the first day of

January (then) next, the direction of the Court House and Jail of Chatham County,

hitherto under the superintendence of the corporation of Savannah, shall be vested

in the Inferior Court and in the Sheriff under the general laws regulating County

Jails in this State, and the Mayor and Aldermen shall thenceforth be discharged

from the rights and duties of commissioners of said Court House and Jail." By an

act passed on the 8th December, 1834, under the title of "an Act to repeal in part the

2d Section of an Act passed on the 21st December, 1822, entitled 'an Act to confirm certain conveyances of the town com-

mon of Savannah, made by the Mayor and Aldermen the commissioners of the Jail of said County,'" it is enacted "that from and after the 1st day of January" then "next, the direction, management and control of the Jail of Chatham County, shall be vested in the Mayor and Aldermen of the City of Savannah and the hamlets thereof, who are hereby constituted the commissioners thereof with all the rights and duties thereto appertaining, with power to them to appoint a Jailor and other necessary officers for a term of years, not exceeding three years."

This Act being passed by the General Assembly of the State, upon which the body politic has conferred "the power to make all laws and ordinances which they shall deem necessary and proper for the good of the State, which shall not be repugnant to the constitution of the State,"

it must have effect, unless the exercise of the legislative \*power upon the subject be restricted by that Constitution, or by "the supreme law of the land," the Constitution of the United States.

This effect is resisted by the defendant, upon the grounds that he was on the first Monday in January 1834, elected Sheriff of the County, and has been duly commissioned and qualified as such; that by the Constitution and laws of the State, he is entitled to hold and enjoy the office of Sheriff with the rights, privileges, emoluments and fees appertaining thereto for the term of two years, and until his successor shall be qualified: that when he was so elected, commissioned and qualified, the Jail of Chatham County was by the laws of the State, attached to and formed part and parcel of said office of Sheriff; and that the custody of the Jail and prisoners therein, with all fees, emoluments and advantages for the keeping of said Jail and prisoners, by law did then belong to the Sheriff; that by virtue of said election, of his commission and qualification as Sheriff, he had and still has a vested interest and property in said office of Sheriff, including the custody of said Jail and prisoners, and the fees and emoluments arising from such custody of which interest and property he cannot be divested by any Act of the Legislature before the expiration of his term of office; and that the said Act of the General Assembly, so far as it enacts that the management, direction and control of the Jail shall be vested in the Mayor and Aldermen during the unexpired term of office of the defendant, is inoperative, null and void.

The objections founded upon these grounds are, 1st, that the Act is the exercise, by the Legislature, of judicial power, and hence infringes the 1st Sec. of the 1st article of the Constitution of the State; and 2dly, that it is in violation of the inhibition of the Constitution of the United States, against laws impairing the obligation of contracts.

To the ascertainment of the force and applicability of the first objection, it is



important to ascertain what is the  
 400 meaning of legislative, \*and of judicial power. Legislative power is that which declares what the law shall be; judicial is that which declares what law is, and applies it to past transactions and existing cases: the one makes the law, the other expounds and judicially administers it: the one prescribes a rule of civil conduct, the other interprets and enforces it in a case in litigation: the province of the former is *jus dare*, the office of the latter is *jus dicere*. (Bedford v. Shilling, 4 S. & R. 411; Ogden v. Blackledge, 2 Cranch 272; Merrill v. Sherburne, Adams N. H. Rep. 203.)

The Act, whose operation is here resisted, does not profess or undertake to declare what the law then was or had been, but is entirely prospective. It gives existence to a new rule, which, by its own express provision, was to take effect at a day subsequent to its passage. It is, therefore, not judicial in its character. Indeed, so far as regards the rights of the defendant, and the question which it is competent for him to raise in the cause, the Act is only in the nature of a repeal of that of 1822; without pretending to avoid or undo what had been done under the former law, and it will not be questioned that the power to repeal a law is purely legislative.

But the objection is not derived from this definition of legislative and judicial power, but assumes as its foundation, that laws which divest private property, are in their nature judicial. It is not necessary to enquire, whether the principle thus assumed be correct, nor whether the exercise of such power has, by the Constitution, been attached to the judiciary department, (the real question involved in the objection,) since its application to this case, is not perceived, and cannot be admitted.

That a public office is the property of him to whom the execution of its duties is entrusted, is repugnant to the institutions of our country, and is at issue with that universal understanding of the community, which is the result of those institutions. Public officers are, in this country, but the

agents of the body politic, constituted  
 401 \*to discharge services for the benefit of the people, under laws which the people have prescribed. So far from holding a proprietary interest in their offices, they are but naked agents without an interest. As public agents, they are intrusted with the exercise of a portion of the sovereignty of the people—the *jus publicum*, which is not the subject of grant, and can be neither alienated nor annihilated, and it would be a repugnant absurdity, as incomprehensible as it would be revolting, that they can have a private property in that sovereignty. Unlike those officers in England, whose offices or places are treated as property, they do not hold under grant, but their authority or function to discharge the duties of their offices, is delegated to them by commission. In those instances in which, in England, the right to officers has been regarded as property, the instru-

ment of conveyance has been technically a grant, a conveyance by which an estate is passed or purchased, and employing the technical terms of a grant, *dedi et concessi*. But from the organization of the first republican government of this State, officers have been appointed by commission, (M. & C. 9,) a term which, whether regarded according to its ordinary meaning, or its legal sense, imports a delegation of authority, and is defined to be "a delegation by warrant, of an Act of Parliament, or of common law, whereby a jurisdiction, power, or authority, is conferred to others," (4 Inst. 163; 3 H. & Munf. 31, 43; Jacobs, "Commission.") And our earliest books draw a distinction between a grant of an office, and a commission, and inform us that the former, as its name implies, is not revocable, but that the latter, which is only the delegation of an authority, is. (Brooke 145, pl. 5.) The title exhibited by the defendant himself, in his return, and by which only he can vindicate his possession, (Bull. 205; The King v. Evens, 1 Show. 282; Hand 57,) is that he has been duly elected Sheriff, and has been duly commissioned and qualified. He claims, therefore, not by grant, but under commission, and that commission commits to him only  
 402 an authority, \*without an interest.

The title of the defendant is not by a grant which passes an estate, but by a commission, which is a delegation or warrant of authority, and which, so far from passing an estate, is founded upon, and is an affirmation of the fact, that the state is not in him, but in those from whom the power proceeds. It confers upon him title to exercise the authority, but the subject of that authority is in the principal, and under his control, and the very authority of the agent is evidence of it. Every authority implies a perfect right in the grantor, to the extent of that authority, at least as between him and the agent, and it is perfectly insensible, that because of such agency, the agent becomes armed with a control over the exercise of that right.

But were the title, under which the defendant claims, a grant, and not a commission, it would not constitute the office his property. As property, offices are classed under the head of incorporeal hereditaments, and must be held under a conveyance to a man and his heirs, or at least, a freehold interest must be held in them. (2 Bl. 36.) Nor can an action be maintained for any injury resulting from a disturbance or interference with an office, unless it be an incorporeal hereditament, or a freehold; (1 Ch. Pl. 133, 4, 144; 1 Ch. Practice 221; Comy. Dig. Assize, B. 25,) a sure test that property cannot otherwise be had in it, since there can be no right without a remedy. But in this State, where offices are never conveyed to a man and his heirs, they cannot constitute incorporeal hereditaments. Nor is the title which the defendant asserts, of that character. He claims a right to his office for a term of years, a right which, even in Eng-

land, is not the subject of property, for the obvious reasons, among others, that it cannot be sold or transferred to third persons, be transmitted to one's representatives, nor seized by his creditors. (Sir George Reynel's case, 9 Co. 95; 2 Bl. 36; Hardres 353; Mead v. Lenthall, Cro. C. 587.) Chancellor Kent says, "In the United States, no public office can properly be termed an hereditament, or a thing capable of being inherited. The Constitution, 403 or the law of the \*State, provides for the extent of the duration of the office, which is never more permanent than during good behaviour. Private ministerial offices only, can be classed as hereditaments, and I do not know of any such subsisting among us." (3 Kent 362, 1st ed.) "The provisions of the ancient common law were remarkably provident in respect to the public interest, and no office of trust, that concerned the administration of justice, could be granted for a term of years. This was so ruled by Lord Coke, and others, in Sir George Reynel's case, respecting the office of the Marshal of the Marshalsea," that is, of the Jailer of the King's Bench Prison. (3 Kent 364.)

If reference be had to the Constitution of the State, the language of that instrument equally repels the claim of property set up by the defendant. It provides that "Sheriffs shall be appointed in such manner as the General Assembly may, by law, direct, and shall hold their appointments for the term of two years, unless sooner removed, by sentence on impeachment, or by the Governor, on the address of two-thirds of the Justices," &c. Now, the term "appoint" is one well known in the law, and whether regarded in its legal acceptation, or its ordinary meaning, is applied to the nomination of an individual, or the constituting of an agent or deputy, but it is never employed to convey an estate. (Hard. 46, 47, 353; 5 Mod. 386, 12, Id. 399; 2 Salk. 467.) A person in whom a power of appointment is vested, may nominate one to whom a conveyance shall be made, but that appointment does not convey the estate. So a Sheriff appoints his deputy, a principal his agent, but in neither instance does the appointment pass an estate, though it confers the right to act as such deputy, in the one instance, and as agent in the other.

That the Sheriff has not a property in his office, derives farther illustration from this section of the Constitution. If the framers of that instrument had designed to vest the office in the Sheriff, as his property, it would not have been consistent with 404 the spirit \*which actuated them, in preserving the inviolability of "trial by jury, as heretofore used in the State," that they should declare, that that property should be forfeited in any other manner, than through the judicial administration of the law. Yet the very clause which directs the appointment of the Sheriff, and ordains the term of his service, provides that he may be removed by the Governor, on the address, not of a judicial tribunal,

but of two-thirds of the Justices of the Inferior Court, and of the Peace of the County.

It is true, that the appointment of Sheriff confers upon him the right to execute the duties of the office, but from the nature of the office, those duties may be changed by law. It is in this State a purely ministerial office, whose function and province is, to execute duties prescribed by law. From the very nature of such an office, its powers are the result of its duties; in reference to it, the maxim is strictly true, that "power and duty are correlative;" but its powers do not extend beyond, they are the mere consequence of its duties. The holder of such office, has power only to execute its duties, and because such duties are prescribed to, and imposed on him. The idea that the duties of a ministerial officer cannot be changed, will involve an inversion of the order of things, and be a flagrant absurdity; it would invest him, who is a mere minister and servant, with authority to limit the power of, and exercise an over-mastering control over those from whom he is to receive the law. Those duties are the mere creatures of law, and are in their very essence, changeable by the law making power; and his rights, which are derivative only from those duties, cannot prevent their creation or change. His rights, which are the consequence of his duties, cannot intercept the authority of the Legislature to act on those duties.

The appointment of him as well as of other officers, is not a grant in derogation of the rights of the public, but the constituting by the people, in the exercise of their sovereignty, of an agent to carry their sovereignty into effect. In creating 405 ating an officer the body \*politic does not restrict its sovereignty or the powers of the Legislature, through whom that sovereignty is expressed and exercised. The purpose is to extend the sphere of its action, or, at least, to give it operation. But if it be true that the officer has a property in his office, that that property embraces its duties as they were prescribed by law at the moment he was commissioned and qualified, and that those duties cannot be changed without a forbidden disturbance of private property, the consequence is, that by his appointment the officer becomes placed above the sovereignty of the people during the term for which he is elected, and to render the absurdity the more palpable, this would be the case though his function and power are only to execute the duty prescribed to him.

But were it admitted that the Sheriff has a property in his office, this Act would not interfere with that property. That property would consist in his title to exercise the office of Sheriff, in other words, to execute the duties and functions attached to the office. That office he still retains, without any interference with the tenure upon which it was conferred upon him, and, with it, he retains the right to execute the duties which may, from time to time,



be appropriated to it; nor can he be deprived of that right. Those duties, which are the mere creatures of law, resulting from the legislative sense of the public interests, are not his private concern, and may be modified, increased or diminished at the pleasure of those in whom the power of legislation resides, and since such increase or diminution does not interfere with his title to the office, nor trench upon his right to execute its duties, his supposed property is not trespassed upon, nor is injury done him. If he sustains loss or incurs a burden in consequence of such alterations of his duties, "it results from the application of those principles by which the public good is to be consulted and promoted," and is *damnum absque injuria*. (Spring v. Russell, 7 Greenl. 273, 289, 290; Charles River Bridge v. Warren Bridge, 7 Pick. 459, 472; Lausing v. Smith, 4 Wend. 9; Cowen 146; Callender v. Marsh, 1 Pick. 410; Coates v. Mayor, &c. of New York, \*7 Cow. 585; Vanderbilt v. Adams, id. 349; United States v. the Peggy, 1 Cranch 103, 110; People v. Livingston, 6 Wend. 526; Allen v. Farrow, 2 Bailey 587; The Elsebe, 5 Robins. 162; Lewis v. Foster, Adams 61.)

He is entitled to his office, but it is such as the laws of the land make it, and being an institution of government created for public purposes, exercising unalienable political power for the public benefit, it may be altered or modified by the Legislature as the public good, the interest or happiness of the people may require. The Act in question does not disturb the tenure by which he holds his office, nor interfere with his right to exercise its functions. It simply changes those functions and diminishes his duties and powers by relieving him from the duty, and the power incidental to that duty, of safe keeping prisoners confined in the Jail of the county. In the case of the People v. Garey, (6 Cow. 642, 651,) the Supreme Court of New York, speaking of the office of Justice of the Peace, the tenure of which is established by the Constitution of that State, say: "It is not in the power of the Legislature either to extend or shorten the duration of this office. They may enlarge or diminish the territory over which its powers are to be exercised. But the office itself exists independently of, and above them." The argument urged in this case, that the custody of the Jail is an incident to the office of Sheriff, implies that it is not an essential constituent part of the office, which may therefore exist independently of, and without it, and the admission of that argument, which is also involved in the return, that the Act detaching the Jail from the Sheriffalty, will legally operate upon the future holders of the office, equally concedes it. Nay, the very ground work of the defendant's title would fail him, if the office of Sheriff did not exist independently of the Jail; since, were it otherwise, there could have been no Sheriff in 1822, in whom the Act of that year, upon which he founds his claim, could

407 have vested the direction of the Jail. \*Indeed there is an evident and essential difference between power and property, between the power of a corporation or an officer, and the property of each. A grant of property passes from the grantor his entire power over it. A grant of power, (if the expression may be used,) implies that it still resides in the grantor, and excludes all interference with his right to exercise it. An act enlarging or abridging the duties and powers of an office, does not abolish or interfere with the title to it, but only regulates its exercise; and it is within the perfect competency of the body politic, from which the power emanates, to pass such Act, though it should be true that the title to the office was secured to the holder beyond the reach of legislative action.

An apposite illustration of these views, will readily present itself. The Judge of this Court holds his office by a tenure which the Constitution protects from legislative intrusion, but his duties are necessarily changeable, at the discretion of the law-making power, which in making such change, would in no manner disturb his title. And it must be obvious, since the Sheriff is the ministerial officer of the Court, that such change of its duties, may as much conflict with his rights, as does the Act whose operation is now resisted. The principle upon which the validity of this Act is questioned, would, if sustained, deny to the Legislature the power of dividing a County, or creating a new one, since that would transfer from the Sheriff a portion of his authority, duties and emoluments. It would avoid the Act organizing the Court of Common Pleas &c. of the City of Savannah, and other local tribunals, whose jurisdiction being carved out of that of the Courts, of which he is the ministerial officer, necessarily contracts his powers and duties; and would preclude the remodelling of the Chancery jurisdiction of the Superior Court, so as to dispense with the interposition of juries. Indeed it would almost annihilate the powers of ordinary legislation; for what public, general statute is there that may not act upon his duties? And there is scarcely any private one that may not have the same operation. If any personal

408 \*privileges or advantages have accrued to the officer, from the institution of the office, they are incidental to the main design, and not the object for which it was created. And if the end for which it was established, requires alteration in its duties, powers or organization, then the collateral and accidental advantages which the officer derives from its present arrangement, cannot be made paramount to, but must yield to the principal, the public object for which it was established.

And admitting the existence of a contract, as urged in the argument, the right to alter or amend the organization of the office, would be a power reserved to the Legislature, and be an implied condition of the contract. All contracts, and all laws, must

be construed in reference to their main design, and it is thence that their meaning and spirit is deduced. The object was the public good; the personal privileges of the officer are a mere accident to it. They must be construed in reference to it, as to which they are subsidiary, not paramount; and since it was established for the public good, they must yield as the public good, the main design, requires, in the apprehension of those to whom its guardianship is committed. Without the possession of this power, the operations of government would often be obstructed, and society itself be endangered, nor can its exercise be surrendered by the legislature without an abandonment of their trust and duty. But the Sheriff is, with us, (unquestionably as relates to the Jail) a ministerial officer, and as such has no power independent of his duties. The former is accessorial to the latter, and from the very nature of his office, these are not under his control; they are prescribed to him by some superior, whom he is bound to obey. It is irreconcilable with the very idea of his office, that he can control that superior, and his right being accessorial to the duty, the latter may be changed without infringing the former. The right of the Sheriff to the Jail of this County, (if it exists,) results from his duty, and he is entitled to it, because he is charged with the safe-

409 keeping of \*prisoners therein. It is correctly called by the counsel for the defendant, a right incidental to the office. It is a right which results from, and is the consequence of that duty attached by law to the office. The rights of a ministerial officer flow from his duties, not his duties from his rights. When then, the Sheriff becomes relieved from the duty of the custody of prisoners, the right to the Jail, which is incidental and accessory to it, ceases with it, and with that release from the duty, he becomes released from the correspondent responsibility for the escape of prisoners from Jail, as is the Marshal of the United States, when the State has made it "the duty of the keepers of its Jails to receive and safe keep therein, prisoners committed under the authority of the United States." (Randolph v. Donaldson, 9 Cr. 76.) The duty is imposed on him by law, and may, of course, be released by law, by the transfer of it, by law, to another. According to the laws of this state, the Sheriff is not answerable for the acts or omissions of any other than himself, and those whom he shall have deputed to execute his duties, but when those duties are detached from his office, and the discharge of them is committed to another, who is not appointed by, responsible to, nor removable by him, his liability, and of course, his duty, ceases. The distinction then, between this case, and that cited in Milton's (4 Co. 34) is striking. It was the law of the land, that the Sheriff "should answer for escapes, and should be subject to amercements, if he had not the body in Court, upon process directed to him," "and

therefore, it would be against all reason that he should be subject to amercement, for not having the bodies of prisoners—and yet another should have the keeping and custody of the Jail;" and such being his responsibility by law, he could not be relieved from it by an appointment of Jailor, flowing from the King's prerogative, which "consists" only "in the discretionary power of acting for the public good, where the positive laws are silent; (1 Bl. 252.) Nor, for the same reason, was it within the sphere of the prerogative to appoint the 410 deputy, for \*the positive law, which the King could not dispense with, had provided that the deputy should be appointed by the Sheriff. It was true then, that by the law of the land, the custody of the Jail was attached to the office of the Sheriff, and was part of it, and that he could not be deprived of it by the King, whose prerogative was subordinate to the law, and could be exercised only where it was silent. But that case by no means tolerates the idea, that the office could not be controlled by law; on the contrary, the very reason for which the King's grant was void, was that it conflicted with the regulations of law—and the same principle is established by the case of Harcourt v. Fox, cited in the argument, and which will be found more fully reported in 1 Show.

But the supposition that the office of Sheriff is, in England, an estate or property is not countenanced by Milton's case, nor tolerated by the principles of the common law. That case establishes, that the office is held durante bene placito and may be determined at the King's pleasure, while also as he is, by St. 9, Ed. II. s. 2, appointed for the term of one year, and by commission (Co. Lit. 168, a.) he is not vested with an estate in it. The Sheriff therefore has no property in his office in England, and upon the doctrine insisted upon, in behalf of the defendant, that the office of Sheriff here is the same with that in England, it is not his property here.

But it is contended that the Act of December last, is an infringement of the inhibition of the Constitution of the United States, against laws impairing the obligation of contracts.

This is the first instance in which so enlarged a construction has been attempted to be given to that clause of the Constitution, but, as it has been urged with great seriousness, it has been felt due to counsel to give it a deliberate consideration.

According to the theory of our institutions they all spring from contract. In the language of the Declaration of 411 Independence, "Governments derive their just powers from the consent of the governed." The declaration of rights of Massachusetts proclaims in conformity with the general sense of the people of this country, "that government is a social compact by which the whole people covenant with each citizen and each citizen with the whole people," and the judges of this State, when deciding the alleviating laws to be



unconstitutional, held, that "a law is but a contract between the State and the citizens who compose it, since all laws are founded upon the express or implied assent of the governed." If the term "contract," as employed in the Constitution of the United States, be accepted in this comprehensive sense, it is manifest that the independence and sovereignty of the States, on all subjects on which their constitutions and laws have treated, is entirely extinguished; that they cannot repeal, alter or amend them, and that their sovereignty becomes exhausted and annihilated by the mere effort to bring it into practical existence.

The power of a State upon a subject would become extinct as soon as it should have passed a law in relation to it. Nay more: the contract of society is not more strongly exhibited in those things upon which positive laws speak than in those upon which they are silent. As a statute is a contract that the subject which it embraces shall be regulated in the manner it prescribes, it is not less a contract that it shall not be regulated in another or different manner. So also a statute regulating a subject is equally a contract that other subjects shall not be regulated. The consent and contract of society was as strong, at the adoption of the Constitution of the United States, upon those subjects on which positive law was silent, as on those upon which it had spoken, and by its very adoption, if laws be contracts within the meaning of the Constitution, the legislative power of the States became annihilated.

Such a construction, then, cannot be admitted, as well because it would prostrate the sovereignty of the States, whose sovereignty is necessary to the existence of the government of the U. States, as 412 because \*it would be repugnant to the very section of the Constitution in which this clause is incorporated, and which, by excepting certain subjects from the legislative power of the States, implies the existence of that power in cases not excepted, and where its exercise does not conflict with some other provision of that Constitution. That Constitution recognizes the existence of legislative power in the States, and by that recognition fortifies it. Laws then, passed in the exercise of the ordinary legislative power of a State, are not contracts within the purview of the Constitution, nor do laws which repeal or amend them fall beneath the constitutional inhibition. In the case of *Fletcher v. Peck*, (6 Cr. 135,) Ch. J. Marshall says: "The principle asserted is, that one Legislature is competent to repeal any Act which a former Legislature was competent to pass; and that one Legislature cannot abridge the powers of a succeeding Legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."

But the proposition which seems to be implied in the return, and which, it is presumed, is intended to be presented by the

argument, is, that at the time "the defendant was elected, commissioned and qualified as Sheriff, the Jail of the county, by the laws of the State, was attached to and formed part and parcel of the office of Sheriff, and that the custody of the Jail and prisoners therein, by law, did then belong to the Sheriff," and hence any Act of the Legislature which, during the term of his office, should commit that custody to another, would be in violation of a contract with him.

Is the proposition true, that Acts passed during the term for which an individual has been elected to office, altering the duties attached to it at the period of his entrance upon its execution, would violate a contract with him, and be therefore void? The effect of such a principle would be scarcely less extensive or less destructive of the sovereignty and interests of the people, than would be that, which has been just considered. Its necessary result would be, that during the term for which an officer

413 has been elected, no law could be passed \*in relation to his office, since it must, in some measure, affect his duties, and of consequence, his powers and rights. The sovereign power of the State would therefore be arrested; it would be struck down, during the time for which he was commissioned. And if the principle be correct, in relation to the Sheriff, that because certain duties and rights were attached to his office, at the time he was elected and commissioned, they cannot be changed during his term of office, it must equally apply to every other officer. The proposition involved in the return is a general one, that the duties which appertain to an office cannot be changed within the term for which an individual has been elected to exercise its functions. It comprehends, therefore, all officers, of every character, whether executive, judicial or ministerial, and if the last, a multo fortiori, the two former. In fact it would extend to almost every law, and the whole action of government; for laws can be carried into effect, and the operations of government be conducted only through the agency of officers. The consequence of such a principle would be that the legislative power of a State would be suspended, and its ability to remedy public grievances and provide for the common good, and, with these, the sovereignty of the body politic be arrested during the term for which officers were elected. Can a proposition involving such mischievous consequences be seriously maintained? Although private property may be taken for public purposes, when the public exigencies may require, yet no State necessity, no exigency, no public policy, however strong or stringent, will authorise the violation of, or interference with a contract. The Constitution regards a contract as sacred and will not permit it to be impaired for any motive, however powerful, for any cause however imperative. Can it then be possible that that instrument applies to public offices and protects them,

from the touch of legislation, by the guards which it has thrown around contracts? Any legislative Act interfering with them, would be a mere nullity—a dead letter on the statute book. If it embraces public offices, then the institutions of the several States must be unchangeable, and the power to amend them be annihilated.

414 \*Indeed with how much more force may it not be objected to such a proposition, that it is not adequate to the Legislature to grant to an officer privileges which impair or interfere with the powers necessarily and inseparably appertaining to the sovereign legislative power of the State, since it would violate the fundamental compact, the compact of the Constitution?

It is admitted, in argument, that the Legislature may, during the term for which an officer has been elected, abolish the office, or diminish its duties. But neither of these admissions is consistent with the idea of a contract. The abolition of the office would be destructive of the contract, since it would destroy the right secured by it. "Obligation and right are correlative terms;" the obligation of one of the contracting parties is co-extensive with the right of the other, and has no existence independent of that right. If he may, at pleasure, destroy the right, he is under no obligation to yield it; nor can the other have the right, since his right can be only correspondent with the legal obligation of the former. Such an admission is a surrender of the idea of contract.

Nor does the other admission more accord with it. A contract is an agreement between two or more persons in which there must be aggregatio mentium on the same particular; the mutual concurrence of two or more minds upon one and the same point. It cannot, therefore, be varied in any respect by one without the assent of the other. In the Dartmouth College v. Woodward, (4 Wheat. 662-3,) Judge Washington asks, "If the assent of all the parties to be bound by a contract be of its essence, how is it possible that a new contract substituted for or engrafted on another, without such assent, should not violate the old contract?" And again, (p. 622,) "Does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation?" And Ch. J. Marshall and Judge Story affirm the same principle. (p. 653, 675.)

415 \*It is manifest then, and results from the very nature of a contract, that its stipulations and terms cannot be altered by one of the contracting parties, without the assent of the other, even though the alteration be beneficial to the latter.

Such an admission then, is equally an abandonment of the position assumed in the argument. And if the admission be applied in practice, an exemplification will be afforded that will be conclusive to every legal apprehension. It is not less inci-

dental to the office of Sheriff to serve writs, than it can be maintained to be, to have the custody of the Jail, and to the unlimited execution of the former duty, he is bound by the express terms of his oath. Yet the statute of the State authorises attachments to be directed to, and served by the Sheriff, his deputy, or any Constable, and would, by its own force, relieve the Sheriff from responsibility for non-feasance, &c. in the execution of such writ, if it should have been placed in the hands of a Constable, whom he does not appoint, and who is not responsible to him. He is released from his responsibility by the law—but is it a release from the obligation of a contract? Is it not a release from a legal duty—from a liability resulting from law? The relation then, of an officer to the government, does not sound in contract.

But the admission seems to proceed from a misapprehension of the nature of a ministerial office. It affirms that the duties may be diminished, but cannot be increased, in consistence with the contract. But the rights of a ministerial officer are limited by his duties, and are correspondent to, and co-extensive with them; and they are enlarged or contracted, precisely as those duties are increased or abridged. Now obligation and right being correlative, the obligation of a contract is impaired, when the right secured by it is impaired. The diminution therefore, of such officer's duties, since it would diminish and impair his rights, would, upon the principle assumed, be a violation of the contract.

416 \*But if the office may be abolished in the whole, why may it not in part?

If it be no infringement of contract to deprive the defendant of the entire office, it is evident that the deprivation of a part would not be obnoxious to constitutional objections, for the whole includes its parts, and is composed of them. If then, it be competent to the Legislature, by abolishing the office of the Sheriff, to divest the defendant of his authority, as well as an immediate officer of the Court, as keeper of the Jail, it is not less competent to them to divest him of the latter authority. Yet while this is not contested, while it is admitted that the Legislature may, in harmony with the defendant's rights, and without any violation of the imagined contract, abolish the office, it is denied that they can transfer it to another. Now, the real question is, what are the rights and the obligations of the contract? The right of the defendant under a contract, would be, to hold the office, and that right is infringed, and the contract violated, by his being deprived of the office. To him it is of no import whether another acquires the office or not, unless it be through the means of his divestiture of it. His right is affected by being deprived of the office, not by the appointment of another to it. It is admitted that it is within the power of the Legislature to abolish the office, to repeal the law by which it has been created. But by that repeal the right of the incumbent



would cease, and his right having ceased, it would not interfere with his right that the legislature should afterwards, the next day, or the next moment, re-create the office, and confer it on another. Are his rights more affected, because at the same moment, the law, which conferred the office upon him is repealed, it is vested in another? If so, the principle resolves itself into an idle mockery, a mere illusion, which a single instant of time suffices to dissipate. The right of the defendant is affected, if at all, by the repeal of the Act of 1822, not by the investing of the Mayor and Aldermen with the appointment of Jailor. The admissions made by counsel, manifest that the idea of the existence, in the case, of a contract,

417 within the purview of the Constitution of the United States, does \*not approve itself to the mind that suggests it. Nor can it be inferred from the character of the office. It is a public office, of which it is an essential characteristic and property, that its duties and responsibilities may be changed, be added to, or diminished, at the pleasure of the government, without the assent of the officer; and it is doubtless under a sense, and from a recognition of this principle that the admissions are made. It would be irreconcilable with the nature of a contract to suppose that a contract relation subsists between such an officer and the government.

The proposition itself is not consistent with the idea of a contract. It affirms, "that when the defendant was elected, commissioned and qualified, the Jail of the county, by the laws of the State, was attached to, and formed part and parcel of the office of Sheriff, and that the custody of the Jail and prisoners, by law, did then belong to the Sheriff." The claim then presented by the defendant in his return, and which is the only one that can be considered in the case, does not rest upon grant or contract, but upon law; which, since it is not affirmed in the return to be a grant or contract, was passed by the Legislature, in the exercise of the ordinary powers of legislation, and which, from its very nature, is susceptible of amendment, or repeal, at the pleasure of the Legislature. It would be idle to say, that an Act of the Legislature opposes an obstacle to its repeal by a subsequent Legislature; and the defendant, therefore, admits by the return he makes, the authority of the Legislature to control the powers and advantages he claims.

If the history of the connection of the Sheriff with the Jail be reverted to, it will equally repel the suggestion of a contract. The present defendant, who has succeeded to the situation of Abram De Lyon, must hold the custody of the Jail under the same title, by which that Sheriff acquired and held it. But he could not have acquired and held it by contract. The contract, if any there be, which a Sheriff enters into, must be at the commencement of his

418 \*official term, when he is elected, commissioned and qualified, as stated

in the return; but when Mr. De Lyon entered upon the discharge of his duties, the Jail was not attached to the Sheriffalty. It was then a duty imposed on him by law, and not the result of contract.

If however, it be said that his contract with the public was, that he would perform whatever duty the Legislature might devolve upon him, then it was a condition of his contract, that his duties might be varied at legislative discretion. And, if according to his contract, they could increase, they could equally diminish the duties of his office. Whence did this condition result? From the cardinal rule in the interpretation of all contracts, that the office must subserve the end for which it was instituted; that being created for the public good, it might be varied, as the public good should require; and not that the will or private interest of the officer, who was employed merely as a means to promote that object, should defeat the end for which it was created. Will it be said that De Lyon's acceptance made it a contract? But he could stipulate only for himself, not for his successor, and his private acceptance of the custody of the Jail, could not make it part and parcel of a public office. If it did, then his refusal would have precluded it from becoming a part of the office. It will not be pretended, however, that the then Sheriff could have refused the charge of the Jail, if it was imposed on him by law. Can the present Sheriff refuse to serve a summons of garnishment, issued under the recent Act of the Legislature? And does a duty which, it may be, is imposed in invitum, resolve itself into contract?

Nor is the idea of a contract with the defendant, in the spirit of the Constitution of the United States, countenanced by any decision of the tribunal to which, in the last judicial resort, the exposition of that "supreme law of the land" is committed.

The first and leading case on the 419 subject, that of *Fletcher v. \*Peck*, draws a distinction, we have seen, between Acts passed in the exercise of legislative power, in the ordinary acceptance of the phrase, and grants of property; and the other cases in which the question has been presented, directly repel it.

A Sheriff is a public officer, the mere creature of law, created by the sovereign power of the State, for public purposes, connected with the execution of the law, and the administration of justice, as the agent of the body politic, to give effect to its sovereignty, and carry into effect its will. His office is a mere civil institution, established for public political purposes, and may be regulated or changed by society. The mere creature of law, he holds not by contract, and his duties change with the law. The agent of the power of the people, to carry into effect the jurisdiction of the body politic, it would be repugnant to the very idea of his title, that he should control the power and jurisdiction, whose agent he is. In *Fletcher v. Peck*, (6 Cr. 143,) Judge

Johnson says, "I do not hesitate to declare, that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity. A contrary opinion can only be maintained upon the ground, that no existing Legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction, and the right of soil. The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it, is to commit a species of political suicide. In fact, a power to produce its own annihilation, is an absurdity in terms. It is a power as utterly incommunicable to a political, as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally, are in no wise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of individuals, who compose the community."

420 \*In the Bank of Columbia v. Oakley, (4 Wh. 236, 244, 5,) the Supreme Court held, that a section of the Charter of incorporation of that Bank, giving to it a summary process by execution, against certain of its debtors, might be altered or repealed by law, and the Chief Justice, by whom their opinion was delivered, says, "We attach no importance to the idea of this being a chartered right of the Bank. It is the remedy, and not the right, and as such, we have no doubt of its being subject to the will of Congress. The forms of administering justice, and the duties and powers of Courts, as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent Legislatures."

And in *Hawkins v. Barney's lessee*, (5 Pet. 457, 466, 7,) Judge Johnson delivering the unanimous opinion of the Court, says, "It is not to be questioned, that laws limiting the term of bringing suit, constitute a part of the *lex fori* of every country: they are laws for administering justice, are of the most sacred and important of sovereign rights, and a restriction upon which must materially affect both legislative and judicial independence. It can scarcely be supposed, that Kentucky would have consented to accept a limited and crippled sovereignty, nor is it doing justice to Virginia to believe, that she wished to have reduced Kentucky to a state of vassalage."

After such decided and emphatic expression of the judgment of that tribunal, that powers, such as those attached to the public administrative office of Sheriff, are "incommunicable," and "must ever be subject to the legislative will," and that the parting with them would reduce the State to a condition of "vassalage," it would not only be preposterous to imagine that the Court can have held, that such

officer holds his powers by contract, but be almost idle to seek for direct declarations from it, of an opposite opinion. We are, however, not without such declarations of opinion, made, let it be noted, not where it has been controverted, but where it has been assumed as a principle that could not be challenged.

421 \*In the discussion and decision of the case of the Dartmouth College v. Woodward, (4 Wheat.) it was treated as an axiomatic truth, and assumed as a postulate, that neither a public officer, nor a public corporation, held office or existence under a contract, but under a law; that neither derived property from it; and that the duties and powers of each might be modified and controlled, at the pleasure of the Legislature; and hence the effort there made, and it was the stress of the argument, to shew that a private, unlike a public corporation, or a public officer, held under a contract; that the charter creating it, was not a mere law, but a grant of property, which a franchise is, and that for this reason, the Legislature of the State could not interfere with its corporate franchises; with the property secured to it by the stipulations of its charter. (Mr. Webster's argument, p. 561, 2.) Mr. Wirt, for the defence, contended (p. 611, 2), that every society has a right to the services of its members, in places of public trust and duty. Such appointments to offices of public trust, have never been considered as contracts, which the public authority was not competent to rescind or modify. And "Mr. Hopkinson in reply, insisted, that the whole argument on the other side, proceeded on an assumption which was not warranted, and could not be maintained. The corporation created by this charter is called a public corporation. Its members are said to be public officers, and agents of the government. We contend that this charter is a contract between the government and the members of the corporation created by it. It is a contract, because it is a grant of valuable rights and privileges, and every grant implies a contract not to resume the thing granted. Public officers are not created by contract or charter. They are provided for by general laws. Judges and magistrates do not hold their offices under charters. These offices are created by public laws, for public political purposes, and filled by appointments made in the exercise of political power. There is nothing like this in the origin of the powers of the plaintiffs; nor is there in their duties, any more than in their origin, any thing which likens them to public political

422 \*agents. Their duties are such as they themselves have chosen to assume, in relation to a fund created by private benefaction, for charitable uses." (p. 615, 6.) There can be no doubt, that in contemplation of law, a charter such as this, is a contract. It takes effect only with the assent of those to whom it is granted. Laws enjoin duties without or against the will of those who are to per-



form them. But the duties of the trustees, under this charter, are binding upon them, only because they have accepted the charter, and assented to its terms."

And Ch. J. Marshall, in the opinion which he delivered, distinctly affirms, that "grants of political power;" that "officers held within a State for State purposes;" "civil institutions adopted for internal government;" "officers invested with political powers, partaking in the administration of civil government, and performing duties flowing from the sovereign authority," or "concerned in the administration of public duties;" in short, that "public officers" and "public institutions," are not objects comprehended within the constitutional inhibition against laws impairing the obligation of contracts—that "they are controllable by the Legislature," and that "the laws which concern them must change with circumstances, and be modified by ordinary legislation." (p. 627, 629, 630, 635, 638.) He says, (p. 627,) "on the first point," (to wit, that it was a contract protected by the Constitution of the United States,) "it has been urged that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices within a State for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation, which deeply concerns the public, and which, to preserve good government, the public judgment must control. That the clause of the Constitution, if construed in its greatest latitude, would prohibit these laws. That it would be an unprofitable and vexatious interference with the internal concerns of a State; would unnecessarily and unwisely

embarrass its Legislature, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances," and then remarks, (p. 629,) "The general correctness of those observations cannot be controverted: that the framers of the Constitution did not intend to restrain the States, in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect private property, or some object of value, and confer rights which may be asserted in a Court of Justice." "If the Act of incorporation be a grant of political power, if it creates a civil institution to be employed in the administration of the government, or if the funds of the College be public property; if the State of New-Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by

the Constitution of the United States." (p. 629, 630.) "Had Dr. Wheelock employed assistant tutors with the funds contributed by others, or had the trustees in England established a school with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors—and the fact that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the Legislature a right to interfere in the management of the fund." (p. 635.) "From the fact that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed and the objects for which they are created. The right to change them is not founded on their being incorporated, but on  
424 \*their being the instruments of government created for its purposes. The same institutions created for the same objects, though not incorporated, would be public institutions, and of course be controllable by the Legislature. The incorporating Act neither gives nor prevents the control."

The opinion of Judge Story is not less direct and decisive. After having remarked that government has a right to regulate, control and direct public institutions "at its own will and pleasure," (p. 661,) he says: "It is admitted that the State Legislatures have power to enlarge, repeal and limit the authorities of public officers, in their official capacities, in all cases when the Constitutions of the States respectively do not prohibit them; and this, among others, for the very reason, that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. They are to exercise them only during the good pleasure of the Legislature. (693, 694.) And again, (p. 700,) "mere naked powers, which are to be exercised for the exclusive benefit of the grantor, are revocable by him for that very reason. But it is otherwise when a power is to be exercised in aid of a right vested in the grantee. We all know that a power of attorney, forming a part of a security upon an assignment of a chose in action, is not revocable by the grantor. For it then sounds in contract, and is coupled with an interest."

The powers conferred upon a Sheriff are then revocable at the pleasure of the government. No property is granted to him; nothing is, strictly speaking, given to him; nor is power delegated to him in aid of rights vested in him, but for the exclusive benefit of the public by whom it is delegated. He is the mere agent of the public under a naked authority to perform duties prescribed to him by laws—the expressions of the public will, for the public benefit, and all that can be claimed to be granted to

him, is the mere authority to be such agent. But such grant is not of property made by the Legislature, in the exercise of a  
 425 right of dominion \*or of proprietary interest, as trustees of the public, for his private benefit; but of political power, for public purposes, and for the common benefit of all, in the exercise of ordinary Legislative power.

He has no interest in the duties whose performance is committed to him, nor in the subjects of them. They therefore may be changed or controlled, without interfering with his interests. Whatever private advantage he has, is in the emoluments which are consequential upon, and derivative from, the actual and precedent execution of those duties. (1 Bl. 470, 1; Ritchie v. Mauro, 2 Pet. 243; 1 Cr. 173.) And if he should sustain loss from the change of those duties, it would be only the consequence of the exercise of an undoubted right of the public, and be, as has been already remarked, *damnum absque injuria*. The office was, (as all public offices with us are,) created for public purposes, and not for the private emolument, or exclusive advantage of the incumbent. The personal advantages he acquires, were not among the objects of its creation, but are only collateral to it, and are incidental to public duties imposed by law, not for his individual benefit, but for the common good, and must, like other privileges, incidental to public laws, yield to such modifications as their principal design may, in the view of those, through whom the public will is expressed, require. To affirm the reverse, would be, to deny that public laws can be annulled or repealed. The authority vested in him, sounds not, as Judge Story observes, in contract, and is not fenced around by the sacredness which invests such a security of private right. The duties attached to it, are the mere creatures of law, and the repeal of them, would "divest no vested interest, but be the exercise of a legislative power, which every Legislature possesses."

An administrator also, holds an office, with powers over the estate of his intestate, and is entitled to a compensation, consequential upon the exercise of those powers; and previously to the Act of 1805, (Prin. 165,) all the personal property of the decedent  
 426 \*was, by law, subject to his absolute power of disposal. But has it ever been imagined, that unconstitutionality could be predicated of the restriction which that Act imposes upon his powers—or can it be doubted, that it is competent for the Legislature, to divest him of the authority which he now possesses, by law, over the real estate? The Bank of Hamilton v. Dudley's lessee, 2 Pet. 492, 523-4; Rice v. Parkman, 16 Mass. 326, 331, and other cases, vindicate the legislative competency, and upon the very reason, which the return in this case, would oppose as an obstacle to legislative action, to wit, that the power was conferred on him by law. If the Legislature can change the office, the powers and duties of an administrator, whose trust

is of a private character, it surely cannot be questioned, that they may control the duties and powers of a Sheriff, a public officer, who has no interest in the subjects of those powers and duties. And, if they can regulate the authority, and consequential rights, attached to the office of the former, during the term for which he has been appointed, it will not be pretended, that they are foreclosed from the exercise of a like power, over the public interests and business, committed to the administration of the latter, simply because he had, at some previous time, been appointed as agent to manage them. These views are illustrated by, and derive confirmation from, the remarks of Judge Washington, in the Dartmouth College case. "A civil corporation, (said that Judge,) is the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the King's government may bestow upon it, and having no other founder, or visitor, than the King or government, the founder incipiens. It would seem reasonable, that such a corporation may be controlled, and its Constitution altered and amended by the government, in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it, the trustees, or governors of the corporation, being merely the trustees  
 427 for the public, \*the *cestui que trust* of the foundation. The trustees or governors, have no interest, no privileges or immunities, which are violated by such interferences, and can have no more right to complain of them, than an ordinary trustee, who is called upon in a court of Equity, to execute the trust."

The same opinion is announced by the Supreme Court of New Hampshire, in the case of Merrill v. Sherburne, (Adams 199-213.) "We wish it to be distinctly understood that Acts of the Legislature are not within the above prohibitions, unless they operate on the interests of individuals or of private corporations. Nor are they within them, when, in an implied or express manner, the parties affected have consented to their passage; as all public officers impliedly consent to alterations of the institutions in which they officiate, provided the public deem it expedient to introduce a change."

Nor is there any dissenting opinion upon the subject among the jurists of our country. Mr. Rawle, in his "view of the Constitution," says, (131-2,) the prohibition in relation to contracts "does not comprehend the political relations of a government and its citizens; civil institutions which must be liable to change with circumstances and to be modified by ordinary legislation, those which deeply concern the public and which to preserve good government the public judgment must control."

It is said by a lawyer of eminence, (Willard Phillips,) whose treatise on another branch of the law is among the standard



works of our profession, when reviewing the Dartmouth College case, "The question was one of great importance, and this depends upon the decision of the question whether they are to be considered public or private corporations, the rights, for instance, of a county town or school, and so the rights of public officers, as such, are, in general, subject to prospective modification and control by the State Legislature as far as those rights arise directly from statutory and not constitutional provisions. (7 Amer. Jur. 311.)

428 \*Chancellor Kent, in the 2d vol. of his commentaries 305, 2d ed. states, that "a public corporation instituted for purposes connected with the administration of the government, may be controlled by the Legislature, because such a corporation is not a contract within the purview of the constitution of the United States. In those public corporations, there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public." A remark equally applicable to all public offices, for all public officers are but trustees and agents for the public.

Judge Story, reviewing the decisions which have been made on this clause of the Constitution, says, in the 3d vol. of his commentaries, p. 260: "There is no doubt as to public corporations which exists only for public purposes, that the Legislature may change, modify, enlarge and restrain them; with this limitation, however, that property held by such corporations, shall still be secured for the use of those for whom and at whose expense it has been acquired. The reason is that it is only a mode of exercising the public rights and public powers, for the promotion of the general interest; and therefore it must from its very nature remain subject to the legislative will, so always that private rights are not infringed or trespassed upon." And upon the immediate point in issue here, he thus emphatically expresses himself: "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, is admitted and it has never been so construed. It has always been understood that the contracts spoken of in the Constitution, were those which respected property or some other object of value, and which conferred rights capable of being asserted in a Court of justice."

The proposition asserted by him, that the Constitution is confined to contracts which respect private property, or some object of value, and confer rights capable of being asserted in a Court of justice, and does not embrace civil institutions, adopted 429 for internal \*government, "public officers," or other "instruments of government, created for its purposes," is precisely that which we have seen, was maintained in the opinion of the Supreme Court, delivered by Ch. J. Marshall, in the Dartmouth College case.

This was the view also, of Judge Chase,

(the ablest lawyer on the bench of that court, previously to the accession to it of the present Chief Justice,) of the object and effect of the prohibition, and who, in *Calder v. Bull*, 3 Dall. 383, considers such a law only as invalid under this clause of the Constitution, as "impairs the lawful private contracts of citizens," as "violates the right of an antecedent lawful private contract." The same construction is given to it by Judges Thompson and Trimble, in *Ogden v. Saunders*, (12 Wheat. 304, 330, 1,) and the Ch. J. there says, "it comprehends those laws whose operation consists in their action on individuals;" (p. 334;) "it relates to the civil transactions of individuals;" (p. 335, 6;) "it contemplates legislative interference with private rights;" (p. 336.) The 44th No. of the *Federalist*, which treats of this clause, advocates it, as designed to fence "private rights, personal rights;" and the Judges of this State, when referring, in the opinion before adverted to, upon the alleviating laws, to the contemporaneous exposition of that instrument for the purpose of ascertaining the spirit of this clause, and to illustrate their own view of it, cite the following argument, from the debates in the Virginia Convention, and it is the only passage invoked by them, from the discussions, which the submission of our present form of government to the people elicited. "If we take a review of the calamities which have befallen our reputation, as a people, we will find they have been produced by frequent interferences of the State with private contracts."

The universal sense, then, of the country, in relation to this clause, that in which it was conceived, advocated and adopted—in which it has been invariably insisted upon, and judicially expounded and enforced, is, and ever has been, that public officers, in their official capacities, are excluded from its operation.

430 \*Nor do any of the cases, which the industry of the counsel for the defendant, has enabled them to invoke, yield any aid to the supposition, that the authorities, duties and rights, of the public officers of a State, are protected by the Constitution of the United States, from legislative regulation.

If I correctly apprehend the proposition of the Supreme Court, in the case of *Marbury v. Madison*, (1 Cr. 162,) that "when the President has made an appointment, his power over the office is terminated. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it;" that before his acceptance, and without his assent, his right to the office is complete, and the other party cannot retract the tender of it; it infers that a public officer does not hold by contract. And neither in that case, nor in any of the cases cited from the South Carolina Reports, is any allusion whatever made to the existence of a contract; an omission which is scarcely reconcilable with the belief, that those who

participated in the discussion or decision of them, considered it as connected with the title of the claimants to office, and which affords by strong, if not necessary implication, evidence, that in their judgment, public officers are not held by contract.

The cases of Gibbs, (1 Dess. 587,) of Lyles, (1 McCord's Reports 238,) and of Hutson, (Id. 240,) maintain, that Masters in Chancery and Ordinaries, are judicial officers, who, by the Constitution of the State, hold their offices during good behaviour, and that an attempt, whether by the Governor or the Legislature, "to alter the tenure of their offices, could not prevail," because repugnant "to a constitutional provision, fixing the tenure of such offices." That of the State v. M'Clintock, (1 McC. Reports 245,) is to the same effect: that "the framers of the Constitution have ordained the fixed and determinate time" of four years, "for which Sheriffs should hold their offices," and that that time could not be abridged by the Legislature, inasmuch as an Act to that effect would violate "the provision of the Constitution, as it relates to the term of office."

431 \*This is the ground on which those decisions are founded: they are utterly silent as to the obligation of contracts being impaired; a silence the more remarkable, as the very clause of the Constitution of the United States, which is objected to the Act of the Legislature in this instance, is incorporated into the Constitution of South Carolina.

The cases adduced from the reported decisions of that State, are limited to legislative and executive Acts, which conflict with the tenure of office, as established by the Constitution of the State, but in relation to the principle involved in this controversy, to wit, the power of the Legislature to control the duties of a Sheriff, or other public officer, her tribunals treat it as one which they cannot imagine can be questioned. In Lining's case, adverted to in the argument, the Court of Appeals demands, "has not the Legislature a right to prescribe to a public officer the duties he shall perform, and to make any requisitions of his time that it pleases? It has, by various Acts, reduced the fees of many of the public officers, and it has increased the labors of some, so as indirectly, by increasing their expenses, to diminish their salaries. But those Acts are not therefore, invalid, although they affect the rights of office, much more directly than the Act under consideration." (3 Dess. 479, 80.) In the case of the Treasurer v. Taylor, (2 Bailey 524,) Judge Martin, whose opinion is affirmed and adopted by the Appellate Court, says, "It would seem indisputable, that the Legislature has the right to regulate the execution of the duties, which are incident to the office of Sheriff, and to demand an indemnity for their faithful discharge. If it be not so, then it necessarily follows, that since the Sheriff is in office under the Constitution, he could be bound to perform only such duties as had been

prescribed before the Constitution, and all legislation since has been idle, and worse than idle. No one, I presume, would contend for positions, which they were sensible would lead to such consequences. The

Constitution fixes the tenure of the 432 office; but the Sheriff takes it \*sub modo. He accepts it subject from its very nature, to legislative regulations and to the control of the supreme power of the State," (p. 526-7.) And the Court of Appeals express themselves with yet stronger emphasis. "The Constitution (say they) no where provides for the mode of appointment, duties or qualifications of Sheriffs; and, by necessary implication, leaves the matters, as they then existed, subject to such modifications as the Legislature should, from time to time, find expedient."

The principles here adjudicated apply with all their force to the case under consideration. The Constitution of this State establishes the tenure of the office of Sheriff, but imposes no other limitation upon the power of legislation in relation to it. It is silent as to his duties, and submits them therefore to the direction and control of that department of the government, which is invested with the power of making all laws which are not repugnant to that instrument.

And upon this point the case of Hoke v. Henderson, introduced into the argument from 4 Devereux, is not less decisive. The Court there say, (p. 14,) that the power of regulating and prescribing "the nature of the office, in duties, powers, privileges and emoluments" is "purely legislative," and "within the legitimate powers of the General Assembly:" that "prescribing the duties of officers, their qualifications, their fees, their powers, and the consequences of a breach of duty, including punishment and removal, are all political regulations, and fall within the legislative province." (p. 15.) "If the Legislature increase his duties and responsibilities, or diminish his emoluments, he must submit, except in those instances in which the Constitution itself has declared the duty and fixed the compensation, because in the nature of things these are the subjects of such regulations, as the general welfare may, from time to time, dictate, and the office must therefore, have been conferred and accepted, subject to such regulations. (p. 20.)

The current of authority, then, is 433 unbroken and unvarying, that \*a public office is not held by contract, within the sense of that term, as employed in the Constitution, and that it is an appropriate exercise of legislative power, and within legislative competency, to reform the office, and change and modify its duties at pleasure, unless the Constitution of the state shall, by an express provision, have fixed that duty.

There is no such provision in the Constitution of this State.

But it is said, that the word "Sheriff," is known to, and derived from the laws of England, and that by its adoption into our



Constitution, the nature and character, the powers, duties and rights of that office, as it existed under those laws, became fixed and established, by the fundamental law of the State, beyond the reach of legislative alteration, and that as by the common law, and the statutes 14 Edward III. c. 10, and 19 Henry VII. c. 10, the Sheriff has the custody and keeping of the Jail, and of the prisoners therein, that custody is by the Constitution, embraced in the office of Sheriff, and cannot be separated from it by legislative Act.

If the premises assumed be, that the term "Sheriff" has been introduced into our Constitution, according to its strict etymological sense, and as importing what it originally signified at common law, "the keeper of the county," with the authorities and dignities attached to the station, as the associate of the King, the chief executive and military officer of the county, invested also with high judicial powers, whose office was purely honorary, and whose duties were gratuitously discharged, it must be obvious that they are incorrect, if in fact, they be not repugnant to the genius of our institutions: while also, it must be equally apparent, that by parity of reason, Justices of the Peace will be protected, by constitutional safeguard, in the same tenure, jurisdiction, powers and incidents, which belong to those officers, in the country from which the Constitution has derived their designation. And the reason

434 why \*the corollary deduced from these premises is untrue, will furnish an answer to the argument that has been built upon them. It is, that they are officers created by law, whose duties, powers, and responsibilities, are, and always have been, regulated and controlled by law.

But if the proposition presented by the argument, be correct; if it be true, that the office is established and fixed by our Constitution, precisely as it exists in England, all notion of a contract between the Sheriff and the government, or body politic, becomes at once exploded. The acceptance of the office of Sheriff, is not a matter of choice in England; it is imposed upon him under a penalty, (Watson 5,) and the Supreme Court have held, in the United States v. Tingey, (5 Pet. 115,) under circumstances less partaking of the character of duress, that the agreement of an officer was not a contract, because not resulting from the exercise of free agency. And even the statute of 9 Ed., upon which the defendant founds his claim to the Jail, imposed a burden and responsibility upon the Sheriff, and was not intended to confer, and from the nature of the office in England, could not confer a benefit upon him.

If, moreover, the proposition be true, it may well admit of doubt, whether the defendant possesses the qualifications required by the common law, and has a right to contest the claim of the relators.

If it be true, has he complied with the duty which the laws of England impose upon him, under penalty, of appointing his

under Sheriff, and the requisite number of deputies and bailiffs?

But serious as would be the consequences to the defendant, which would result from this proposition, they would be much more mischievous in their effects upon society. The administration of justice, the pursuit of rights, and the redress of wrongs; all laws which are administered through judicial tribunals, all which relate to property, to contracts, or persons; and these form the great mass of the laws of

every civilized community; the whole  
435 \*criminal jurisprudence of the country, and every thing connected with the enforcement of civil rights, require the agency of the office of Sheriff in England, or of an officer of like nature and character, in every country where laws and courts of judicature are known—and are, therefore, immediately connected with his powers and duties. If then, the powers and duties of the Sheriff, as they exist in England, are surrounded by the impregnable safe-guard of the Constitution, the laws of that country, almost in their totality, have been inflexibly fixed upon us; they cannot be changed, since any change in them, must affect the Sheriff in his powers or duties, his rights or responsibilities, and make them different from what they were in England, at the period of the establishment of our Constitution; and the framers of it, when ordaining a government, in which they embodied the representative principle, in order that it might reflect the sentiments of the community, and with the distinct design, that the political society, which they were organizing, should advance with the advancement of the age, and accommodate itself to the improvements of society, have, with the iron hand of an imbruted despotism, stamped inflexible immutability upon our institutions; have bound us to the notions of our ancestors, no matter how exploded by the sentiments of society, or inconsistent with its interests; and not merely limited, but abolished the power of the Legislature, in the very effort to organize it. The proposition is too monstrous to be for a moment entertained.

If it be true; the contemporaries of the Constitution and those who, themselves, had an agency in framing it, have betrayed a lamentable ignorance, or been guilty of a wanton disregard of its provisions, by divesting the Sheriff of the high judicial and executive powers which belonged to him in England and degrading him to the performance of unmixed ministerial services; by transferring from him the authority of presiding at elections and imposing on him the duty of attending them as a mere police officer, subject to the orders of others who

preside; by depriving him of the im-  
436 portant \*privilege of selecting jurors; by admitting constables, not of his nomination, to participate with him in the service of writs; by all the regulations in relation to Sheriff's sales, and by the enforcing upon him of the duties of humanity towards prisoners whom the common law

allowed "in the name of God" to starve, if they could not support themselves; by requiring from him a bond, as a prerequisite to the discharge of his duties, and by numberless other interferences with his powers and privileges; nay, by the Judiciary Act itself, passed almost simultaneously with the Constitution, and whose provisions the defendant invokes in support of his claim;—and not only by the Acts which have direct reference to his office, but also by all those which regulate Courts and their proceedings. If there be any thing attached to the office that can be regarded as the private right of the officer, it is his emoluments and fees. But will it be pretended that the Legislature have been guilty of desecration of the Constitution by reducing the enormous costs that attend the prosecution of a suit at law in England, and which would, if retained among us, amount almost to a denial of justice? Yet such a proposition, if not more tenable, would not be less so than that which is contended for.

It is much more reasonable to believe that the framers of the Constitution had in view the office as it then existed in this State, where many and material alterations have been effected in its nature and character. But even viewed in this modified aspect, the proposition insisted on would involve the same mischievous consequences which have just been indicated. It would deny to the Legislature the right to regulate the administration of justice—to change the organization of Courts—to amend the laws which regulate property, respect contracts, or which affect civil rights. It would abolish all changes that have been made in any of these respects since the establishment of the Constitution, would restore the civil institutions which then existed, and towards the reforming of which the Constitution itself was remodelled, and render  
437 \*them immutable by the power of legislation which it for that purpose organized. Of its effect the argument presented in the case will afford apposite and strong illustrations. It is maintained that to the Sheriff belongs the custody of persons arrested for debt or for criminal offences, and that, inasmuch as the Jail is the place where they are to be confined, the custody of the Jail appertains to him. Now if it be true that the depriving him of the custody of debtors and of criminals be unconstitutional, it is insisted, the consequence is, that the improvements in penal jurisprudence and in the laws having in view the mitigation or abolishment of imprisonment for debt, so creditable to the humanity and intelligence of the age, are void, because interfering with the rights of an officer, created too for the very purpose of aiding in effectuating the law and, for his benefit, we must be remitted to the barbarism of feudality. The law establishing the Penitentiary would be unconstitutional, because to the Sheriff belongs the custody of criminals. The Act for the relief of honest debtors is void, because he is entitled to the custody of persons arrested for

debt. So, in like manner, the organization of city and other local Courts is an infringement of his constitutional rights, since to the Sheriff belongs the execution of writs; as for the same reason are laws which confer upon constables the authority to serve attachments and other process.

But in the making of such laws the Legislature is, we have seen, in the exercise of powers which cannot be surrendered, and which are essential to the protection of rights that cannot be alienated. The powers as whose agent he is employed, are the essential powers of government, and the rights in whose enforcement he is engaged, are those for the securing of which, government was instituted. It would be destructive of the very object of government and subversive of its ends that he, who is employed as such agent, should, because of the very duties which inhere in and result from such agency, control those powers and  
438 defeat those rights. It \*would be a forfeiture of self-government and a substitution of the authority of the agent of the people for that of the sovereign people.

Besides this, the duties which belong to his office are purely ministerial—they are the mere creatures of law, and are imposed upon him by law, and "from the very nature of things," as remarked by the Supreme Court of North Carolina, they must be subject to be modified and controlled by law. His powers, as already observed, are the consequences of his duties, his rights result from his obligations, and it would be repugnant to the very nature of his office that he, whose duty it is to receive the rule, should, because of his obligation to obey it, impose restraints upon those from whom he is to receive it.

The framers of the Constitution, when they employed the term, necessarily contemplated the officer whom it designated, in the light in which he was known to the institutions of the State. These recognised him as a purely ministerial officer, whose duty it was to obey the injunctions, and execute the prescriptions of law, and under them his powers had always been regulated by law, unrestrained by any direct constitutional provision. The employment of the term in the Constitution, therefore, so far from relieving his duties from the control of the Legislature, imports their subjection to the legislative will, and would leave them, did it impose no other restraint, to the unlimited action of that will. Ours is a government founded upon the public will: and the representative form in which it is organized, is designed to reflect and embody that will. Laws are, therefore, with us, emphatically, "the public will duly expressed," and when it is confined to its constituted ends, there is nothing that can hinder it from operating on its appointed agents.

But the term, from which a restraint upon the power of legislation is attempted to be derived, does not impose a limit  
439 upon the \*ends for which government



is constituted, but on the contrary, is used in reference to an agent, a means to accomplish those ends.

Now the only limit which the Constitution imposes upon the Legislature, in relation to the office of Sheriff, is as to the tenure by which it shall be held. It is silent as to his qualifications and duties, and of necessity, leaves them, as remarked by the Court of Appeals, of South Carolina, to the control of the Legislature. And the insertion of this provision into the Constitution, by which bonds are imposed upon the Legislature, in respect to the duration of the office, bears evidence, by necessary implication, that, but for its introduction, the legislative will, in regard to the office, would in this respect, as in all others, have remained unrestrained. And a recurrence to precedent legislation on the subject, will tend to establish that this was the object of the provision.

If the provision of the Constitution were of equivocal import, the practical construction that has been given to it, and the uninterrupted usage under it, would remove all doubt. The legislative interferences with the office, the duties and rights of Sheriff, before adverted to, commencing almost at the moment the Constitution went into effect, and unintermittently exercised ever since, and among these interferences, that, above all others, by which the regulation and custody of this very Jail were transferred, as early as the year 1801, to the relators and their appointees, and continued in them, without resistance, or being questioned, until revoked by the Act of 1822, conclusively evince the sense in which it was adopted, and has been accepted by the people, whose Act it is; and establish the universal understanding, that the control of the office, and of the authorities, duties and rights of the holders of it, is subject to legislative discretion.

But the Constitution itself forbids the indulgence of a doubt.

A Constitution is designed to organize the political government of society, and the very comprehending of the office of Sheriff, in that fundamental law of the body politic, is a recognition of it as a public office, established for political purposes, and to subserve the ends for which the government was established. The duties of such an office are, from their very nature, subject to be abridged and controlled, as the general welfare, the common good, and the happiness of society may require, and they may therefore, be modified, at the pleasure of that department which is the exponent of the public will, so long as its action is confined to the ends for which government was constituted. As principle, and the nature of the office establish, so all authority proclaims, that the duties of a public officer may be diminished or increased at the pleasure of the government. In the language of Ch. J. Marshall, a public officer is "an instrument of government, created for its purposes," an agent "for the performing of duties flowing from the

sovereign authority," "exercising powers conferred by the government for public objects," holding "an office created for state purposes," "and must of course, be controllable by the Legislature."

He is an instrument for public purposes—an agent for the performance of public duties. But public purposes must be such as the public appoints and can control, and public duties must be for the benefit and therefore under the direction of the public. They would cease to be public if they were subjected to the control of the individual whose instrumentality was employed for their attainment or execution. He is appointed as a means for the effecting of an end, and must be controlled as that end requires. Were it otherwise the end would be sacrificed to the means.

And regarding him as a mere ministerial officer, he has no powers beyond, or independent of, his duties. Powers become vested in him, we have seen, because of the duties that are imposed on him, and are accessorial to the latter. His powers and rights are incidental to his duties, and the remark of the defendant's counsel is rightly conceived, which affirms that his right to the keeping of the Jail is incidental to the office. But in the duties to which

that \*right and power are incident, he has no interest. They may be changed without an injury to his rights. Those rights are collateral to, and consequential upon duties, which are entirely under the control of the public, and he cannot more justly complain of a consequential loss that he has sustained from the exercise of that undoubted right of control over his duties, than could an owner of property, of damage resulting to him from the exercise by the public of their unquestionable rights in relation to the establishment or alteration of highways, or the improvement of navigable streams; or, than could the owners of lots on the river or in the former seats of business within the city, legally resist the authority of the Legislature to incorporate the Steam Boat Company.

Since then, the right to the custody of the Jail is incidental to the office of Sheriff, because incidental to the duty of safe-keeping prisoners, and since that duty may be withdrawn from him by the Legislature, in the exercise of their legitimate and appropriate power, a consideration of the question so fully discussed at the bar, becomes unnecessary. For if the right be incidental to the duty, over which the Legislature has an unquestionable control, the loss of the right has been the effect of a legal exercise of legitimate power, which it would be a solecism to say, the defendant can legally resist. And if, as is insisted by the relators, the right which he claims has not been attached to the office, then he has not incurred even loss from that exercise of power; he has sustained neither damage nor injury.

With the authority of the principal, that of the Jailor, who is his deputy, or ap-

pointee, and mere "shadow," also ceases. (3 Kent 365, 6; Earl of Shrewsbury's case, 9 Co. 42, 48; Paddock v. Cameron, 8 Cowen 212.)

Although this examination of the Constitution has been felt due to the argument, which has been addressed to the Court, it was not required by the record in the case. The return, which alone presents the title upon which the defendant can con-  
442 test the claim of \*the relators, does not advert to the Constitution, nor to contracts, as the source of his right to the Jail, but correctly deduces it exclusively from the laws of the State, and claims the advantages and property, which it alleges to be attached to the office, not as secured to the office so long as it shall endure, as they would be were they attached to it, or protected by constitutional provision—but as secured to him during his current term of office, because they were attached to it by laws existing at the time he was elected, commissioned, and qualified. But the fact that his title was derived from law, established that it might be revoked by law: and the argument itself, which asserts the unconstitutionality of the Act of 1834, and that it is hence inoperative on the present Sheriff, abandons the ground on which it is based, when it admits, that it may have operation on his successor.

Indeed, the facts of the case, so far as the rights of the defendant are concerned, are simply these:—The Act of 1801 had conferred the control of the Jail, and the appointment of the keeper, upon the Mayor and Aldermen. That of 1822 vested the direction of the Jail in the Inferior Court and Sheriff of the County, and the Act of 1834 repeals that of 1822. The power to repeal a law, it will not be contested, is purely legislative, and its exercise in this instance, since it is not retrospective, and does not avoid or undo what had been done under the pre-existing law, is a legitimate exercise of that power.

The Act of 1834, therefore, being passed in virtue of powers vested in the Legislature, containing in itself no provision repugnant to the Constitution of the State, and not being intercepted by any impediment arising from the Constitution of the United States, must have effect.

The rule granted in this case, must therefore, be absolute, and a peremptory mandamus must issue.

443 \*The State v. John I. Dews.

January Term, 1835.

Chatham Superior Court, Jan. 2, 1835.

On motion of the Recorder and Mr. M'Allister, on behalf of the Mayor and Aldermen of the City of Savannah and the hamlets thereof, for a mandamus to issue to John I. Dews, Sheriff of Chatham county, commanding him to deliver to the said Mayor and Aldermen, the possession

of the Jail of said county, and the custody of the prisoners therein confined, and on reading the affidavits and papers, stating the facts on which said motion is grounded; and on hearing Messrs. Berrien and Cuyler, and Mr. Law, on behalf of the said John I. Dews, opposing the said motion—It is ordered, that a peremptory mandamus do issue, to be directed to the said John I. Dews Sheriff as aforesaid, commanding him to deliver the possession of the said Jail, and the custody of the prisoners therein confined, to the said Mayor and Aldermen of the City of Savannah, and the hamlets thereof, or to Young S. Pickard, the Jailor appointed by the said Mayor and Aldermen.

Wm. H. Bulloch, Recorder, and M. H. M'Allister, for the relators—Berrien & Cuyler, and Law, for defendant.

444 \*Samuel Dibble, Pl'ff, v. William Gaston, Garnishee.

January Term, 1835.

**Bills of Exchange—Letter Requesting One to Pay Another a Certain Sum—Acceptance.**—The master of a vessel consigned to G. wrote a letter by H. the Pilot who carried the vessel out, informing G. that the ship had crossed the bar in safety, and requesting G. to pay H. \$35, the amount of pilotage due, "and oblige your obedient, &c." H. indorsed on the letter, "Pay to L. or order." D. a creditor of H. sued him and garnisheed G. (as the creditor of H.) who returned under oath, that previously to such garnishment L. had presented such letter indorsed as above, and that he (G.) had promised to pay the amount to L. Quære, if such letter was a bill of exchange, or an order in the nature of a chose in action.

**Same—Acceptance—Effect.**—HELD, that if considered as a bill of exchange, the indebtedness of G. as acceptor, created a liability to L. the then holder, and not to H. who had parted with his interest in it.

**Chose in Action—Acceptance—Effect.**—HELD, also, that if it was a chose in action, the indebtedness of G. was created only by his promise, and that this being made to L. produced a privity of contract between G. & L. only, and that therefore G. had never been the debtor of H.

The facts of this case were, briefly, as follows: Goldie, the master of a vessel consigned to William Gaston, wrote a letter to Mr. Gaston, by Harden, the Pilot who carried the vessel out, informing Mr. G. that the ship had crossed the bar in safety, and adding, "you will please pay Mr. Harden the sum of \$35, the amount of his pilotage, and oblige your obedient servant." Harden endorsed on the letter, "Pay to John Low, or order." Dibble, the plaintiff, who was a creditor of Harden, sued him in a Magistrate's Court, and garnisheed Gaston, (as the debtor of Harden,) who returned under oath, "that he had antecedently to the summons, promised to pay Low the amount for which the order was drawn, Low presenting to him an order



in favor of Harden, which was indorsed by Harden to Low." No evidence was offered by the plaintiff in the Court below, but the Jury gave a verdict in favor of Dibble against Gaston as garnishee, and the proceedings were carried by certiorari to the Superior Court.

By NICOLL, Judge.

Having seen nothing calculated to shake the opinion already \*intimated in relation to the regularity of the proceedings, it only remains to me to express my opinion on the merits of this case.

The real question in the case is, not that which has been discussed at the bar, whether John Low was the creditor of the garnishee at the time the summons was served on the latter, but whether the garnishee was the debtor of Harden, the defendant, in the original suit; for it was only as such debtor that judgment could be rendered against him. Now the indebtedness of the garnishee to the original defendant is predicated exclusively upon the order drawn by Captain Goldie on the garnishee, in favor of Harden. This order must be regarded in one of two lights, either, 1st. as a bill of exchange, which the garnishee's counsel insist it is, or 2dly. as a mere private request or order, in the nature of a chose in action and not negotiable by indorsement, as is contended by the counsel for the plaintiff.\* But in which ever of these lights it be regarded, I can perceive no difference in the legal result.

If it were a bill of exchange, the indebtedness of the drawee did not arise until acceptance, which acceptance constituted an engagement to pay the sum specified in the bill, to the then holder, or to those who should thereafter be the holders. It is immaterial therefore, whether the acceptance was before or after the service of the summons, in either event, the drawee became the debtor, not of Harden who had ceased to be the holder, but of Low who had become the holder. The indebtedness of a drawee upon the bill is the result only of his acceptance, and as acceptor, and that acceptance would create a liability not to the payee, who had parted with his interest in the paper, but to him who was then the holder of it, or to whom he should thereafter transfer it. But there \*is no evidence that the garnishee ever promised payment to Harden, or that he ever accepted the order while it remained in the hands of Harden.

And if the paper be treated as a mere chose in action, the same result will follow. The true inquiry, it will be noted, is not whether the paper was negotiable, and therefore, whether the garnishee became the debtor of Low, but whether he was the

debtor of Harden. Now, it must be obvious, that if this paper was not a bill of exchange, but a mere chose in action, the assignment of which could not make Low the legal creditor of the garnishee, equally was any claim arising out of the indebtedness of the garnishee to Goldie, if any such indebtedness existed, a chose in action, and therefore the assignment of such claim from Goldie to Harden, in which light the objection assumes the paper to be, could not constitute the latter the creditor of the garnishee. The objection therefore, since it would, if well founded, show that Harden was not the creditor of the garnishee, would be fatal to the plaintiff's right of recovery. But independently of this consideration, if it were such chose in action, then to produce a privity between the original defendant and the garnishee, and to make the latter a debtor to the former, there should have been a promise of payment by the garnishee to the defendant. (Williams v. Everett, 14 East, 582; Yates v. Bell, 3 B. & A. 643; Hodgson v. Anderson, 3 B. & C. 842; 10 C. L. Rep. 247; Tierman v. Jackson, 5 Peters, 580, 597; Weston v. Barker, 12 Johns. 276, 280.) But there was no such promise from the garnishee to Harden, on the contrary his promise was to Low, and that promise, as is established by the cases just cited, made him the debtor of Low. This view supersedes the inquiry, whether the acceptance or promise by the garnishee, was before or after the service of the process on him. For though it were after the service, the acceptance, (if the paper be treated as a bill of exchange,) from which only his indebtedness could result, was of a bill, the interest in which had \*passed from the original defendant, which was the property of Low, to whom as holder, the drawee by his acceptance became debtor, and no acceptance of which could make him the debtor of Harden the payee, who had ceased to be the holder, and who could have no interest in it. So, if it was a chose in action, it is equally immaterial though the promise was made after the service of the summons. The indebtedness of the garnishee to the assignee, could be created only by his promise: that promise was made to Low, not Harden, and made Gaston the debtor of the former, not of the latter.

But the evidence ascertains, that the acceptance or promise, which ever it may be called, was made before the service of the summons of garnishment. The return made under oath by the garnishee, the only evidence upon which the plaintiff could have relied for a recovery, for he offered none other, expressly states, that "he had antecedently to the summons, promised to pay Low" the amount for which the order was drawn "Low presenting to him an order in favor of Harden, which was endorsed by Harden to Low." And the necessary implication from the testimony of Low, who states, that previously to the service of the summons, "Mr. Gaston had

\*A paper in these words, "Mr. L. please let the bearer have £7. and place it to my account, and you will oblige your humble servant R. S." is not a bill of exchange. (1 Moo. & Mal. 171; 22 En. C. L. Rep. 280.—(Ed. of Original Edition.)

inquired of him, if he had the order, and desired him to come round to the counting room, and that he would pay it," is, that Mr. G. then knew that Low held the order, and was entitled to payment, and this implication is confirmed by the fact, that Low received the payment for the order, had it then in his possession, with the endorsement or assignment of Harden upon it, and delivered it up to the garnishee, upon receiving payment. To resist this conclusion, the presumption must be entertained, that Mr. Gaston knew that the plaintiff was about to issue the process of garnishment, and that he designed, though having no interest, fraudulently to defeat the plaintiff's remedy. But such presumption arises out of, and is countenanced by no fact in the cause, and is repelled by the rules of law, by which fraud is never presumed. But did not the evidence as-

448 certain the fact, yet would \*there be a want of title in the plaintiff to recover against the garnishee. To authorise such recovery, he should affirmatively establish his title, by proof that the garnishee was the debtor of the defendant in attachment, and to constitute this proof, it was essential that the acceptance, or promise of payment, should have been made to Harden, or at least while Harden was the holder of the order, and that the transfer from Harden should have been after the service of the summons of garnishment. And the obligation of so proving, was imposed on the plaintiff, not only by the attitude in which he stood to the cause, but also by the presumption of law, in relation to paper of the nature of that concerning which this controversy arises, that the endorsement was made simultaneously with the making of the instrument, which presumption must prevail, until encountered by adverse evidence. (*Pinkerton v. Bailey*, 8 Wend. 600; *Webster v. Lee*, 5 Mass. 334.) But there is an entire absence of any such evidence in the cause. I am therefore, of opinion, and it is considered by the Court, that the verdict below, and the judgment thereupon, were erroneous, and must be set aside. Whereupon it is ordered, that the same be certified to James Cleland, Esq. the Magistrate before whom the verdict and judgment complained of, were rendered, that the said proceedings may be corrected, and right and justice may be done in the premises.

Judgment Reversed.

M. Sheftall, Sen. for plaintiff—Millen & Charlton, for garnishee.

449 \*The Governor v. Wm. C. Daniel, Ex'or of Joseph V. Bévan.

May Term, 1835.

**Bonds—No Stipulation for Interest—How Interest Awarded.**—Where a suit was instituted on a bond given for a certain sum of money, and conditioned for the performance of a duty, without any stipulation as to interest, and the Jury on an issue of

fact submitted to them, found the bond declared on to be the deed of defendant, and assessed nominal damages; HELD, that interest could be awarded on such bond only in the shape of damages assigned by a Jury.

**Same—Same—Verdict for the Debt—Execution for Interest and Debt—Validity.**—HELD, also, that the verdict rendered only found the debt mentioned in the bond, and as that contained no stipulation for interest, the execution which had issued for principal and interest from the date of the bond, was illegal.

**Same—Judgment for Damages—Execution.**—Where the judgment is for damages only, an execution issued for debt and damages, is illegal.

The action out of which arose the question submitted for the decision of the Court, was debt upon a bond, dated 26th April, 1825, in the sum of \$400, conditioned to collate, arrange, and publish, the papers relating to the original settlement, and political history of Georgia, to be found in the Executive or Secretary of State's offices. Various pleas were pleaded, upon which the Jury rendered this verdict:—"We find the deed declared on, to be the deed of Jos. V. Bevan, &c. and we assess ten cents damages and costs." The judgment entered was, "Therefore it is considered, that the said plaintiff do recover, against the said defendant, his damages aforesaid, by the Jury aforesaid assessed, and also, seven dollars, and seventy-five cents, for his costs, &c." Upon this a Fi. Fa. was issued, "to levy the sum of \$400, with interest," which was endorsed—

"Judgment, . . . . . \$400 00

"Interest from 26th April, 1825,

"Costs, . . . . . 7 75

The defendant presented an affidavit, alleging that the execution issued illegally, because it was issued for interest not warranted by the verdict or judgment; because no interest was due or payable 450 \*on the bond: because the judgment is for a larger sum than the verdict specifies, and because the only judgment that could have been entered up, was for the penalty, without interest.

The following was the opinion expressed by the Court:—

By NICOLL, Judge.

In the case out of which this question arises, which was an action of debt, upon a bond conditioned for the performance of certain acts, an issue of fact was joined, and the determination of it was submitted to the Jury.

To the Jury, therefore, exclusively belonged the trial of the point involved in the issue, and the ascertainment of the amount which the plaintiff was entitled to recover. The inquiry then, in the present proceeding, is not whether interest could have been recovered on the bond, on which the action was instituted, but whether such interest has been awarded. The Jury have assessed no damages upon the breach assigned, but have, by their verdict, simply found the debt, with nominal damages. That debt is the sum mentioned in the obligation. It



is not necessary to decide whether, if the obligor had, by the terms of the bond, bound himself to pay the sum specified, with interest thereon, the interest would not be considered a part of the debt, and a finding by the Jury of the deed, would not have been a verdict for the specified sum and interest—for the bond in this case, contains no agreement for the payment of interest, but merely binds the party to the payment of a certain sum of money, without any stipulation as to interest; nor is it conditioned for the payment of a sum of money, at a day certain, nor indeed for the payment of any sum, but for the performance of a duty. A verdict of the Jury, therefore, affirming the obligation, finds nothing more than the debt specified in it, to wit, the sum of \$400. (Page v. Newman, 9 B. & C. 378; 17 C. L. Reps. 400; Hillhouse v. Davis, 1 M. & S. 170; Foster v. Weston, 6 Bing. 707; 19 C. L. Rep. 211; Higgins v. Sargent, 2 B. & C. 451 \*348; 9 C. L. Rep. 101, 103; Arnott v. Redfern, 3 Bing. 353; 13 C. L. Rep. 3; Hogan v. Page, 1 B. & P. 337, n.; Craven v. Pickell, 1 Ves. Jr. 60, 63; Ex parte Koch, 1 V. & B. 345; 1 Hovend. Fraud. 63; 5 Cowen 608, 9, 10; Laing v. Stone, 2 M. & R. 561; 17 C. L. Rep. 320; Du Belloix v. Ld. Waterpark, 1 D. & R. 16; 16 C. L. Rep. 12; Cameron v. Smith, 2 B. & A. 305; Lee v. Lingard, 1 East. 401, 403; Frith v. Le Roux, 2 T. R. 58; Francis v. Wilson, R. & M. 105; 21 C. L. Rep. 391; 12 Wheat. 340, 244, argo.) And such being the nature of the bond, it is obvious, as well because interest could be awarded upon it only in the shape of damages, which could be assessed only by the Jury, as because of the reason already stated, viz: that issue of fact was joined, which was submitted to the Jury, that in the absence of a finding by the Jury of such interest, execution cannot be had for it. The verdict here determines nothing more than would have been ascertained and fixed by a judgment by default. (Arch. Appx. 336; The People v. Hallett, 4 Cow. 67.) But upon such judgment by default, there is nothing in the record of this case, that would authorize the recovery of interest from the date of the bond, from which date it is computed in the execution.

But besides this, the execution is not warranted or sustained by the judgment upon which it professes to be founded, and on which only it can issue. That judgment is for damages only, whereas the execution is for debt as well as for damages.

The opinion of the Court is, therefore, that the execution has issued illegally.

Execution set aside.

ROBERT M. CHARLTON.

Appointed Judge. December 31, 1835.

452 \*Randolph B. Fell v. Eliza G. Abbot.

May Term, 1835.

New Trials—Verdict against Evidence.—If a verdict

be clearly against evidence, a new trial will be granted.

**Same—Conflicting Evidence.**—But where there has been conflicting testimony, and the case has been fairly submitted to the Jury, and it does not appear that any rule of law has been violated, or injustice done by the verdict, a new trial asked for, on the ground, that such verdict is against the weight of evidence, will not be granted.

**Appeals—Frivolous—Right of Special Jury to Assess Damages for.**—The Judiciary Act of Georgia, which directs that "no interest shall be given on any open account, in the nature of damages," does not prohibit a Special Jury on an appeal trial from assessing damages on the principal sum, for a frivolous appeal, though the action was in its inception founded on open account, if such Jury are satisfied that the appeal was frivolous and intended for delay only.

**Same—Same—Question for Jury.**—And the question whether such appeal be frivolous, is exclusively for the Jury.

**Juries—Verdicts—Interest.**—Where a verdict has been rendered by a Petit Jury on an open account, and such verdict has been appealed from, it seems that interest can only be computed on such demand from the verdict of the Appeal Jury.

**"Unliquidated Demand"—"Open Account"—What Are.**—The Judicial and Legislative construction in Georgia, of the words "unliquidated demand" and "open account" has been to consider all as such, unless there be some written acknowledgment or promise by the debtor. A verbal acknowledgment of indebtedness in a definite sum, accompanied with a promise to pay, does not constitute it a liquidated demand.

A New Trial May Be Granted on Terms.

By CHARLTON, Judge.

This was an action of indebitatus assumpsit, for money had and received, and was brought originally in the name of Randolph B. Fell and wife, against the defendant. A verdict was obtained by the plaintiffs, before the Petit Jury, with interest from 27th July, 1833, and from this verdict an appeal was entered by the defendant. Upon the first trial, before the Special Jury, the presiding Judge charged the Jury, that where husband and wife

joined in the action, the interest of the wife could not be inferred, \*but must appear expressly in the declaration, and the Jury not being able to agree, a juror was withdrawn, and a mis-trial declared. The attorney of the plaintiff then amended his declaration, by striking out the name of the wife wherever it appeared, and the case, when it came before me, stood for trial in the name of Randolph B. Fell only; and after hearing evidence and argument of counsel, the Special Jury returned a verdict for plaintiff for \$300, with interest from 27th July, 1833, and ten per cent. on the principal sum, as damages.

A new trial is now moved for, on the following grounds:—

1st. Because the verdict of the Jury is contrary to evidence, because by confession of the plaintiff, it appeared that the money for which the action was brought, was money arising from the sale of trust prop-

erty, belonging to the plaintiff's wife, who had then, and now has, a subsisting Trustee."

An application for a new trial, is an application to the discretion of the Court, who ought to exercise that discretion in such a manner as will best answer the ends of justice. (*Edmonson v. Machell*, 2 Term Rep. 4.) If a verdict be clearly against evidence, a Court will not hesitate to render justice, by granting a new trial, but "it may be regarded as a proposition containing a rule of universal application, and one *instar omnium*, that where an issue of fact is fully and fairly submitted upon its merits, and the Jury, in the free exercise of a sound judgment, pass upon it, their verdict shall stand." (*Graham* on new trials, 362; *Arch. Prac.* 222; *Gra. Prac.* 514.) And the fact, that the Jury have found the issue in favor of the party, against whom, in the opinion of the Court, the weight of evidence preponderated, will not be sufficient ground for granting a new trial, unless some rule of law has been violated, or manifest injustice done. This principle will be found in almost all the authorities on this point, and particularly in *Ashley v. Ashley*, 2 Str. 1142; 1 Wils. 45; 3 Wils. 45; *Lewis v. Peake*, 7 Taunt.

153; *Hartwright v. Badham*, 11 Price 383; *Douglass v. Tonsey*, \*2 Wendell 352. Now by applying this principle to this case, I cannot say that any rule of law has been violated, or any injustice done. There was conflicting testimony. On the part of the defendant, Mr. Stephen Mitchell testified, that the plaintiff informed him, that the money received by defendant from plaintiff's wife, was derived from the sale of a house, secured to the wife by the marriage settlement between plaintiff and wife. On the other hand, *Levi S. De Lyon*, Esq. swore, that he was the original trustee to such marriage settlement, and had continued to be such, until changed by an order of Court, made during the progress of this cause, and that the house, from the sale of which it was alleged, these funds were derived, had never been sold, and was now a part of the trust estate. In my charge to the Jury, I expressly told them, that if they believed, from the evidence in the case, that the money received by the defendant, was derived from the trust estate, or that it did not belong to the plaintiff, they must find the verdict for defendant, but if they had no satisfactory evidence of that fact, or if they believed from the evidence, that this money belonged to the plaintiff himself, or that it was acquired by the labor of the wife, without reference to the trust fund, then there was a sufficient privity of contract to sustain the action. The duty of reconciling testimony, or of deciding upon the credibility of the witnesses, is the peculiar province of the Jury, and when they have done so, and I am not satisfied that any rule of law has been violated, nor manifest injustice done by such verdict, I have no inclination to disturb their decision.

But it is urged "2dly. That the verdict is contrary to law, because it was against the weight of evidence, and because the Jury, in rendering their verdict, gave interest on an open account, and damages on facts, that did not legally warrant them in so doing, and also, because there was no privity of contract proved between the plaintiff and defendant."

I may as well dismiss at once the 455 grounds, that it was against \*the weight of evidence, and that there was no privity of contract, because I have already observed, the Jury are the proper triors of the weight of evidence, and because it was expressly left to them to say, whether this was the money of plaintiff or not, and they having found that by the evidence, it was the money of the plaintiff, a sufficient privity of contract has been shown.

The question in relation to damages, is a much more doubtful point. In the judicial Act of 1799, section 28, (*Prince's Digest* 212,) it is enacted, "that no verdict shall be received on any unliquidated demand, where the Jury have increased their verdict on account of interest, nor shall any interest be given on any open account, in the nature of damages." By reference to the other portion of said Judicial Act, we may be enabled to ascertain the intention of the Legislature, in relation to this question of damages. In the 26th section of the same Act, (*Prince* 212,) a right of appeal is given from the verdict of the Petit Jury, in all cases, upon complying with the conditions, of giving security, &c.; and it is further provided, that if "on hearing such appeal, it shall appear to the Jury, that the appeal was frivolous, and intended for delay only, they shall assess damages to the party aggrieved, not exceeding 25 per centum on the principal sum, which they shall find due, and such damages as shall be so assessed, shall be specially noted in the verdict of said Jury." There is no restriction here, on the Special Jury, where the action was in its inception, founded on an open, or unliquidated demand; nor taking into consideration the spirit and intention of the law, in allowing the Appeal Jury to give damages, would there be any reason in such a restriction. The object is expressly stated, as a punishment, to be inflicted on the person who perseveres in a wrong committed, or a right withheld, for the purpose of delay. If it be true, (as it most certainly is,) that under our law, interest cannot be given, even by a Special Jury, upon an unliquidated or open demand, and that the gaming party would obtain interest on such a de- 456 mand, not from the date \*of the verdict of the Petit Jury, (unless in case of no appeal, or such appeal being dismissed, or withdrawn by consent,) but from the finding of the Special Jury, there is every inducement to a Court to hold, that the clause in relation to damages will not apply to a case like this, and that the Special Jury have the power to punish the



wrongful withholding of a right, by the assessment of damages on the principal sum, in cases of frivolous appeal. A contrary construction would uphold injustice, and would be offering an inducement to a dishonest defendant, to appeal from a verdict of a Petit Jury, in cases too clear to admit of a doubt, in order that he might retain, without interest, and without risk of damages being awarded against him, a sum of money to which he had no shadow of claim. Such a law would be a fruitful source of continued litigation, of taking up the time of Courts of Justice by vexatious and unfounded defences, and would be lending the sanction of the law to the dishonest debtor, to aid him in defeating the rights of his honest creditor. I would hesitate long, before I would give a construction so forced and unnatural, and so contrary to right and justice.

But it is said, that a Court will control a Jury in the exercise of this power, and when it perceives that the Jury have found that to be a frivolous appeal, which was not so in truth, that a new trial will be awarded. Upon this point I can observe only, that there was evidence of the declarations of the defendant that she would keep the plaintiff out of the money as long as she could, and this, no doubt, had its influence on the Jury, on the question of damages. The question, whether it was a frivolous appeal, is given exclusively to the Jury by the Legislature, and although the Court might be justified, in very outrageous cases, in stretching its authority a little, and grasping at the improper exercise of such power by a Jury, in aid of other reasons for granting a new trial, it will not interfere, where the amount is so small, and where the defence, though a legal one, was purely technical, and not combined with the equity of the case.

457 \*The most important question, however, remains to be determined. The Jury have thought proper to give, not only damages, but interest on the principal sum, and the defendants' counsel object, that this being an open account, or unliquidated demand, it is illegal, under our law, to give interest upon it. (Prince's Dig. 212.)

The plaintiff's counsel denies that this is an open or unliquidated demand. He contends that it is a liquidated demand, and he cites many cases to show, that upon an action like this, interest has been allowed. I cannot give those cases, however, their full effect, because they do not proceed upon the question, whether interest should be given on a liquidated demand, but whether interest can be given on the action for money had and received, &c. The rule is settled by our statute, and is made to depend, not upon the form of the action, but upon the nature of the demand. If it is liquidated, it bears interest; if it is unliquidated, it does not. I am compelled, therefore, to inquire, whether this claim is, or is not, a liquidated demand.

I must confess, that if this were a case of

first impression, and untrammelled by judicial or legislative construction, in our own State, I should be very unwilling to designate such a demand as this, an unliquidated demand, or an open account.

The evidence on the part of the plaintiff, disclosed an express acknowledgment, by the defendant, that she had received \$300 from plaintiff's wife, for the purpose of buying a negro, that she had not bought the negro, but had brought back the money, lodged it in a Bank, and would give a check for it, whenever required; and that she subsequently said, that she would not return it, because the plaintiff and his wife had put her to some costs, by suing out a writ of possession against her, and that she would keep the money, until the interest on it reimbursed her for those costs. Here was an acknowledgment of a definite sum, unaccompanied with any legal claim to withhold it; and in fact, in the first

458 instance, accompanied \*with an express declaration, that it would be returned whenever called for. In Courts unfettered by any judicial or legislative construction upon a local statute, as to the meaning of the word "unliquidated," or "liquidated," I should presume such a claim as this would be properly denominated, a liquidated demand. In *Liotard v. Graves*, 3 Caines' Rep. 234, Spencer, J., says, "If an account be transmitted by a creditor, and acquiesced in, or assented to by his debtor, it becomes thereby liquidated, and interest is allowed," and many other authorities might be adduced to the same point. But I am forced to remember, that a different construction has been given in our own Circuit. In the case of *Wells v. Davant*, which was tried in the Chatham Superior Court, in January Term, 1829, before Judge Davies, and which was assumpt on a tailor's bill, the plaintiff's counsel offered to prove by parol, an express admission of the correctness of the account by defendant, and a promise by him to pay interest upon it. Judge Davies said, "the words of the statute are so positive, that I cannot allow the Jury to give interest on an open account." It is very clear, that he considered an express verbal admission of a definite sum, and an express promise to pay interest thereon, as being within the intent of our statute, an unliquidated demand, or open account. In the case of *N. B. & H. Weed v. Penny*, tried before Judge Law, of the Eastern District, and Judge Holt, of the Middle District, in Bryan Superior Court, I was counsel for the plaintiffs in the action, which was also assumpt on note, and for goods sold; and for the purpose of proving my bill of particulars, I introduced a letter written by defendant to myself, in answer to a communication to him, in relation to the payment of the claim. The letter contained in substance, "I am indebted to them about \$40, and will pay it when my crop comes in." I took the verdict without interest, on the open account, and after reading it to the Court, Judge Holt said, "Why do you not

take interest—is not that a liquidated demand?" Judge Law interposed, and stating that this was an action brought on an open account, and that the practice of  
459 \*this Circuit had been uniformly, not to allow interest in such cases, directed that the verdict should remain as it was; and interest was only allowed on the note, which formed a part of the suit.

Such is the judicial construction of the meaning of the words "unliquidated demand," in our Circuit, in reference to the judiciary Act of 1799; and although it is believed that most of the Judges in the other Circuits have not gone so far,\* and whilst (with great respect to the learned individual who made the last decision), it may be doubted, whether a written acknowledgment, with a promise to pay, can in any view of the matter, be called an open account, (a point unnecessary here to determine,) it is still important to a correct decision of this question, that we endeavor to ascertain what meaning the Legislature have given to the words "liquidated," and "unliquidated demands." In the same statute that contains this prohibition of interest, on unliquidated demands, there is a section (Sec. 25, Prince's Dig. 211), which provides, that "all bonds, and other specialties, and promissory notes, and other liquidated demands, bearing date, &c. whether for money or other thing, shall be of equal dignity, and negotiable by endorsement, in such manner, and under such restrictions, as are prescribed in the case of promissory notes, provided, that nothing herein contained, shall prevent the party giving any bond, note, or other writing, from restraining the negotiability thereof," &c.

The language of this section is very extensive. It includes "all bonds," and all other "liquidated demands," and it is clear, that it does not contemplate, in the use of the words "liquidated demands," any verbal acknowledgment, no matter how definite it may be, either in terms, or in amount, because none such could "bear date," or be "negotiable by endorsement;" and  
460 because the \*section afterwards gives the right to the party giving such bond, note, or other writing, to restrain the negotiability thereof, the words "other writing," evidently having reference to the words "other liquidated demands," antecedently used. I might go on to show, by other statutes, that the legislative construction of the words "unliquidated demands, or open accounts," has been, to consider all accounts as such, unless there be some written acknowledgment, or promises by the debtor. But it is deemed unnecessary, and would be extending this decision to too great a length. Acting,

\*"An acknowledgment of an open account by letter, is such a liquidation of the demand, as will enable the creditor to obtain interest from the date of the acknowledgment." (Hicks, et al. v. Thomas, Dudley's (Geo.) Rep. 218.)—(Ed. of Original Edition.)

therefore, upon the maxim stare decisis, and upon the intention of the Legislature, I am constrained to declare, that this was an unliquidated demand, and that consequently, the verdict of the Jury, giving interest upon it, is illegal, and cannot be suffered to remain in its present shape.

But, as I have already observed, a motion for a new trial is addressed to the sound discretion of the Court, and where it is satisfied that injustice has only been done in one point, or rather, where it is only dissatisfied with the verdict on one point, it will grant the motion on terms. The Court has sometimes limited the new trial to a single point. (6 Term. Rep. 626, Per Grose, J., *Thwaites v. Sainsbury*, 7 Bingham 437.) And various other authorities might be adduced to show, that new trials are frequently granted on extraordinary terms. (Graham on new trials, 604, et seq.) I will, therefore, grant this motion, under such restrictions and conditions, as may prevent the whole matter from being reopened, (unless the plaintiff should decline adopting the suggestion of the Court,) whilst it will purge the verdict of its objectionable part.

It is therefore ordered, That the plaintiff by himself, or attorney, have leave to enter a remittitur of the interest given by the verdict of the Jury, on or before the 2d day of March next; and upon such remittitur being entered and filed on record, before the third day of March next, that the order for supersedeas be annulled, and the motion for new trial refused:—And it is  
461 further ordered, \*That if said interest be not released and remitted before the 3d day of March next, 1836, that then the motion for a new trial be granted, and the order of supersedeas continue and be of force, until the determination of the cause.

M. Sheftall, Senr. & C. S. Henry, for the motion—L. S. De Lyon, against it.

462 \*John J. Maxwell, et al. Ex'ors of Ann Pray, and John J. Maxwell, et al. Trustees of Rebecca Knox's Children, v. James H. Maxwell, et al.

January Term, 1836.

**Equity Practice—Suit by Creditor of Decedent against Executor—Parties.**—A creditor is not compelled to join the legatees in a suit in equity, brought against the executor of the debtor; it is his privilege, not his duty to join them. The executor is to sustain the person of the testator, and to defend the estate for creditors and legatees.

**Same—Same—Same—Effect When Estate Has Been Distributed.**—And the fact that the estate has been distributed, and is in possession of the legatees, does not vary the rule.

**Same—Same—Right to Levy on Specific Legacies.**—A creditor having established his claim and obtained a decree against the estate of his debtor, authorising a levy upon said estate, in whosever hands it might be, will not be enjoined, at the instance of specific legatees, from proceeding



against that portion of the estate in their hands, on the ground that the testator had set apart a particular portion of his estate for the payment of his debts. Creditors having superior claims to volunteers, cannot be embarrassed or retarded by such a provision.

By ROBERT M. CHARLTON, Judge.

This is an application for an Injunction.

The bill states, that John Pray died, possessed of a large estate, which he disposed of by a very voluminous will; that by certain items in said will, he set apart and designated, an ample fund for the payment of all his debts, and that in various instances in said will, funds were particularly mentioned as given to legatees, if not required for the payment of debts: that the executors John J. Maxwell and George M. Waters, and the executrix Ann Pray, the widow of John Pray, took on themselves the administration of said estate, and caused legal notice to be given to all creditors, to present their demands; that from the several funds designated for that purpose by said will, they paid all the debts of which they were apprised, and after satisfying the known demands against said estate, they surrendered and delivered to the respective specific devisees and legatees, the possession of their several devises and legacies, and paid over to the general

463 of pecuniary legatees, the \*amount of their legacies, which they would not have done, so far as concerned the legacies which were given on the condition, that they should not be wanted for the payment of debts, had they been aware that any other debts existed against said estate; that after such payment of debts, and distribution of legacies, the defendants, the heirs and legatees of James B. Maxwell, upon whose estate the said John Pray was executor in his life-time, notified the executors of the said John Pray, for the first time, that they had a claim against the estate of said John Pray, who, they alleged, was a defaulting executor, and had mismanaged and misapplied the funds belonging to the estate of said James B. Maxwell; that the executors of John Pray having answered that they had fully administered the estate of said John Pray, before such notice, a bill was filed by the present defendants against said executors, and answers having been put in, such proceedings were had on said bill and pleadings, that a verdict or decree was rendered in favour of the present defendants, (then complainants,) "for the sum of twelve thousand dollars, payable out of any assets which may hereafter come to the defendants' hands, or out of the estate of John Pray, which has been delivered over to his legatees or devisees by the defendants. We find that the defendants have fully administered the estate of John Pray, so far as the same came to their hands, by the delivery thereof to his devisees and legatees; and we further decree that the complainants have leave to take out execution for the enforcement of this decree, and to levy the same on the estate, real and

personal, which was of the estate of John Pray, at the time of his death." That judgment having been rendered on said decree, execution was taken out, and delivered to John I. Dews, Sheriff of Chatham county, who proceeded to levy the same on certain lots, which had been specifically devised by said John Pray to Mrs. Ann Pray, his widow, (of whom the complainants are executors,) and the children of Mrs. Rebecca Knox, (for whom the complainants are trustees,) the said Ann Pray, and the said children of Mrs. Rebecca Knox, having been the especial objects \*of testator's bounty and regard, and the legacies given to them having been specific and unconditional, and not charged in any event with the payment of his debts. The prayer of the bill is, that the defendants may be compelled to resort to the legatees, whose legacies have been charged with the payment of debts, or that they may be compelled to resort to all the legatees of the said John Pray, if all are liable, and that in the mean time, an injunction may be awarded, to restrain the defendants from the sale of said lots, or either of them, and for further relief.

The cause has been argued at the bar at length, and with great ingenuity and ability. Many reasons are urged upon the Court for restraining the defendant from proceeding in the present levy. In the first place, it is said, that it is a general rule of Equity, that all parties in interest, must be parties to the suit; that a Court will not make a decree to affect the interests of parties not before it; that such a decree is void so far as concerns such parties, because the Court has no jurisdiction in relation to their rights, and because a decree against persons not parties, is considered an imposition and fraud upon the Court; that if the present complainants had been made parties to the suit instituted by the present defendants, in Bryan Superior Court, against the executors of John Pray, the complainants could easily have shown, that the legatees, whose legacies were charged with the payment of debts, if necessary, were first to respond to the defendants' demands, and that it would be unjust and inequitable to suffer the property held in trust by complainants, to be taken for the satisfaction of said judgment, without having given them an opportunity of being heard in defence of their rights.

The proposition, that you must have before the Court, all parties whose interests the decree may touch, is undoubtedly true, as a general rule. But it is not of universal application; it has exceptions, amongst the most settled of which are, the cases of creditors and legatees; the executor is to sustain the person of the testator, 465 \*and to defend the estate for creditors and legatees. (1 Ves. Sr. 105; 1 John. Ch. Rep. 438; 2 Mad. Ch. 152; 1 M'Cord's Ch. Rep. 324; 2 Ibid. 435; 3 John. Ch. Rep. 555, 6.) It is not doubted, that in a suit by a creditor, the legatees may be joined with the executor in certain cases,

(and perhaps in all,) but the question before me, is whether such legatees must be joined, and the authorities bear me out in asserting that such is not the law.

But it is attempted to carve an exception out of this exception. It is said by the counsel for complainants, that the reason why the executor is alone the necessary party to a suit by creditors, is because the legal estate is in him—the possession is with him, and so long as these continue to abide with him, he may alone be made the party, but that when the estate has passed from him, by the fulfilment of his trust, and the legal estate has vested in the legatees, by the assent of the executor, who has thus “denuded” himself at once of the title and possession, cessante ratione legis, cessat ipsa lex; he no longer ought to be made the sole defender of such suits. The legatees, who hold the legal estate and the possession, and whose rights may be materially affected by the decree, ought to, and must be joined.

I can find no such distinction in the books. The executor sustains the person of the testator, and so long as he continues to act as such, and has not been discharged by the proper tribunal, he is to defend the estate. His assent to legacies has not divested or denuded him of his representative capacity. That assent is simply an admission, that there are assets in hands, sufficient to satisfy all known debts; it does not take away from him his character as trustee for all interested under the will; if after assent and delivery of a legacy, other debts are discovered, of which he had no previous notice, he may compel the legatees to refund, and the legatees are as much interested in the question, whilst the estate is in his possession, as after it has passed

466 into their hands. If it is \*necessary to make them parties in the latter case, why not in the first? And in relation to the fact, that the legatees had possessed themselves of their respective legacies, with the assent of the executor, and had thereby acquired the legal estate, (as it is said in argument,) it must be obvious, that such possession, even with the assent of the proper representative of the estate, cannot take away the rights of creditors, claiming *ex debito*—such legacies cannot be held by a better title, or by greater exemptions, than whilst they remained the estate of the testator; so far as creditors are concerned, they are liable to the debts of testator. “The title of an heir to the estate of an ancestor, or a devisee in an estate unconditionally devised to him, is upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title incumbered with the liens which have been created by the party in his life-time, or by the law at his decease. It is not an unqualified, though it be a vested interest; and it confers no title, except to what remains after every such lien is discharged.” Such is the language of the Supreme Court

of the United States, in the case of *Wilkinson v. Leland, et al.*, 2 Pet. Rep. 658—and it is the undoubted language of reason and the law. I am therefore of opinion, that the legatees, in the suit in Bryan Superior Court, ought not necessarily, to have been made parties, in any other manner than they were so made, through the executors, who were appointed to sustain the person of the testator, and to act as trustees, for all interested under his will.

But other reasons are assigned for the granting of this injunction. It is asserted in argument, (and indeed alleged in the bill,) that the demand of the present defendants, upon which the decree in their favor was obtained, in the Equity side of the Bryan Superior Court, was a stale demand—that the defendants stood by silently, in the life-time of John Pray, and for many years after his death, without asserting any demand against said John Pray, 467 or his estate, \*and without any complaint, that he had acted fraudulently in regard to the estate of their testator, James B. Maxwell, of whom he was executor; that all the confusion and litigation has been thus produced by the laches of defendants, since, had their claim been advanced, before such estate of John Pray was distributed, their demand would have been satisfied with the fund and the legacies, set apart and designated by the testator, for the payment of his debts; that the individuals represented by complainants in this bill, were specific legatees, the especial objects of the bounty of testator, and that a Court of Equity should aid in carrying into effect the intentions of a testator, and ought, therefore, in this case, to compel the defendants to proceed with their judgment against that portion of the estate of John Pray, which had been made subject by him to the payment of debts, and was the primary fund for such purpose, or to force them to seek contribution from the estate generally, and not allow them to take advantage of complainants, who have been brought into the difficulty, through the wrongful negligence of the present defendants.

I may not take into consideration, in the determination of this application, the allegation, that the demand of the present defendants was a stale one. I cannot judicially know it. I cannot presume, that a Court of Equity, and a Jury sworn to determine according to equity, and the opinion they entertained of the evidence, would grant a decree, based upon a claim barred by the statute of limitations, or rather by that length by time, adopted as a bar by Courts of Equity, in analogy with the provisions of that statute. I am bound to believe, that the delay of defendants was satisfactorily accounted for, and that they were laboring under some disability, such as infancy or coverture, which formed a sufficient excuse for their apparent laches. I am constrained the more to believe this, from the fact, that no application was presented for a re-hearing of the cause, and



no effort made to reverse the decree by such proceeding. I must take this case as I find it, as the decree of a Court  
468 \*of competent jurisdiction, having a binding effect, and being a lien on the state of John Pray, both real and personal, according to the law of the land. This brings me to the consideration of the question, whether I can exercise the equitable powers of this Court, by interfering with the rights of defendants under such decree, and by compelling them to resort to a particular portion of the estate of John Pray, or of seeking contribution from all his legatees, in order that the specific legacies devised to those represented by complainants, may be relieved from the operation of the lien created by such decree.

It will be kept in mind, that the parties to the bill do not stand in *æquali jure*; that the claimants are volunteers, claiming (as it is properly said at the bar,) *ex gratia*; whilst the defendants claim *ex debito justitiæ*; that in truth they are not only creditors, but in the highest class of creditors, having a right to priority, before debts due to the public, or judgments, or any other debt of such testator, save perhaps the funeral expenses, and other expenses of last sickness, and the charges of probate of will. A Court of Equity will pause before it controls a judgment, in the hands of such creditors, or enjoins them from proceeding against a particular portion of the estate of such defaulting testator, merely because he had prescribed what portions of his estate should be primarily liable to the payment of his debts. A Court of Equity will often interfere between parties claiming in equal right, and will cause the assets to be marshalled in aid of one creditor, where the equity of the case seems to require it, and where no injustice can be done to another creditor by the proceeding. So may assets be marshalled as between volunteers in certain cases. But has the rule been extended beyond this? Can a case be produced at all analogous to this, where a Court exercising equitable powers, has interfered at the instance of a legatee, to restrain a creditor, one high in right to priority of payment, from proceeding against any portion of an estate, subject to his lien? If such a case has existed,  
469 and such a power been exercised, \*it has escaped the industry of counsel, and I must confess, my own research. The very foundation of the rule of marshalling assets, is hostile to the assertion of such a power. It is said to be a rule founded in natural justice—and it is just that a creditor should be delayed, should be prevented from the collection of his demand, (in this case, his lien,) upon the estate of his debtor, simply because such debtor has designated a particular fund for the payment of his debts? I cannot yield my assent to such a proposition. As between those claiming under his bounty, it would be proper that his directions, as to the disposition of his estate, should be enforced—but a man must be just before he is generous, and no directions that he may give, ought, or

can, embarrass for one moment, those who have legal rights or claims against him or his estate. In the absence of all authority, my own convictions would lead me to this conclusion, but fortunately for myself, I am not compelled to resort to my own impressions alone. I find a case determined by his Honor Judge Law, on the Equity side of this Court, which upholds the idea I have taken of this matter, and seems to me to cover the whole ground of this controversy. I allude to the case of M'Leland and wife, complainants, and Wallace, administrator, and the Marine and Fire Insurance Bank, defendants. In that case, James H. M'Leran executed a mortgage upon land and negroes, to the M. & F. I. Bank, and died intestate, leaving his next of kin aliens, and more remote kindred, citizens. The Bank being about to foreclose its mortgage against the real estate, the complainants who were citizens, (further removed in blood than the alien heirs, who were supposed to be the inheritors of the personal estate,) filed a bill, to enjoin the Bank from proceeding to collect its debt from the sale of the lands, on the ground, that the personal estate was the primary fund for the payment of debts, and that the complainants were entitled to have the real estate exonerated from the incumbrance of the mortgage. The Court admitting, for the purposes of the motion, the (contested) point, that the personal estate in Georgia, was the primary fund for the  
470 \*payment of debts, and as its consequence, the equity on the part of the heir and devisee, to have an incumbrance upon the real estate removed, proceeds to observe, "The important inquiry is, to what extent does that equity exist? I apprehend it is confined as between the heir or devisee, and the residuary legatee, or general personal estate. The authorities do not sanction the extension of the principle to specific or pecuniary legatees, or to a case in which the rights or interests of creditors are concerned." In support of such assertion, he cites 1 *Mad. Ch. 624*; 2 *Fonbl. 293*, note 2; *Vern. 477*; 2 *Ves. jr. 65*—and he adds, that in the latter case, the Lord Chancellor says, "The equity afforded to a person entitled to real estate by devise, to have the incumbrances on it discharged, as a debt out of the personal estate, can go no farther than this, as between the heir or devise of the estate, and the residuary legatee; it cannot interfere with the disposition of other parts, as specific or general legacies, much less with the interests of creditors." His Honor, Judge Law, adds "It does not appear to me, upon any principle to be extracted from this rule, or from any precedent which the case affords, that in a question of right, between two different sets of heirs, the one excluded from the real estate, because an alien, but interested in the personal, the rule could be made to apply to a creditor, pending his lien upon the real estate."\*

\*See the case reported in *Dudley's (Ga.) Rep. p. 127.*—(Ed. of Original Edition.)

I have been thus particular in adverting to this decision, because it proceeds from one of my predecessors, and is entitled to great respect. I repeat, that it covers the whole ground of this controversy. In that case, as in this, an effort was made by an individual, entitled to that portion of the estate, not primarily liable to the payment of debts, (as was conceded for the purpose of the decision,) to compel a creditor having (as here) a lien on the whole estate, to resort to that portion, which was first to be applied to discharge the debts;

but the Court refused to interfere  
471 with him, \*alleging that it was properly a question between the heirs themselves, and to be determined in a suit between them, and with which determination, a creditor having a lien on the whole estate, had nothing to do. I am asked to remember, that in the case of M'Leran, the estate remained undistributed in the hands of the administrator, whilst in the present case, it has been delivered to the legatees. In discussing a previous point, I expressed the opinion that this did not vary the case, and in reference to the ground we are now going over, it cannot possibly affect the principle upon which the case, I have just been stating, was determined. The principle decided there was, as I have already mentioned, that a creditor could not be interrupted in prosecuting his legal demands, by the equity existing between heirs. If the prayer for injunction had been granted in that instance the creditor would have been compelled to resort to the fund primarily liable, and the favored heir would have had his property relieved. And such would be the result in the present case, if the injunction should be awarded; and the refusal of the Court, in M'Leran's case, drove him, (as it will necessarily do these complainants,) to resort to his equity against his co-heirs, in a suit between them. The analogy of the cases is perfect, and no one who will look with attention to the case determined by Judge Law, and the principles upon which that determination rested, can suppose for a moment, that if the administrator had delivered over the property to the heirs, in ignorance of the lien of the Bank, and that the Bank had subsequently proceeded to foreclose its mortgage, the Court would have done otherwise than it did, or that it would have granted the injunction.

It is needless to pursue this subject further, or to determine the point raised in reference to a bill of review. It may be observed, however, that this is neither a bill of review, nor a supplemental bill in the nature of it, which agrees with the former in all respects, except in the enrollment. This is not based upon any allegation of the discovery of matters of fact which could not possibly  
472 \*have been used at the time the original decree passed, nor does it allege that such decree has been obeyed, or shew the inability of the complainants to obey it; on the contrary, it seeks to enjoin defendants from enforcing it, a proceeding

not consistent with a bill of review; and looking on this bill in the light of an original one, and admitting that a bill of that nature may be exhibited in this Court for the purpose of impeaching and setting aside a decree obtained by fraud or imposition, still this will not avail the complainants, as I can find no evidence of imposition or fraud practised by defendants in obtaining their decree: and in reference to the argument that the decree is inconsistent, since it declares in one line, that the executors of John Pray had fully and properly administered the estate, and in the next, gives leave to the then complainants, to enforce the decree against such estate, in the hands of the legatees, it may be remarked, that a case may well occur, in which the executors, having acted in ignorance of an existing debt, had distributed the estate, after waiting the legal time, should be protected from liability, and yet, that such debt, not being barred or extinguished, might be enforced against the estate liable to it, and it may be doubted, whether the leave granted by such decree, to the present defendants, (then the complainants,) to enforce such decree against all the estate of John Pray, in the hands of his legatees, or wherever it could be found, was necessary to confer that right, since the rule of Court says, that "when a case in Equity shall be tried by a Jury, who shall render a judgment for a specific sum, a decree shall be entered for such sum, and such execution may be issued thereon, as if the case had been decided at common law."

I have examined all the cases cited in argument, and have made diligent search for others, with the anxious desire to relieve the complainants, and to carry into effect the intentions of the testator, if this could be done without interfering with the superior claims of others; but upon mature reflection, I am convinced, that I can-  
473 not, \*grant relief, without overturning principles as old as the hills, and disregarding the well defined boundaries, between the rights and claims of creditors and legatees.

I am constrained, therefore, to deny the prayer for Injunction, and to discharge the rule.

Messrs. Law, Gordon & M'Allister, for the complainants—Messrs. Berrien & Cuyler, for the defendants.

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\*The State v. Wm. Hogan.

January Term, 1836.

**Practice—Indictment—Two Felonies Charged.**—Where two distinct felonies are charged upon the prisoner in one indictment, the Court may before plea, quash the indictment, or after plea, compel the prosecutor to elect, on which charge he will proceed.

**Same—Same—Same—Discretion of Court.**—But this rule is to be exercised by the Court in its discretion, and will be enforced, when the prisoner



may be confounded in his defence, or prejudiced in his challenges, or where the attention of the Jury will be distracted by such joinder.

**Same-Same-Same.**—And it does not apply, unless the charges are actually distinct, and grow out of different transactions.

**Same-Same—Charge of Larceny and Receiving Stolen Goods—Election.**—The Court will not compel the prosecutor to elect upon an indictment charging prisoner with larceny, and receiving stolen goods, &c. when it appears by the indictment, that the charges relate to the same transaction, modified to meet the proof.

By ROBERT M. CHARLTON, Judge.

There are three counts in this Indictment, and the counsel for defendant allege, that the first count charges him, with being a principal in the second degree in the larceny; the second count, with being an accessory after the fact, in buying and receiving stolen goods, knowing, &c. and the third count, with being an accessory before the fact: and they now move, that the Solicitor General may be put to his election, on which of these counts, (or distinct felonies, as they term them,) he will proceed.

In order to determine this question properly, it is necessary to ascertain the rule, contended for by the prisoner's counsel. It is said, in the books, that if two distinct felonies are charged upon the prisoner, in one indictment, the Court will, before plea, quash the indictment, or after plea, compel the prosecutor to elect on which charge he will proceed. This is matter of discretion and prudence, however, which it rests with the Court to exercise. In point of law,

there is no objection to several distinct felonies of the \*same degree, though committed at different times, being joined in the same indictment, against the same offender. (1 Chitty's C. L. 253.) But if the Court perceives, that by this means, the prisoner will be confounded in his defence, or prejudiced in his challenges or that the attention of the Jury will be distracted, it will listen to such request, and compel the prosecutor to elect.

But this rule only applies where the charges are actually distinct. Mr. Chitty says, (1 C. L. 248,) that it is advisable, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the charge precisely as laid, to insert two or more counts in the indictment. Thus, it is usual to join a count for feloniously breaking out, with larceny in a dwelling house; and a count for embezzlement, under the 39 George III. c. 85, with a count for stealing, at common law: and on an indictment for burglary, to insert one count for a burglarious entry, with intent to steal the goods of A. B.; another count for the same burglary, with intent to steal the goods of another person; and a third or more, for a burglary, with intent to kill and murder. (2 East. P. C. 515.) And no doubt can now be entertained, says Mr. Chitty, (1 C. L. p. 248,) that this course is as legal as it is advantageous. He adds,

that the introduction of several counts, therefore, which merely describe the same transaction in different ways, cannot be made the subject of objection.

The true distinction is, as I apprehend, not whether distinct felonies are charged, but whether those charges are actually distinct. Every separate count should charge the defendant, as if he had committed a distinct offence, because it is upon the principle of the joinder of offences, that the joinder of counts is admitted. (1 Ch. C. L. 249.) If it be in fact the same transaction, merely described in different ways, to meet the evidence that may be given, how can the defendant be confounded in his defence, or prejudiced in his challenges? How can the attention of the jury be distracted? The Jury are trying him for one crime, and it is their duty to ascertain to which of the counts in the indictment the evidence is \*applicable. In

The People v. Johnson, (2 Wheel. C. C. 365,) the Court declared, upon a similar objection to the present, that it was obvious, that the indictment contained but one charge, although modified to meet the proofs in the different counts. In that case, a stranger having been murdered, and his name not being certainly known, the prisoner, his supposed murder, was charged, in one count, with killing one Murray; in a 2d count, with killing one Maury; in a 3d count, with killing Clark; 4th, with killing a person unknown, &c. It was strongly urged, that it could not appear to the Court, that all these names belonged to the same person, or that the charges related to the same transaction; but the Court declaring that it was obvious that it was the same charge, said they could see no hardship upon the prisoner, and compelled him to plead. In the present indictment, the goods, in the three counts, are alleged as the property of the same person; to have been feloniously received from the same individual, at the same time, and the same place, and the goods charged to have been received, are the same in each count. Is not this one transaction? How can the defendant be surprised or confounded? He has had notice for months of the nature of the charge against him; he has had an opportunity of procuring witnesses who could speak as to the whole of the transaction, and his means of defence are as ample, as if the charges were contained in different indictments. The fact that he does not know what count the State may eventually have to rely on, cannot prejudice him the more in the one case, than in the other. If he is ready with all his witnesses, to speak to the transaction, as he ought to be, he cannot be injured by the joinder. The defendant's counsel say, that they cannot tell, on this indictment, what witnesses it may be necessary for them to have; and would there be any difference, in this respect, if the charges were contained in different indictments? Could he tell which would be tried first? Would he not be bound to be ready on all?

My attention has been called to several late cases, determined in England. (Galloway's case, 1 Moody, C. C. 234; Madden's case, \**ibid.* 277; Flowers' case, 3 C. & P. 413.) In all of which it was ruled, that the prosecutor should be put to his election, upon an indictment containing counts, charging the same individual, both as the principal felon, and as the receiver of the same goods. Upon what principle these decisions proceeded, the books we have, do not enlighten us. Whether they proceed upon the principle before adverted to, or are founded on any local statute, or special rule, we cannot ascertain, since all we find concerning them, leaves us in doubt. In Roscoe's *Crim. Ev.* p. 721, the decisions are given, but the reasons are not assigned, and although Flowers' case is mentioned in the 14 Eng. Common Law Reports, p. 374, yet the mere marginal note of the case is given. It might be fair to infer, from the case itself being omitted, that the rule was for some reason, inapplicable to this country, since that publication is intended to include every thing that could be applicable here.

I have but little doubt that these decisions are founded on the provisions of the statute of 7 and 8 Geo. IV. C. 29, by which it is enacted, that the receiver of stolen goods, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, "provided always, that no person howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time, for the same offence." If these cases are founded on any local statute, they are of course not applicable, and if they are based on the general principle before stated, I am still at a loss to discover, why they so particularly object to the joinder of counts for stealing, and receiving goods stolen, whilst other felonies or charges, equally liable to the objection, are not brought within the vortex of the rule. The same objection might be raised to the joinder of murder with manslaughter, burglary and larceny; since though the charges grow out of the same transaction, they are charged as distinct felonies, and the defence may be different.

This point has been expressly adjudicated by my immediate predecessor,

478 \*in the case of the State v. Ann Ratigan. The indictment in that case contained two counts—one for larceny from the house, and the other for receiving stolen goods, knowing them to have been stolen. The objection raised in this case, was there made and argued, but the Court refused to compel the prosecutor to elect, and the prisoner was found guilty of simple larceny.

Upon the precedent established by this Court; with reference to the reason of the rule, and with the perfect assurance, manifest from the indictment itself, that the counts relate to the same transaction, modified to meet the proof; satisfied that there can be no prejudice to the prisoner in his

defence, or confusion in his challenges, and that the attention of the Jury cannot be distracted by listening to the same transaction, I cannot accede to the motion of the counsel for the prisoner, to compel the Solicitor General to elect on which of these counts he will proceed.

Motion denied.

McAllister & Henry, for the motion—J. E. Ward, (Solicitor General,) contra.

See also *Rex v. Towle*, et al., *Russ & Ry.* 233, (Green's Jurist ed.)—(Ed. of Original Edition.)

479 \*John I. Dewes v. Young S. Pickard.

May Term, 1836.

**Payment—To One without Power to Receive—Ratification—Effect.**—A payment to a person who has no power to receive, becomes valid, by a subsequent ratification by the creditor.

**Same—Same—Simple Assent on Part of Creditor—Effect—Case at Bar.**—But where the creditor does not ratify the act of an individual, receiving money for him without authority, but merely assents to receive the liability of a third person, for the payment of the debt due by his debtor, the latter will not be discharged, unless it be expressly agreed to run the risk of the solvency of the person who comes in aid of the debtor, and to discharge the latter, or unless the creditor has thereby received payment of his debt, or has debarr'd himself from recovering by some laches.

**Same—Same—Same—Same—Same.**—Thus, where M., without any authority from the creditor D. for his own convenience, entered into an arrangement with the debtor P. (his partner), by which M. assumed the payment of the money due to D., but there was no agreement in relation to this settlement, between P. the debtor, and D. the creditor, and the only evidence of assent shewn on his part, was, a charge made by him against M. of the amount of the due bill of P. in an account exhibited for the purpose of submitting all matters between them for arbitration, HELD, that these facts did not constitute a legal payment of the debt from P. to D.

**Application of Payments—When Court Exercises Right.**

—Where neither debtor nor creditor has directed the application of the payment made, the Court is vested with the discretion to apply it, according to the justice of the case.

By ROBERT M. CHARLTON, Judge.

This case is brought up by Certiorari, from the Court of Common Pleas and of Oyer and Terminer, for the City of Savannah. The following statement of facts is taken from the written opinion and decision of his Honor Judge Henry, before whom the cause was tried, in the Court below:—"This was an action of assumpsit, brought by the plaintiff against the defendant, to recover the sum of \$90, upon the following due bill:—"\$90—Due John I. Dewes, ninety dollars, borrowed money.—January 2, 1830. Y. S. Pickard."

"To this action the plea of the general is—



sue was filed, and under it the defendant sets up the defence, that he has paid this due bill. The plaintiff rested his case upon the production of the due bill in 480 \*his possession. The defendant then, in support of his defence, called Richard R. Cuyler, Esq. who being sworn, testified, that a certain paper writing, headed No. 1, was left with him by George Millen, Esq.: that a difference having arisen between the plaintiff and the said George Millen, in relation to their money transactions, they agreed to refer the same to the arbitration of friends: that said paper was left with witness for that purpose: that a portion of said account is in the hand writing of the plaintiff, and a portion in the hand writing of Millen.

"The paper referred to, being then introduced, and read in evidence, it was proved that the following charges, (amongst others,) were made against Millen, in the hand writing of plaintiff, viz:—

"2d Jan. 1830, Y. S. Pickard, to John I. Dews due bill, \$90 00.

"19th Jan. 1831, Y. S. Pickard, to John I. Dews due bill, \$300 00.

"12th March, 1831, Y. S. Pickard, to John I. Dews due bill, \$360 00.

This paper is headed, in the hand writing of Millen, 'Register of debts due August 1, 1834, by George Millen to John I. Dews.'

"George Millen was then called by defendant, and sworn. The due bill upon which the action was brought being handed to him, he testified, that he had a distinct recollection of the same, and for what it was given: that it was given by Mr. Pickard to the plaintiff, for money borrowed of him for witness' use, and which he received from Pickard, and for which Pickard gave the due bill in question: that at the time witness and plaintiff were jointly interested in the proceeds of the Jail, &c. and witness and defendant in the concerns of a livery stable, in Savannah: that upon a settlement between the defendant witness, in relation to the concerns of the livery stable, the payment of its debts fell to lot of witness: that upon this settlement witness assumed the payment of the due bill in question and believed that plaintiff was apprised of such settlement: that on one occasion witness made plaintiff a payment of \$100, generally, and on account, and had requested plaintiff, on several occasions to

481 \*get together his papers, that they might have a settlement, but was put off by plaintiff from time to time, on the ground that it was inconvenient, &c.: that upon an agreement between witness and plaintiff to arbitrate their differences, plaintiff, in his account rendered for that purpose, charged witness with the amount of Pickard's due bill, (on which the suit was brought,) and other notes: that upon the presentation of an account by witness, to plaintiff, for hack hire due by Dr. Footman, the Jail Physician amounting to \$40, the plaintiff stated to witness, that if witness insisted on that account, he, plain-

tiff, would charge witness interest on his notes: that no settlement of accounts had yet been made between plaintiff and witness, nor any balance struck, either by them individually, or by arbitration, and that their money affairs are now in suit and litigation.

The testimony of George Millen was objected to by the plaintiff's counsel, on the ground of interest, but the Court considering his interest to be equally balanced according to his testimony, admitted it for what it was worth, allowing the objection to go to the credibility of the witness. It was then, upon the facts, which have been thus stated, that the Court was called upon to sustain the defence set up by the defendant, that this due bill had been paid by him," &c.

The Court below having decided, that the facts disclosed did not show a legal payment of this note, rendered judgment for the plaintiff, to which judgment the defendant's counsel excepted, insisting that the settlement made between defendant and Millen, in relation to this due bill, and the subsequent ratification and confirmation of that settlement, by the plaintiff, in charging Millen with the amount of this due bill, in the account rendered, and other alleged acts of confirmation, did constitute a legal payment to plaintiff of this note; and moreover, that the sum of \$100, paid "generally and on account," by Millen, being more than sufficient to extinguish this due bill, and not having been shown to have

482 \*been appropriated by plaintiff to any other debt due by Millen, ought to have been applied by the Court to the extinguishment and payment of this due bill.

In the argument before me, it was strongly urged, by the counsel for the defendant, that although it is true that one individual cannot bind another with authority, yet, that a payment to a person who has no quality or power to receive, becomes valid by a subsequent ratification and approbation by the creditor, and that in this case, the subsequent acts and declarations of plaintiff, did make valid the previous payment to Millen, by defendant, of the note in question.

There can be no doubt that the rule of law is correctly stated by the defendant's counsel. The ratification of an act is equivalent to a prior authority to do it. In the language of Best, Ch. J., "the subsequent sanction of a contract, made by an agent, is more satisfactory than any authority given before hand. Where the authority is given before hand, the party must trust to his agent, but if it be given subsequently to the contract, the party knows that all has been done according to his wishes." (Maclean v. Dunn, 4 Bingham 727, S. C.; 1 Moore and Payne, 761.) There is no difficulty in the rule of law, and if any embarrassment arises, it must be upon the application of it to the facts of this case.

When it is said, that the subsequent ratification by the creditor, of the payment to

a person who had no power to receive the money, makes the act valid, the rule must generally be taken to refer to the relationship of principal and agent. If one assumes to act in my name, and to receive for me a sum of money, and I subsequently assent thereto, I am taken to have admitted, or rather I have estopped myself from denying his authority to bind me. The moment the act is ratified by me, a privity of contract is established between us: the money that he received for me, and in my name, becomes, by my assent, my money, and may be recovered by me

483 \*from my self-constituted agent. Was this the case here? Did Millen in this settlement and alleged payment assume to act in behalf of plaintiff? Did plaintiff by his subsequent assent and supposed ratification, confirm the act of Millen as his agent, or did he after due notice of all the facts, connected with the settlement, expressly assent and acquiesce in both the payment to Millen, and the mode of it? If none of these questions can be answered in the affirmative it must be evident, that neither the alleged payment to Millen, nor the subsequent ratification by plaintiff, can preclude him from recovering the amount of this due bill from defendant.

There is no evidence that any previous authority had been given by plaintiff to Millen to collect this debt, nor did the latter assume to act as plaintiff's agent in its (alleged) collection. By an agreement between plaintiff and Millen, the former of whom was Jailor, and the latter Sheriff of the county of Chatham, the profits arising between the two offices were to be divided between them; and Millen and defendant were co-partners in a livery stable. A settlement took place between defendant and Millen in relation to the concerns of the livery stable, and upon this settlement, it was agreed between defendant and Millen, that the latter should assume the payment of this due bill. I repeat, that Millen neither acted, nor assumed to act as the agent of plaintiff in this matter. He assumed the payment of this debt in consequence of the contract entered into between his co-partner, (the defendant,) and himself, but their agreement did not constitute any privity of contract between plaintiff and Millen. It was a principle of the civil law that a contract has no effect, except with regard to the things which are the object of the agreement, and to the contracting parties. Pothier in his treatise on the law of obligations, (1st vol. p. 45,) in reference to this principle, says, "the obligation which arises from agreements, and the rights which result from them, being formed by the consent and concurrence of intention of the parties, they cannot oblige or give right to a third person, whose

484 intention \*did not concur in forming the agreement. The 25th law code de pact. furnishes an instance. I agree with my co-heir that he shall take upon himself the whole of a certain debt due from the succession; this agreement shall not hinder

the creditor from demanding the debt of me with respect to the part for which I am heir, for the agreement can have no effect in relation to the creditor who was no party to it. *Debitorum pactionibus creditorum petitio, nec tolli, nec minui potest.* It is no contradiction to this principle, that a partner may bind his associates; a factor his principal; a husband his wife, for these persons are considered as having themselves contracted by the ministry of the associate, the agent, or the husband."

I am not aware of any principle of our law that conflicts with the rule thus laid down. There are instances in which it has been held, that upon a promise in fact made to A, (where the contract is not under seal,) to pay money, or deliver goods to C, the latter might sue in his own name for the breach; but this case cannot be brought within the principle, without extending its operation unnecessarily. The contract entered into between defendant and Millen was made to bind them, and did not in its terms seek to bind, nor could it bind the plaintiff. If the latter had instituted an action against Millen for money had and received to his use, might not Millen have replied, I have received no money to your use; I have assumed the payment of a debt, due you by another, and I may have made myself liable to that other, for the non performance of that contract; but you have no cause of complaint against me; I did not assume to act as your agent in this settlement; it was made by me for my benefit and convenience, not for yours: you have paid no consideration, suffered no loss, given up no claim against your debtor, and there is no privity between us. It seems to me, that under the circumstances of this case, Millen might legally have thus replied to the plaintiff, if the latter had commenced any action against him.

485 \*But it is said, that Millen assented to become the debtor of the plaintiff, for the amount of this due bill, and that this assent having been communicated to plaintiff, and acceded to by him, that thereby a privity of contract was established between them, and that plaintiff might therefore have maintained an action against Millen for this amount. Admitting that he might, will that aid the defendant? Is there any proof that plaintiff assented to receive Millen as his debtor, in the place of defendant, and to discharge the defendant from all liability on the note? So far as I can ascertain from the evidence, there was no such agreement. The fact that an individual agrees to receive the obligation or liability of a third person, for the payment of a debt due from his debtor, will not discharge the latter, unless it be expressly agreed to run the risk of the solvency of the individual who comes in aid of the original debtor, and to discharge such debtor; or unless the creditor has thereby received payment of his debt, or has debarred himself from recovering, by some laches on his part, which laches, under special circumstances, may sometimes



operate to preclude him from further suit. There is no such agreement proved here; in truth there is no agreement in relation to this settlement, proved in any manner, as between plaintiff and defendant: it is not even shewn, that defendant knew of the charge, made by plaintiff to Millen, of this due bill, and even if he had known of it, in the absence of any agreement to discharge him by the plaintiff, and to receive Millen absolutely in his place, as debtor, and with the fact disclosed, that in making the settlement with defendant, Millen acted for himself, and did not assume to act for plaintiff, I must declare, that the subsequent assent of the plaintiff, signified by charging Millen in the account exhibited against him, for the purpose of arbitration, was not the ratification by plaintiff as principal, of the settlement made by Millen with defendant, nor the recognition and confirmation of any act of Millen's, as his agent, but was merely an assent by a creditor, of a willingness to receive from

486 a third person, the \*sum due to him from his debtor, in pursuance of a contract entered into between such debtor and a third person, and to discharge the original debtor, upon the payment by such third person, of the debt. If the money had been paid to Millen, or, perhaps, if a debt due by Millen to defendant, had been cancelled by the latter, upon the condition that Millen would discharge a debt due from defendant to plaintiff, and plaintiff having received due notice of all the facts, had adopted this act, and expressly assented, both to the payment, and to the mode of payment, it might be argued with great force, that so far as defendant was concerned, the debt was discharged; but that case is a very different one from this, where Millen, for his benefit and convenience, and without any actual or pretended authority from plaintiff, entered into this agreement with defendant, to become the debtor of plaintiff, which agreement has never received any other assent on the part of plaintiff, (so far as appears from the statement of facts submitted to me,) save that evinced by charging Millen with the debt, in an account made for the purpose of submitting all matters between them for arbitration, and where there never has been any agreement, either express or implied, between plaintiff and defendant, to receive Millen as the debtor, in discharge absolutely, paid or unpaid, of the original debt due by defendant. In the absence of such agreement; with the fact of the possession of the note having been retained by the plaintiff, I must agree with the Court below, in affirming, that the settlement made between defendant and Millen, and the subsequent charge made by plaintiff, of the amount of this note, against Millen, did not constitute a legal payment of the debt, nor operate to discharge the defendant from the same, paid or unpaid.

I find it stated in the 4th exception taken by defendant, that the evidence established, that when plaintiff was requested by Millen

to give up said due bill, he did not refuse to do so, but stated to Millen, that he could not conveniently find the same. The evidence taken by the Judge, does not substantiate this exception, but only

487 \*shows that Millen had requested plaintiff, on several occasions, to get together his papers, that they might have a settlement, but was put off from time to time, on the ground that it was not convenient, &c. Even the evidence, as stated in the exception, shows, more to my mind, an attempt by plaintiff, to evade the demand of Millen, that this due bill should be given up, than an assent to it, since he did not promise that he would give it up when found. If the due bill had been given up, or there had been any express promise, on the part of plaintiff, to give it up, founded on this settlement, it would go very far to evince an assent to its terms, and to the substitution of Millen as the debtor, in the place of the defendant. But there is no such evidence.

In reference to the argument, which has been pressed upon me, that plaintiff declared to Millen, on the occasion of the latter presenting an account due to the livery stable by the Jail Physician, that if that account was insisted on, he, plaintiff, would charge Millen "interest on his notes," I would ask, is there any proof to authorise the belief that he thus designated the due bill given by defendant, or that he did not refer to the many other transactions and notes that had passed between plaintiff and defendant?

It is urged, however, that plaintiff has actually received the amount of this due bill, and that no matter from what source, if it has been paid, the right of action is gone. The legal position cannot be controverted. But what is the evidence produced to substantiate the actual payment of this specific note to plaintiff himself. It is founded entirely upon the testimony of Millen, who declares that upon one occasion, he made a payment to plaintiff of \$100, "generally and on account." The statement of facts furnished by the Court below, does not disclose the time when this general payment was made, whether before or after the settlement between defendant and Millen, by which Millen assumed the payment of this due bill. If it was made before the assumption of this debt by Mil-

len, it ought not to be applied to the

488 payment of a debt \*that so far as Millen was concerned, had no existence at the time, and it would be properly applied to such debts as were then existing, and due by Millen in his individual capacity; and if such payment did not take place until after such settlement and assumption of this debt by Millen, it seems to me, that it would be an improper exercise of the discretion vested in the Court, where the application of the payment has not been made by either debtor or creditor, to apply such payment to this specific debt, when the evidence discloses, that the plaintiff still holds two notes made by defendant,

upon the trial of the suits brought upon which, such payment may be deducted, if the defendant is entitled to the benefit of the payment; and when it is also made known, that all the accounts between plaintiff and Millen are in suit and litigation, and where such payment may also be allowed, if the facts then proved will authorize such application. No injustice can be done to any party by the refusal to apply such payment to this specific debt.

It is ordered, that the case be remanded to the Court of Common Pleas, and of Oyer and Terminer, for the City of Savannah, and that it be certified to the Hon. Charles S. Henry, the Judge thereof, that it is the opinion and decision of this Court, that there was no error committed by that tribunal, in awarding judgment against the defendant, and that such further proceedings be had on such judgment, as to law and justice may appertain.

Judgment affirmed.

William Law, for the plaintiff—John Millen, for the defendant.

Chambers, October 26th, 1836.

489 \*In the Matter of Joshua Toulmin, Mitchell, Otherwise Called Edward Coppee, Mitchell.

October, 1836.

**Habeas Corpus—Infant Children—Power of Court to Change Custody.**—On a habeas corpus at common law, the Court, (or Judge presiding) on the return, has the power to change the custody of an infant child, if its interest require it.

**Same—Same—Same—Discretion.**—And this discretion is more properly to be exercised, when the infant is too young to make a proper election.

**Same—Application.**—The writ of habeas corpus at common law, applies as well to cases of illegal detention as illegal confinement or restraint.

**Children—Who Has Legal Right to Custody.**—The father has the legal right to the custody of his children.

**Same—Same—Discretion of Court.**—\*But Courts of

\***Habeas Corpus—Infants—Discretion of Court.**—In *Miller v. Wallace*, 76 Ga. 486, it is said: "The rule of discretion, as applicable to *habeas corpus* cases, did not originate with the compilers of our Code; they took it from the common law, and in adopting it, they adopted also the meaning and limitations placed upon it by the venerable sages and authorized expounders of that noble system. Under the 'discretion' vested in him, no judge has authority to disregard or even to impair any acknowledged or established right of a party by its exercise, and if he does so, it would seem to follow, as a necessary consequence, that he abuses that discretion. As was well remarked by the court, in the matter of *Mitchell, R. M. Charlton's E.*, 493, 'the power ought to be exercised in favor of the party having the legal right, unless the circumstances of the case, and the precedents established, would justify it, acting for the welfare of the child, in refusing its aid. Again (*Id.*, 495) it is said that the court will draw no inference to the disadvantage of the father, but act from positive proof. The authority of this case

justice may control this right, when the safety or interests of the child imperiously require it.

By ROBERT M. CHARLTON, Judge.

In delivering my opinion orally in this application, I intimated that I would reduce the substance of it to writing, in order that it might be spread upon the minutes and preface the order that I granted, relative to the custody of the child, the subject matter of the habeas corpus. In questions of general importance to the community at large, most particularly in matters that affect the nearest and dearest rights, the opinions of those who adjudicate, in the last resort, upon those rights, and the grounds of those opinions, should be known, or at least should be open to the inspection of all, whose interests may be affected by them.

The habeas corpus in this case, was issued at the instance of Dr. John J. Mitchell, and directed to Dr. Edward Coppee, requiring him to bring up the body of Joshua Toulmin, Mitchell, alias Edward Coppee, Mitchell, the son of Dr. Mitchell, the applicant, and the grandson of Dr. Coppee.

490 It appears that the child is only \*three months old, and that its mother (the wife of applicant, and daughter of Dr. Coppee,) died in childbed, at the house of her father and mother, where the child was born, and has remained ever since, with the consent of its father, until a few days ago, when becoming dissatisfied, as he alleges, with the treatment it was receiving, and anxious to obtain it, that it might be under his own charge, he demanded it, and the grand parents refused to deliver it up. Sundry affidavits are exhibited on the part of the grandfather, going to shew the kind and judicious manner in which it has been treated, and expressing an opinion that a change of nurses, residence, and treatment, might be attended with danger to the infant. The fact is also stated in these affidavits, that the father of this child promised his wife, the daughter of respondent, (on her death bed, and in answer to her request,) that it should remain with her parents during its infancy, and that the applicant has since admitted that he made such a promise. On the other hand, he denies under oath ever having done so, and without asserting that there is any want of kind treatment to the child on the part of the grand parents, he yet declares, that their treatment of it is in his opinion injudicious, calculated to make its constitution too delicate, and to pre-dispose it to a disease hereditary in the family of its deceased mother. The morals of the father

has been expressly recognized by this court in *Boyd v. Glass*, 34 Ga. 258. It is a well-considered and ably-argued case, is in point with the present case, and decides every question made by it, is sustained by copious references to such authorities, both English and American, as existed at the time it was made, 1836, and by subsequent text-writers and adjudicators."

On this question the principal case is also cited in *Boyd v. Glass*, 34 Ga. 258.



are not impeached, nor is his pecuniary ability to maintain the child denied. The return admits the custody, but denies that the infant is under any illegal restraint.

It is contended on behalf of the grandfather, that this is not a case in which the writ of habeas corpus will apply; that there is here no illegal restraint, and that all a Court will do on such applications, will be, to relieve the infant from improper restraint, but that it will not determine in this summary manner, any rights of guardianship inter partes, when these are contested. The cases cited by the counsel do declare this doctrine. But neither these

cases, nor any other that I am apprised of, (except perhaps, *Rex v. Smith*, 2 *Strange* 982,) deny that the

Court, or Judge presiding, on the return of the habeas corpus, has the discretion vested in it, to place the custody of the child into the hands of any one, by whom its interests and health would be best promoted. The cases assert, that the Court is not bound to deliver the infant over to any particular person; that it is not a matter of right which the father can claim at the hands of the Court, but a matter resting in the sound discretion of the Court, to be guided by the interests of the child. (*Rex v. Delaval*, et al., 3 *Bur.* 1436; *Commonwealth v. Adicks and wife*, 5 *Binney* 520; *Matter of Waldron*, 13 *John* 420; *United States v. Green*, 3 *Mason* 482.) And it is most proper that this discretion should be exercised by the Court, when the infant is too young to make a proper selection. It was accordingly exercised in the case of the *King v. Johnson*. (1 *Strange* 579; *L. Raym.* 1334.) And though the authority of this case has been impugned, (*King v. Smith*, 2 *Str.* 982,) yet Lord Mansfield, in the case of the *King v. Delaval*, et al. (1 *Blackstone's Rep.* 412), remarks, in reference to this case, "It is said in the next case, that Lord Raymond repented of what was done in this. His Lordship was latterly a very scrupulous man. But we are clear his first judgment was the right one." And in a case which occurred in this Circuit and County, one of my predecessors, (my father, Judge Thomas U. P. Charlton,) on an application like this, took the infant from her grandmother, and gave to her legal guardian the custody of her person, upon the ground, that the child who was only seven years old, was unable to make a free and unbiased election between her grandmother and guardian, and adding "that upon different circumstances, this Court, upon the authority adduced, would permit the infant to go where she pleased." (*Matter of Ralston*.\*) The precedent established by these authorities, negatives both positions of the counsel for the grandfather,

for these cases shew, that the writ of habeas corpus at common law, will apply, though there be, strictly speaking, no illegal restraint and confinement of the infant, and that the Court will determine under this application, and

under circumstances similar to the present, the right of custody. To confine the writ of habeas corpus at common law, exclusively to cases of illegal confinement, would be destructive of the ends of justice. It would enable a kidnapper to maintain possession of a child of tender years, (taken by him by fraud or force from the bosom of its family,) merely because its want of legal discretion would preclude the idea of its being confined against its will. I apprehend that it is not going too far to say, that the interests and welfare of society require, that under peculiar circumstances, the fact that the child of tender years is detained improperly from the custody of the person entitled to its possession, is sufficient to ground and maintain the writ of habeas corpus.

And the power to determine the right of custody on applications of this nature, ought more properly to be exercised by this tribunal, (unless those peculiar circumstances intervene which would justify it in refusing to interfere in determining the rights of the parties,) because there is no other tribunal in this State, in which the question can so appropriately be decided. The peculiar jurisdiction over infants which is claimed by the Chancellor in England, as representing the King, the *parens patriæ*, and the doctrine of wards in Chancery, is not claimed or recognized by the Courts of Chancery in this State, to any extent that will bear a comparison with the claim and doctrine as established in England. Our Courts of ordinary are clothed with the power of appointing guardians, and that power is exercised in the case of orphans, (*Prince* 157, 168), illegitimate children, (*Foster* 114,) and in cases where property has descended to a child whose father or mother is in life, and such natural guardian refuses to give bond and security for the performance of the trust. (*Foster* 110.) Without at all intending to decide the

question, I may observe, that under these statutes of Georgia, our Courts of Ordinary have never pretended to claim the right to appoint a guardian to a legitimate child, whose father was in life, and capable in all respects to maintain it, unless property had descended to the child, and the father refused to give security for the performance of the trust. If then this Court, the highest judicial tribunal in the State, has the power to determine the right of custody of an infant of tender years, and there is no other Court where such right can be so appropriately decided, the power ought to be exercised in favor of the party having the legal right, unless the circumstances of the case and the precedents established, would justify it, acting for the welfare of the child, in refusing its aid.

It becomes important then to enquire, who has the legal right to the custody of this infant, and it seems to me, that the answer that would rise to the lips of any one, however unskilled he might be in the science of the law, would be, that such right resides in the father. The law of

\**Supra*, 119.—(Ed. of Original Edition.)

nature, the feelings which God has implanted both in the man and the brute, alike demand, that he who is nearest to it, who is the author of its being—who is bound to its maintenance and protection, and answerable to God for the manner in which it is reared, should have its custody, and the law of man which is founded upon reason, is not hostile to the assertion of this claim. Lord Ellenborough, in the case of the *King v. De Manneville*, (5 East. 223,) speaking of the father, says, "he is the person entitled by law to the custody of his child. If he abuse that right, the Court will protect the child." Lawrence, J., concurred, and added, that "Lord Kenyon had no doubt but that the father was entitled to have the custody of the infant, unless the Court saw reason to believe, that the father intended to abuse his right by sacrificing the child." In both these cases the child was given to the father, (and in the latter the custody of the mother was divested for that purpose,) although in *De Manneville's* case, the father was an alien, the mother a subject, and the infant 494 \*only eight months old, and at the breast of its mother; and in the other case mentioned by Lawrance, J., as having been determined by Lord Kenyon, Sir W. Murray had been divorced from the mother, and though the child was born before the divorce, there was not any reason to think the child his. But the Court did not think that a sufficient ground to deny him the custody of it, he being the legal father. And in *Lytton's* case, mentioned in *De Manneville's* case, it is stated, that Lord Mansfield said, that the Court could not at any age take a child from its father. Lord Eldon, when this case came before him as Chancellor, (10 Vesey Jr., 61,) speaks of the right of the father to have the custody of his child as "the legal, natural right of the father." Chancellor Kent, (2 vol. Com. 192, 3d edit.) says, that the right of the father is perfect while the child is under the age of fourteen years. And indeed Mr. Chitty affirms, that the Court of King's Bench cannot directly control this right, (Notes to 1 Bl. Com. 360—see also *ex parte Skinner*, 9 Moore's Rep. 278.) And Lord Chancellor Eldon, (in *Lyttons v. Blenkin*, 1 Jacob 245,) seems to draw a distinction where the Chancellor is acting on a habeas corpus, and when there is a cause in Court, and to hold that in the former case, he is bound to decide on the same principles as a common law judge, and could only then divest the legal right of the father to the custody, by proof of personal ill usage, or other circumstances shewing that he was an improper person to have charge of his child. When there is a cause in Court, his powers are more ample. But it is unnecessary to multiply authorities on a point that cannot be contested.

But notwithstanding this legal right of the father, circumstances may exist which would justify a Court in this proceeding, in refusing to lend its aid to him in procuring the custody of his child, or even with-

drawing the infant from his custody, when its morals, its safety, or its interests seem to require it. All legal rights, even those of personal security and liberty 495 may be forfeited by \*improper conduct, and so this legal right of the father to the possession of his child, must be made subservient to the true interests or safety of the child, and to the duty of the State to protect its citizens of whatever age. A host of authorities might be adduced to maintain this position, and I do not doubt its justice or correctness for a moment. (See 2 Kent's Com. 3d edit. 193, 205; 4 John. Ch. Rep. 80; 5 Binney's Rep. 520; 3 Mason's Rep. 482, and various other American and English authorities cited in note (c) 2d Kent's Com. 193, note (b) *ibid.* 205.)

But do these circumstances exist in this case? Is the father brought within the range of those authorities? He is not alleged to be of bad morals, of unsound mind, or of pecuniary inability to maintain his child. He is an intelligent physician, who disagrees to the mode in which his child is treated in a medical point of view, and expresses under oath his apprehension, that both the body and mind of his offspring will suffer under such treatment. He is anxious to obtain its custody, that he may guard it against the consequences of this treatment, and that he may shield it from a disease, which he alleges to be hereditary in the maternal line, and which the manner in which it is reared, is fast driving it into. He is competent to determine whether its removal at the present time would endanger its safety, and a Court (which will draw no inference to the disadvantage of the father, but will act from positive proof), will presume, that his natural feelings will prevent his sacrificing his child by such removal, if it be improper, and that he will not immolate it on the altar of his resentment to its other relatives. To a father thus able to maintain and preserve his infant, unimpeached in morals, and asking from this tribunal, that his legal, natural right should be awarded to him, shall a denial be given?

But it is urged that this legal right has been abandoned by the father, and that the affidavits accompanying the return, disclose the fact, that he promised his wife on her death bed, that the child should remain with its maternal relatives during in- 496 fancy. This \*promise is distinctly denied by the father under oath. The counsel for the grandfather objects to any weight being given to such denial, as it is a contradiction to the return to the habeas corpus, which may not be controverted. Without intending to decide the disputed point whether the facts set forth in the return to a habeas corpus at common law, may be controverted by proof of their falsity, made apparent by contrariant affidavits, I may observe, that it is not every fact, however irrelevant, which an individual may choose to incorporate in his return, that is to conclude the Court. But assum-



ing that this fact cannot be controverted or denied, I presume that no one contests my right to determine if it is sufficient in law to justify the restraint or detention. This is a promise then, made to the wife of the applicant, on her death bed, and at her instance, under circumstances, when perhaps no request, however unreasonable, would have been denied. This case differs very widely from Listor's case, (13 East 172, note,) where the husband had abandoned his marital rights by formal articles of separation, and the Court therefore refused to give him the custody of the wife. And it also differs from the case of Rex v. Delaval, where the parent had by indenture parted with his parental authority. (1 Black. Rep. 413.) In the case before me, the promise was made to the wife of the applicant without any legal consideration, and I cannot hold it to be an entire surrender of his legal or parental right. It might with great propriety be called nudum pactum.

From all these considerations, I feel it to be my duty to deliver the custody of this child to its father. I do so with the expression of a hope, that he will not deny to its maternal relatives, their natural (though not their legal) right to have access to it, at proper times and under proper circumstances.

It is ordered, that the infant Joshua Toulmin, Mitchell, otherwise called Edward Coppee, Mitchell, be delivered to the custody of its father, Dr. John J. Mitchell.

M. Sheftall, Senr., for father—L. S. D'Lyon, contra.

497 \*The Comm'rs of the Town of Brunswick, et al. v. Urbanus Dart and Wm. B. Davis.

November Term, 1836.

**Fraud—Adequate Remedy at Law—Effect upon Jurisdiction of Equity.**—The fact that fraud has been committed, will not per se, entitle complainants to redress in a Court of Equity, if a plain and adequate remedy at law can be afforded them.

**Equity Practice—Want of Equity in Bill—Demurrer—Case at Bar.**—Demurrer sustained for want of equity, where it appeared by complainants' bill, that they held the senior grants to the land in dispute, and that the junior grants issued by the State of Georgia to defendants, were examinable collaterally at law, the State having no title to the lands thus granted, and such grants having issued contrary to the prohibition of a statute.

**Vacant Lands in Town of Brunswick—Title.**—Neither the legal nor equitable title to the vacant lands in the town of Brunswick resides in the Commissioners. If the State has made an improvident or mistaken grant thereof, the State only can take advantage of it.

By ROBERT M. CHARLTON, Judge.

This is a bill filed by the Commissioners of the town of Brunswick and certain proprietors, (the Jacksons,) of lots situated

therein, to set aside two grants issued by the State of Georgia to defendants, upon warrants obtained by them on head rights located on the town and common of Brunswick. The bill alleges that in September, 1826, Urbanus Dart, of the county of Glynn, then deputy Surveyor, and Wm. B. Davis, by virtue of warrants issued on head rights by the Land Court of said county, surveyed 3691-2 acres of land within the limits of the town and commons of Brunswick, in two separate surveys, both made by defendant Dart in his official capacity, in direct violation of the Acts of the Legislature in relation to said town, and of the rights of the proprietors; that Dart being threatened with a prosecution for these surveys, and suit commenced against him, wrote a letter to one of the Commissioners, informing him that he would withdraw the warrants, and abstain from all further proceedings thereon:—that upon the faith of this letter and of the promise of Dart, the Commissioners did not prosecute him for

498 \*his wrongful act in making these surveys—but that Dart and Davis, long after the said surveys were made, to wit, on the 17th September, 1828, without the knowledge of complainants and with intention to defraud them, and contrary to the promise of said Dart, obtained grants from his Excellency the governor, founded on the surveys: that the Commissioners were deceived by the said letter and promise of said Dart, and took no steps to enter a caveat against the proceedings of said Dart and Davis, which they otherwise would have done—that said grants include the whole or the greater part of the town of Brunswick and the public streets thereof, and that the whole of the land included therein, had been granted or otherwise entirely disposed of by the State of Georgia, and placed under the control and direction of the Commissioners, and that no part thereof was vacant or subject to warrants on head rights at the time of the surveys of Dart and Davis: that said Dart and Davis now claim to hold the land thus granted, in violation of the rights of complainants as Commissioners and proprietors; and the bill then prays that the said grants may be declared fraudulent and void, and be cancelled, &c.

To this bill the defendant Dart has demurred, (the defendant Davis not having been served with a copy of the bill, &c.) assigning various causes for demurrer, the principal of which is, that the bill contains not any matter of equity, wherein this Court can give relief, and that there is a plain and adequate remedy at law.

It is urged in answer to the arguments adduced in favor of the demurrer, that whenever a fraud has been perpetrated, you may come into a Court of Equity, and particularly when the fraud relates to grants, and that this is the proper proceeding to set aside letters patent.

Although it is undoubtedly true, that fraud is one of the great sources of Chancery jurisdiction, it is not correct to

499 say, that \*it is exclusively cognizable therein. It is, in many cases, cognizable in a Court of law, and sometimes exclusively cognizable there. (1 Story's Eq. 68.) The fact, therefore, that fraud has been committed, will not per se entitle the complainants to redress in a Court of Equity, if a plain and adequate remedy at law can be afforded them. If the aid of a Court of Equity is not indispensably necessary, to secure them from the violation of their rights, or the consequences of the fraud that has been perpetrated, they must seek their remedy in a proper tribunal. It will be proper, therefore, to examine this matter, in order that it may be ascertained whether the complainants may not thus protect themselves in a Court of Law.

It is argued for defendants, that the complainants, the Jacksons, by their own shewing, have a legal title to the lots claimed by them; that the grants which they hold are senior grants, and that therefore they cannot be affected by the junior grants to defendants; and that as defendants' grants are founded on warrants and surveys, obtained under the law of head rights, and can therefore embrace only vacant lands, that the lots held by the Jacksons cannot be affected by such grants, and that they may be amply protected by a Court of law; and I confess that it seems to me, that these arguments are unanswerable. I cannot conceive how the Jacksons can be injured by these grants, or what relief they would seek from a Court of Equity. In an action of ejectment brought against, or by the Jacksons, their elder grant would be sufficient to ensure or protect their rights—and if the State had no title to the lands granted to Dart and Davis, as the complainants allege it had not, the matter is properly examinable at law; and this argument has greater strength, from the additional fact shewn by the complainants, that the Act of 1796 made it penal to attempt to run any part of the said town or commons of Brunswick, under any pretence whatsoever; and that said grants were, therefore, by complainants' own shewing, prohibited by statute and might there-  
500 fore, \*be impeached collaterally, in a Court of law, in an action of ejectment. (See Patterson v. Winn, 11 Wheaton's Rep. 384, 5.)

And in reference to the title of the Commissioners, and to their right to come into Equity, to procure the cancellation of these grants to Dart and Davis, after the most careful and deliberate investigation of the numerous Acts relating to their authority, and to the town of Brunswick, it appears to me, that they have no right as Commissioners, to come into a Court of Equity, to set aside the grants made by the State; that neither the legal nor equitable title to the vacant lands in the town of Brunswick, resides in the Commissioners. and that if the State has made an improvident or mistaken grant, the State only can take ad-

vantage of it. (See Jackson v. Lawton, 10 John. Rep. 24.)

The demurrer must therefore be sustained, and the bill dismissed.

L. S. D'Lyon and C. S. Henry, in support of demurrer—R. R. Cuyler, contra.

# 501 \*Shad and Shad, Adm'rs Norton, v. Wilson Fuller, Def't.

January Term, 1837.

**Partnership—Death of a Member—Effect.**—Upon the death of one member of a firm, the representatives of deceased partner, become tenants in common with the survivor, and are entitled to an account.

**Same—Same—Survivor—Liable at Law for Debts.**—But the survivor is alone responsible at law, for the joint debts, and therefore the right to the possession and disposition of the joint effects remains with him.

**Same—Public Sale of Effects by Survivor—Injunction—When Improper.**—An injunction will not be granted at the instance of representatives of deceased partner, to restrain survivor from selling joint effects at public sale, where there is no charge of fraud, insolvency, or misconduct, alleged against such survivor, and where there is no proof that the account has been withheld for an unreasonable time.

**Same—Same.**—There can be no objection to a public sale of the joint effects, made after public notice, and at a proper time and place.

By ROBERT M. CHARLTON, Judge.

The bill charges, that defendant and complainants' intestate were co-partners, during the life-time of intestate, in a large dry good store in Savannah, under the firm of Norton & Fuller; that intestate died sometime in the month of —, 1836, without a will; that complainants having been appointed administrators on his estate, applied to defendant for an account of the said co-partnership affairs, as they stood at the death of their intestate, and what had been done since; that defendant had refused to account, and threatens to sell, and had advertised for sale, at public auction, the whole of the remaining goods and effects belonging to said firm, without the consent of complainants, and to the great injury of the estate of intestate. The bill prays for an account, an injunction to restrain such public sale, and for general relief. The application having been presented to me on the 11th January, and the sale being advertised for the 12th, in conformity with the precedents established by some of my predecessors, to grant an injunction in the first instance, where the danger was imminent and irremediable, I ordered the writ of injunction to issue, to restrain the defendant from selling the co-partnership effects, except at retail,  
502 \*and in the ordinary course of business, until further order—leaving it to the defendant to move, at any time, for



the dissolution of the injunction, which motion he now makes.

It is true, that although upon the death of one member of the firm, the co-partnership may be said to be dissolved, yet that it remains for certain purposes, and that the representatives of the deceased partner are tenants in common with the survivor, and entitled to an account. As such survivor, however, is alone responsible at law, for the joint debts, the right to the possession and disposition of the joint effects remains with him, and upon him devolves the duty of winding up the concern. This right has never been denied to him, unless the articles of copartnership have provided for the contingency of death, or fraud, misconduct or insolvency are charged against him. No such allegations are made by the bill, but the application is grounded on the denial of the account, and the intention of defendant, made manifest by his advertisement, to sell the joint effects at public auction.

In reference to the first, I have only to say, that no case has been presented to me, where an injunction has been granted, upon the sole ground of a refusal to account with representatives of a deceased co-partner, unaccompanied with any charge of fraud, insolvency, misconduct, &c.; and apart from authority, I am not disposed to grant an injunction on such an allegation, unless it was also shown to me, that the defendant had withheld such accounts for an unreasonable time, which, connected with other circumstances, might be evidence of misconduct or fraud. As this bill does not state the time of the death of complainants' intestate, but only that he died during the year that has just passed, I am unable to say whether the account has been withheld for such an unreasonable time, as would per se, authorise an injunction.

But it is urged by the solicitors for complainants, that as no account has been exhibited by the defendant, nor answer  
503 filed by \*him, that the facts of this case are to be ascertained by reference to the bill alone; that there is no proof of joint debts, and that the right of surviving co-partner to sell the joint effects, is founded upon his legal liability to respond to the joint debts; that the existence of the necessity must precede the exercise of the right; and that if there are no debts, then the reason of the rule ceases; the surviving co-partner has no power to sell against the consent of the other tenants in common, (the representatives of deceased partner,) and that the latter may have partition in kind, if they prefer it; and that when it is said in the books, that a sale is the proper method of winding up the affairs of the co-partnership, a "judicial" sale is meant: a sale made by the direction of a Court of Chancery, and under the supervision of its officers. I have given to these arguments the reflection to which they were entitled, from the ability with which they were urged, but they have failed to convince me, that they are sufficient to authorise me in

upholding this injunction. Looking to the bill alone, I cannot see that the defendant is doing, or about to do, that which he ought not to do. Conceding that there are no joint debts, yet it seems to me, that a public sale of the joint effects, made after proper notice, at a time when, and a place where, all the buyers in market may be present, and conducted by one, in whom the intestate, in his life-time, reposed confidence—who is jointly interested in the subject matter of the sale, and against whom no charge of fraud, nor suspicion of insolvency is alleged—it seems to me, that such a sale would be a much more fair and accurate method of ascertaining and dividing the value of the joint effects, than any division "in kind" which could be made, however skilful the partitioners might be. It is the method pointed out by law, for all sales on execution, &c. and it is the mode that would have to be pursued, if a sale should be ordered by this Court, as prayed for by the bill; and it is the course which the complainants must themselves adopt, if they should receive their intestate's share in kind.

504 \*I have no disposition to avoid the decision of the other point raised by the counsel for the defendant, viz. that no injunction can issue under our statutes, unless bond and security be given. I have, however, reason to believe, that this point has been determined by the Judges in Convention, and as it becomes unnecessary to make any decision upon it in this case, and as it is represented that it is material to the interests of defendant that the issue of this application should be made known at as early a day as possible, I have not thought it necessary to withhold my decision, until the opinion I have adverted to could be procured—and I have not thought it advisable to determine it, until such opinion could be ascertained.

It is therefore ordered, that the injunction granted in this cause be dissolved.

McAllister & Henry, for motion—Berrien & Law, contra.

# 505 \*The State v. George I. Henley.

January Term, 1837.

**New Trial—Impeachment of Witness.**—A new trial will not be granted, to furnish an opportunity to impeach the credibility of a witness, who gave testimony on the trial.

**Same—Motion for—Court Must Judge of Effect of Evidence.**—After verdict, when the motion for a new trial is considered, the Court must judge not only of the competency, but of the effect of evidence.

**Same—Same—Refusal—Case at Bar.**—After conviction, the prisoner moved for a new trial, producing the affidavit of prosecutor, that he had sworn falsely on the trial, and that prisoner never stabbed him. But it appearing to the Court, that the prosecutor had been drinking liquor, and that his mind was clouded thereby, at the time such affidavit was administered; that the contents

of such affidavit were not read to him by the Magistrate, and that he was sworn thereto, upon his saying that he knew the contents—that said affidavit was made by prosecutor, with the intention of immediately leaving the State; that there was strong ground to believe that he was tampered with; and the identity not being clearly proved, and his testimony given on the trial, having been confirmed by two disinterested witnesses—the motion was refused.

**Same—On the Merits.**—Quære, if a new trial can be granted on the merits, in a case beyond a misdemeanor?

**Same—Verdict—Presiding Judge Satisfied of Correctness.**—But such new trial will not be granted, when the presiding Judge is satisfied of the correctness of the verdict.

**Jurors—Challenge for Cause—Case at Bar.**—The prisoner on being put upon his trial, challenged a juror peremptorily, and he was set aside. The Jury, after hearing the evidence, not being able to agree, were discharged by consent. The prisoner was again put upon his trial at the same term, and one of the jurors whom he had challenged peremptorily at the former trial, being again presented to him, was challenged by him for cause, and the cause assigned was, that he had set him aside peremptorily on the former trial, and thereby created a prejudice on his mind. **HELD**, that it was not a good challenge for cause.

By **ROBERT M. CHARLTON**, Judge.

This is a motion for a new trial, upon the following grounds:—1st. Because since the trial of the prisoner, he has discovered new evidence, material and important to his defence. 2d. Because the prosecutor and witness, John Lee, who was sworn on the trial, has since the said trial, voluntarily made an affidavit, and delivered the same to the prisoner, in which he admits his innocence of the charge, and the falsity of the statements made \*on said trial, by the said witness, and which influenced the Jury in rendering a verdict of conviction. The 3d ground was waived on the argument. 4th. Because upon the second trial of the prisoner, the same Jurors who were challenged by him on the first trial, were again placed upon the panel, and having been compelled to challenge or accept said Jurors, he was thereby prejudiced in his right to challenge, by being compelled to exhaust his number of peremptory challenges from the original panel.

The first and second grounds may be examined together. The newly discovered evidence consists of the affidavits of John Mulligan and Wm. McDermott, both of whom swear, that they were imprisoned in the room with John Lee, the prosecutor on the above indictment, and that they frequently heard him declare, that he believed the prisoner to be innocent, and on the day on which prisoner was tried, and before Lee left the Jail, to give his testimony, he repeated his belief of the innocence of prisoner, and prayed to God that he might get clear. I may dismiss these affidavits with the remark, that a new trial will not be

granted to furnish an opportunity to impeach the credibility of a witness who gave testimony on the trial. After these alleged declarations, he gave testimony to the contrary, and it would be introducing a dangerous principle, to allow the verdict to be set aside on affidavits like these. But the affidavit of Lee himself, made since the trial, and now offered in support of this motion, requires a more attentive consideration. That affidavit declares, that since his discharge from Jail, he has thought on all the circumstances, and that being about to leave Savannah for the West Indies, he wishes to do justice to the prisoner, and to declare the truth. He says that he (Lee,) did draw a knife on George Millen, before Millen knocked him down; that he fell with the knife in his hand, and knows that he was wounded in the fall; that prisoner did not touch him till after he felt the wound; that the knife he used to peel

507 potatoes with, was \*a knife belonging to the pilot boat, and was not a pointed knife: that on the day of the trial of prisoner, as he (Lee) arrived at the Court House, he was persuaded by John Low, and others, to charge prisoner with having stabbed him; that he was threatened with being prosecuted and punished, if he did not swear in that way, by the said John Low, and was compelled to come back to Savannah for that purpose; but that now being out of Jail, and no longer in the power of John Low, he makes this statement to show why he swore on the trial as he did, and that before he did so swear, he prayed at the Jail, that prisoner might get clear, because he knew that prisoner did not stab him. This affidavit is sworn to, on the 23d February, 1837, before Wm. A. Pittman, J. P., and witnessed by Thos. F. Moxham and Henry Hay. These affidavits are met by the Solicitor General, by the deposition of Wm. A. Pittman, the said Magistrate, that he was at Dibble's shop, on his horse, in the latter part of February last, and that he was called by Robbins, to swear one John Lee, and another person, whose name he does not now recollect, and that he did swear them to an affidavit, the purport of which he does not know, as he was told by them that they had heard the contents read; that he thinks Lee had been drinking, but that he did not seem to be very drunk, and that this was the only affidavit which he took from said Lee. The Solicitor General also produces the affidavit of John B. Mills, who states, that he was Steward of the Hospital in August last, when one John Lee, a seaman, was brought to Jail, wounded by a stab in the back; that he was in a critical situation, and in his sane moments, when no one was near him who could influence him, of his own free will he stated to witness, that one of the two men who came together on board the pilot boat of John Low, in July, had stabbed him; that he did not know his name, but that it was the short man. The affidavit of the attending physician, Dr. Richard D. Arnold, was also produced, who



testifies, that he examined the back of Lee, whilst in the Hospital, and found a cicatrix about 5-8 or 3-4 of an inch broad, 508 (evidently resulting from a \*penetrating instrument,) in the left side of the spinal ridge, in the lumbar region: that his situation was very critical, and that deponent thinks that it was occasioned by said wound, and that from the situation of it, he does not believe that he could have received it by falling on any instrument, unless that instrument was of considerable length, such as an ordinary sword cane, of twenty inches, or upwards; and that from the cicatrix, he judges the stab to have been a deep one. The prisoner's counsel then introduces the affidavit of Thomas F. Moxham, who swears, that he was present when Justice Pittman administered an oath to John Lee, on the 23d February, 1837, and that he knows that said Lee was well aware of the contents of the affidavit, as deponent inquired of him if he was, and he replied "yes:" that the said Lee had been drinking, but was not so affected by drink as not to understand the affidavit, or to be incapable of swearing to, and subscribing it. The affidavit of John Low has since been handed to me, in which he denies that he has ever used any threats towards Lee, or offered any bribe to him, or in any way attempted to influence him to prosecute either prisoner or Millen, or any other individual, or to give testimony against them. The affidavit of Hugh Cullen is also introduced, (a part of which being founded on hearsay testimony, is therefore inadmissible,) in which, among other things, he testifies, that Spencer, the clerk of prisoner's step-father, was three times at deponent's house, after the trial, to see Lee, during the two days that Lee remained with deponent, after the trial, and that Lee was very drunk on the first of those days, and that his habits were intemperate.

Upon these affidavits the motion is presented to me, and it will be my duty now to enquire, whether the legitimate effect of such evidence would be to require a different verdict, for I agree with the Court, in *Ludlow's heirs v. Park*, (4 Ham Ohio Rep. 5,) that after verdict, when the motion for a new trial is considered, the Court must judge, not only of the competency, but of the effect of \*evidence.

To do this properly, I must advert briefly to the testimony given in the cause. I must see which of these two contradictory statements, on the part of Lee, is to be believed. I must contrast them with the facts, as testified to by other witnesses, and then determine whether, after this examination, such a case is presented to me, as will authorise me in putting aside this verdict. The prisoner has been twice tried. On the first trial, the Jury could not agree, and were discharged by consent. The situation of the prosecutor, who had been confined in Jail for five or six months, in consequence of not being able to give security to prosecute, and who was suffering from the effects of his wound and confinement, seemed to

me to require, that he should not be detained in Jail until the next term; and as I saw nothing in law or justice against it, and a great deal of humanity in it, I acceded to the motion of the Solicitor General, and ordered that the prisoner should be tried again at the same term.

On that second trial, Lee, the prosecutor, testified, that he was cooking in the galley of the pilot boat Sarah M., when George Millen came down and commenced searching for a seaman; that witness told him that the man was at the mast head, and remonstrated with him against throwing the things about, when Millen picked up a piece of wood and knocked witness over the head: that he fell against a cask, and that whilst lying in a "slanting" position, against such cask, prisoner, who had followed Millen down, took a knife which was on the top of the copper, and stabbed witness in the back. Lee swears distinctly, that he had no knife in his hand when Millen and prisoner came down, or whilst they were below: that before they came down, he had been peeling potatoes with a sharp pointed knife, but that he had placed it on the lids of the coppers, from which place prisoner took it, and stabbed him. He admits that he was rendered quite "stupidified," though not insensible, by the blow which Millen gave him, and says, in his cross examination, that it was hard 510 to say who struck \*him, but that

Millen and prisoner were the only persons down in the cook's galley, and that Millen did not stab him; but he swears that he had no knife in his hand before he fell, and that he was quite sure he did not stab himself, and that there was also a slight scratch on his right arm. It was quite evident to the Court, that the witness had not a very clear idea of what passed, after he was struck down by Millen, but he was corroborated in the facts of his being so struck down, that when he fell he had no knife of any description in his hand, and that prisoner was the individual who stabbed him, by the testimony of Joseph Knight and Hugh S. Watts, who do not seem to have any interest in the matter, and who describe the position of the knife before prisoner took it, and the manner of his stabbing Lee, with a minuteness and distinctness, that leave no room to doubt, that they either saw what they have sworn to, or else that they have perjured themselves. The position in which they were, looking down upon, and immediately over the parties in the hold, with no impediment to their vision, gave them full opportunity of seeing all that was going on. They also swear, that when Lee received the stab in the back from prisoner, he groaned, and prisoner made another stab at him, and Lee threw up his right arm, and received the second stab upon it. The testimony of these witnesses is assailed by Dr. George Millen only, who swears, that before he struck Lee down, the latter flourished a knife about the person of witness, and that he knocked him down therefor; that he

fell with the knife, (a common sailor knife with a wooden handle) and threw his hand behind him when falling, and witness thinks it "possible and probable," that Lee received the wound, when he was falling, from the knife which he had in his hand, and that although he saw prisoner grapple with Lee, he did not see him stab him, and does not think that he could have done so without his seeing it. He admits, however, (what the other witnesses have testified to,) that after he knocked Lee down, he stepped back, and that some one from above commenced kicking or striking him, (Millen)

and that he then went on deck, leaving \*prisoner and Lee below—prisoner on his knees and Lee on his breech. When it is recollected that Millen was a participator in this violence to Lee, that he immediately after having struck Lee down, was kicked and cuffed from above, by which his attention must necessarily have been diverted from prisoner and Lee, and that he rushed on deck to make a better defence or fight, leaving prisoner and Lee below; that his positive testimony that Lee had a knife in his hand is as equally positively denied by Lee, Knight and Watts, and that against the positive statement of the two latter, that they saw prisoner stab Lee, first in the back, and then in the right arm, he offers only the probability and possibility that Lee may have wounded himself in the fall, it is hard to conceive how the Jury could have come to a different conclusion than they did. Throwing aside entirely the testimony of Lee, they had the positive testimony of two witnesses, who were not proved to be interested, both to the fact that Lee had no knife in his hand, and consequently could not have fallen on it, and also, that prisoner was the individual who stabbed Lee. Now I am called to put aside this verdict and nullify the effect of this evidence, upon the faith of an affidavit, made by an individual, in a shop, where he had been drinking, which deposition is in opposition to his former testimony delivered in a Court of Justice, when he was perfectly sober, and when he was examined and re-examined on two occasions; and in denial of his statement, made when he was very ill in the Hospital, and when there was no undue influence used towards him, and when the attending physician declares his belief, that the wound could not have been inflicted by a weapon of less than twenty inches in length. The case of the Great Falls Manufacturing Company v. Mathers, 5 N. H. Rep. 574, (7 Amer. C. L. Rep. 114,) has been adduced by the prisoner's counsel as a case analogous to the present. It appeared, in that case, that one Moulton, who testified for the defendant on the trial, had since been indicted for perjury in his testimony, had pleaded guilty to the charge, and had been sentenced to the State's Prison, 512 and on \*motion for new trial the Court say, "We think that the conviction of one of the defendant's witnesses

of perjury in this cause, furnishes a good reason why the verdict should not be permitted to stand. An indictment for perjury, found by a Grand Jury, is no ground for a new trial, and perhaps a conviction is not, if founded upon the testimony of those who are interested in the cause. But in this case, the witness has been convicted on his own confession." We have not the report of this case, and cannot therefore tell, whether there had been on the trial, any corroborating testimony to the particular facts, detailed by the witness Moulton, but apart from that, I remark, that when a sane individual, upon an indictment charging him with perjury, with a full knowledge of the bodily suffering and imprisonment that will follow his confession, pleads guilty to the charge in a Court of justice, the idea that he has been tampered into such confession, would be wholly absurd. But no such absurdity will attach to the idea, when such confession is made in a shop, where the individual has been drinking, and so far intoxicated as to be perceptible to the Magistrate who administered the oath; and when it is made known, that in addition to this clouded state of mind, the oath thus administered, in a place so very unlike a Court of justice, was not even read to him, but he was sworn upon his saying that he knew the contents; and when we know how easily an illiterate man may have one affidavit read to him, and another presented for his oath, and that this paper so sworn to, was not intended to bring down punishment upon his head, as in the case of Moulton, but was made with the intention of immediately leaving the State, I think that the time, the place, the inducement, the consequences of the two cases are so different, as to justify me in the assertion, that one furnishes no authority for the other. To make the distinction more manifest, the identity of Moulton was clearly ascertained by his pleading guilty in open Court, and thereby confessing that he was the same person who had testified in the suit, whereas here, the only proof 513 that is offered \*to shew, that the John Lee who swore to the affidavit, was the same John Lee who prosecuted prisoner, is the fact, that he is styled the prosecutor, in an affidavit, the signature of which is not shown to be the signature of John Lee who prosecuted, and when it is not stated that he is known to such Magistrate to be the same person who testified in the case; and indeed when the Magistrate declares, that he (the Magistrate,) did not know what was stated therein. Without laying further stress on this circumstance, I add, that with positive proof of identity, the failure in this affidavit, so carefully drawn up, to account for the stab or scratch in the right arm, which Knight and Watts swore was inflicted by prisoner, and which Lee recollected to have seen, would have cast sufficient doubt over the truth of this statement, taken in connexion with all other facts, to have made me discredit it. He



surely did not get stabbed on the left part of the back, and the right arm, by the same blow.

It has been urged that this affidavit of the Magistrate will not be received to contradict his attestation, but when I find that such affidavit is not contradicted by the subscribing witness Moxham, and is confirmed in the allegation that Lee had been drinking, I do not feel myself authorised to put it aside.

But I am bound to see what effect the evidence would have on a new trial. These affidavits could not be used on such trial, unless Lee himself should again be made a witness. Lee is a seaman, a stranger—having no ties here; his affidavit discloses that at the time of his making it, he was about to leave Savannah for the West Indies; he has made himself liable to be indicted for perjury, either by John Low, whom he has accused of suborning him, or of prisoner against whom he has sworn. Under these circumstances, it is scarcely possible to suppose that he will voluntarily return. The evidence on such new trial, would, then, be confined to the testimony of Knight and

Watts on the part of the State, and 514 Millen on \*the part of the prisoner—on the one side, there would be disinterested witnesses, and on the other (without intending to cast unnecessary reflection,) a witness, who from his connexion with the case, would be supposed to have a bias; there would be two witnesses against one—positive testimony (so far as proof of stabbing,) against negative. Would not the result be the same? But suppose Lee should be here. The Solicitor General after this proof of his worthlessness would not place him on the stand, and if a witness at all, he would testify on the part of the prisoner; but would not that testimony be destroyed by proof of what he had before sworn to, and must not the verdict still be based on the same testimony as if he were not here? Considered in any way, these affidavits would have no effect on another trial.

It is not necessary for me to decide whether a new trial on the merits can be granted in any case beyond a misdemeanor, but it certainly will not be granted when the presiding Judge is satisfied of the correctness of the verdict.

It remains for me to examine the ground assumed by prisoner's counsel, in reference to the refusal of the Court to allow him to challenge for cause, a juror whom he had challenged peremptorily on the former trial. If the prisoner has been denied any right, however guilty he may in truth be, he will nevertheless be entitled to a new trial. When the Jury were being empanelled on the second trial, a Juror was presented to the prisoner and challenged for cause, and the cause assigned was, that he had been peremptorily challenged by prisoner on the former trial, (which ended in a mis-trial.) I determined that this was not a good challenge for cause. The prisoner then put the juror on his *voire dire*, and after receiving his statement on oath, that he had not

formed and expressed any opinion in the case, and that he had neither bias nor prejudice for or against him, he again peremptorily challenged him. The principle now assumed by the prisoner's counsel is, that

a peremptory challenge is always considered by jurors as an \*attack upon 515 their integrity; as a suspicion on the part of the prisoner that the juror will not do him justice, and that this creates a prejudice in the mind of the juror against the prisoner, which renders him unfit to sit on the trial; and this "legal presumption" of prejudice is supposed not to be falsified or removed, by the subsequent oath on the part of the juror, that no such prejudice does in fact exist. Before I make such a decision, I must look to the principle upon which it is based, and the consequences that will follow it. This prejudice on the part of the juror, I repeat, is supposed to be aroused by the impeachment of his integrity by the prisoner. It is not, therefore, a prejudice growing out of a knowledge of the circumstances of the case, nor because of any relationship or feeling which he may have for those who are prosecuting—but it is a prejudice against the person of the prisoner, springing from his attack on the jurors' integrity, and which embitters his feelings, so far as to prevent him from doing the prisoner justice. Such a prejudice cannot with any kind of consistency or reason, be confined to the particular indictment then about to be tried against the prisoner. It would reach other indictments, to be tried by the same panel, at the same term. Suppose that four indictments should be found against a prisoner, at one term. (This has happened in this Court, and it is not impossible, therefore, that it may again happen.) Upon each he is entitled to twenty peremptory challenges, and on the trial of three, he has used that privilege. When put upon his trial, on the fourth indictment, he can still challenge twenty peremptorily, and he can also set aside the sixty Jurors, whom he has challenged peremptorily, on the three indictments on which he has been tried, although they should swear to him, that they were wholly impartial, and though he should be unable to falsify their oaths, or to shew that there was the least suspicion against them, save what he has chosen to cast, by his peremptory challenge. Thus, on this fourth indictment, if the principle contended for be correct, instead of having twenty, he would have eighty, "arbitrary, capricious" challenges. He would 516 \*be saying to sixty men, I do not think you honest, and though I cannot, on this trial, challenge you peremptorily, or shew that in fact you are not impartial, yet, the law will presume that my attack upon your integrity, has made you prejudiced against me, and I will therefore, challenge you for cause. But when would this supposed prejudice end? We know its beginning, but who can read the human heart so well, as to lay down a time when, as a general rule, it shall cease. Shall we

refuse, at one term, to believe the juror on his oath, when he solemnly swears, that such challenge has created no prejudice on his mind against the prisoner, and then, at the next term, whether six or only two months shall have elapsed, permit him to purge away the legal presumption, by the same oath that we denied our belief to, and the echo of which is still upon our ears? Could the prisoner, if he had not been tried again this term, have objected to this juror, for the same ground, at the next, or any succeeding term? If so—if this general prejudice against the person of the prisoner, cannot be limited with consistency or reason, (looking to the principle upon which it is founded,) either to the same case, or the same term, it is not hard to perceive, that in most counties it would hinder—in some, it would wholly prevent, the operations of justice. I am perfectly aware, that the prisoner's counsel have not sought to carry the principle beyond the particular case, or the same term, but I am equally certain, that if admitted at all, it cannot be so confined. The principle cited from Chitty's Criminal Law, that "the same person who has been challenged on the original panel, cannot afterwards be sworn on the tales, and if that should be done, a new trial will be granted," cannot be made to apply to this case. If an individual, whom the prisoner had a right to challenge, and whom he had so challenged, and who was therefore set aside, should have been, notwithstanding, put on the Jury, at the same trial, it would have, indeed, been denying to him, one of his "arbitrary capricious" challenges. It would be putting a man on the Jury, whom the prisoner, in the exercise of his legal right, had

517 \*peremptorily put aside; but the features of the case are considerably changed, when on a second trial, he seeks to set the juror aside, not in the exercise of the peremptory right which the law allows to him, but because wishing to use his twelve "capricious" challenges against others, he strives to thrust away the juror, on an alleged legal presumption, rebutted by the individual.

It was to meet these general prejudices, growing out of antecedent circumstances, or from undefined dislike on the part of the prisoner, that the law, in its mercy, has given to him a certain number of arbitrary and capricious challenges. He did upon this trial, put aside twelve men, who called on God to witness their declarations, that they were impartial, against which solemn assertion no proof was offered, and he has therefore had his twelve arbitrary and capricious challenges. I am assured, that on this point, no injustice has been done to him—no right withheld from him.

It is ordered, that this opinion be entered on the minutes, and that all the affidavits appertaining to this motion, be filed as of record, in the office of the Clerk of this Court.

The motion is denied.

Berrien & Law, L. S. D'Lyon, and M. H. M'Allister, for Prisoner—John E. Ward, Solicitor General, and John Millen, contra.

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## \*The State v. James Allen.

January Term, 1837.

**Arrest of Judgment—Cause Must Appear on Face of Record.**—Causes of arrest of judgment are confined to objections, which arise upon the face of the record itself, and the Court must be governed by that alone, in determining them.

**Indictments—Regularity—Case at Bar.**—It seems, that if an existing indictment be altered by the prosecuting officer, and submitted, thus changed to the Grand Jury, who, again, return "True Bill" thereon, such informality will not destroy the second indictment, even though Nol. Pros. be subsequently entered on the minutes, in reference to the first indictment.

**Larceny—Value of Article Stolen.**—Evidence must be given, on an indictment for Larceny, that the thing stolen is of some value.

**Same—Same—To Whom.**—But it is not necessary, that the subject matter of the Larceny should be of value to third persons, if valuable to the owner.

**Same—Indictment—Allegation—Proof.**—Where the indictment alleged, that the notes stolen, were "notes of the Georgia Rail Road and Banking Company," and the owner proved, that he received them from such Banking Company, HELD, in the absence of all proof to the contrary, that this was sufficient proof of their genuineness, to support the allegation.

By ROBERT M. CHARLTON, Judge.

The motion in arrest of judgment, in this case, is based upon two grounds:—1st. That the indictment on which the prisoner has been convicted of the alleged offence, has been quashed. 2d. That the indictment is defective, because there is no return of "true bill," endorsed thereon by the Grand Jury.

Causes of arrest of judgment, being confined to objections which arise upon the face of the record itself, I have made an attentive examination of the records and proceedings of the Court, in reference to this prisoner. On the 23d February, 1837, a true bill was found against him, for the offence of privately stealing, in a dwelling-house. On the 27th February, a second bill was found by the Grand Jury against him, for the same offence, and a third bill for simple larceny. The bills were en-

519 tered on the criminal docket, \*in the order in which they were found. On the same day, the Solicitor General moved, that a Nol. Pros. should be entered on the first indictment found against prisoner, and the minutes of the Court bear recorded upon them an entry of Nol. Pros. The criminal docket has opposite to the entry of the indictment first found, to wit, the indictment of 23d February, the words "Nolle Prosequi" entered. By an examination of the indictment of 27th February, I find no entry of nol. pros., but on the contrary, the plea of the



prisoner, and the verdict of conviction on the same day—and on the 28th February, a nol. pros. appears to have been entered on the indictment for simple larceny. There is nothing, therefore, either on the indictment, or any part of the record, which imports that the proceedings were inconsistent or repugnant, and which would make the sentence appear irregular hereafter. The prisoner's counsel supposes, that the indictments of the 23d and 27th February, were in truth the same; and that the Solicitor General changed the word "note" to "bill," wherever it occurred in the indictment of the 23d—and submitted that indictment, thus changed, on the 27th Feb. to the Grand Jury, by whom it was again returned as a true bill, and he offers as a truth of this assertion, the fact, that the indictment of 23d February is not produced with the entry of nol. pros. He contends, therefore, that the entry of nol. pros. which the Solicitor General moved should be made on the indictment of 23d Feb. and which the minutes of the Court disclose was made, was in truth a nol. pros. on the indictment of 27th February—it being the same paper, and that the prisoner was convicted on an indictment which had no existence. Whatever correctness there may be in the assertion of prisoner's counsel, it is not borne out by the record, by which alone I must be governed. The indictment on which prisoner was convicted, has upon it, in the hand-writing of the Foreman of the Grand Jury, the words "True Bill, G. B. Lamar, Foreman, Feb. 27, 1837." However informal it may be in the prosecuting officer, to take an existing indictment, and to make a material change in it, and to

520 \*present it to the Grand Jury, thus changed, for a second action, and however such change may affect the first indictment, I do not see how it could destroy the second indictment, or how I can determine, that a nol. pros. intended to be endorsed on one indictment, and declared by the proceedings to have been so entered, shall operate to discharge another indictment, not appearing by the record to be in any manner connected with it. I cannot even tell whether the subject matter of the larceny was the same in both indictments. I certainly am not bound to presume it. I must, therefore, dismiss both these grounds, as they are not sustained by the records of the Court.

The grounds in relation to the motion for a new trial, are, 1st. That the verdict is contrary to evidence, because there was no proof that the bank bills, which were the subject matter of the alleged offence, were genuine. 2d. That the verdict is contrary to law, because the bank bills, which were the subject matter of the alleged offence, were not proven to be the bank bills of the respective banks, as the indictment avers.

There is no principle of law better settled, than that in larceny, evidence must be given, that the thing stolen is of some value. Hence, it has been determined, that on an indictment for stealing a bank

note, it must be proved to have been genuine. (State v. Tillery, 1 Nott & McCord 9.) That decision was perfectly correct, with reference to the case then under consideration; but the circumstances of the present case are very different. The prosecutor here, swore that he received the fifty dollar bills, which formed a part of the subject matter of the larceny, from the bank, whose bills they purported to be. Unless we can presume that a bank would be guilty of the absurdity of issuing counterfeit notes of its own corporation, we have good evidence that they were genuine. But if they were not, I am not prepared to say, that the rule laid down in Nott & McCord, ought to be a universal one. Stealing a counterfeit bill, is certainly not 521 larceny, as a general \*rule, because the thing stolen must be of some value. But it is not necessary that the subject matter of the larceny should be of value to third persons, if valuable to the owner. The prosecutor having received these bills from the bank, whose notes they purported to be, upon every principle of law, could have made such corporation pay specie for them, whether genuine or not, and they were, therefore, of the same value to him. A somewhat analogous principle may be found decided in Ranson's case, (Russ. & Ry. 232; 2 Leach 1090; Roscoe's Crim. Ev. 512.)

And in reference to the second ground, I observe, that the bills exhibited in evidence, and which were admitted by prisoner, to have been taken from him, did correspond with the averment in the indictment; and the fact that they were issued by the bank, whose bills they purported to be, and therefore, in the absence of all proof to the contrary, presumed to be genuine, seems to me to have sufficiently proved the allegation, that they were bills of that bank. Craven's case, (in Russ. & Ry. 14) in which it was determined, that where a bank note was described, as being signed by A. Hooper, some evidence must be given of the signature being by him, is not a case in point. There was no allegation here, that the notes were signed by any one, but merely, that they were notes of the Georgia Rail Road and Banking Company, and that, I think, was sufficiently proved.

All this argument, of course, proceeds upon the supposition, that the bills which Stewart lost, were the same found upon the person of the prisoner. The want of identity is not urged in the notice given to the Solicitor General, for a new trial, but it was insisted on in the argument of such motion. The point of identity was commented on by me, to the Jury, upon the trial, the evidence and the law explained to them, and the facts left exclusively for them to determine. By their verdict, they have declared, that the identity of the bills was sufficiently ascertained. Though 522 such evidence \*was not of a positive character, yet there was strong circumstantial evidence to shew that prisoner was the felon, and I do not feel disposed to

disturb a verdict, with which I cannot say I am dissatisfied.

A case strikingly analogous, in some of its facts, may be found in 1 Nott & McCord 91, (State v. Casados)—and in the Court there refused the motion—as all Courts ought to do, when acting in the exercise of a sound discretion, and with no doubt of the justice of the verdict.

Motion denied.

Alexander Drysdale, for Prisoner—John E. Ward, Solicitor General, contra.

523 \*Zara Powers, Compl't v. Thomas Heery, Def't.

May Term, 1837.

**Injunction—To Restrain Trespass—When Proper.\*—**

An injunction may issue to restrain trespass, where irreparable injury would follow its denial; as where defendant is insolvent.

**Same—Same—Title in Dispute—Effect.**—But it seems, that it will not be granted, where the title is in dispute.

**Same—Same—Same—Same.**—And where the answer set forth, that there was an actual adverse possession by defendant, at the time of the purchase

**\*Injunctions—To Restrain Trespass—When Proper.**

—An injunction may issue to restrain trespass where irreparable injury would follow, and where the defendant is insolvent. *Powers v. Heery*, R. M. C. 523; *Moore v. Ferrell*, 1 Ga. 7.

And in *Camp v. Dixon*, 112 Ga. 872, 38 S. E. Rep. 71, an injunction was granted, to restrain a trespass, under the circumstances of the case even though the defendants were solvent, the remedy at law by action for damages being entirely inadequate.

†**Same—Same—Title in Dispute.**—Equity will not restrain waste except upon unquestioned evidence of complainant's title; and where the defendant is in possession under adverse title, or where complainant's title is not clear, the relief will be refused. *Nethery v. Payne*, 71 Ga. 374; *Flannery v. Hightower*, 97 Ga. 602, 25 S. E. Rep. 371, citing the above case.

And in the principal case it is said in the second and third headnotes, but it seems that the injunction will not be granted where the title is in dispute; and where the answer set forth that there was an actual adverse possession by the defendant, at the time of the purchase of the land by the complainant, the injunction was refused. See sec. 4917 of Code.

In *Murphey v. Harker*, 115 Ga. 78, 41 S. E. Rep. 585, it is held, when in an application to restrain a trespass, upon the ground that the damages threatened would be irreparable, the defendant sets up title to the property adverse to that of the plaintiff, or questions the title of the plaintiff, a court of equity will by injunction restrain the trespass and preserve the status until it can be settled at the final hearing; but where the defendant denies the title of the plaintiff, the trespass will be closely inquired into before the court will interfere by injunction.

See also, *Johnson v. Hall*, 83 Ga. 281, 9 S. E. Rep. 783; *Moore v. Ferrell*, 1 Ga. 7; *Field v. Howell*, 6 Ga. 426; *Silva v. Rankin*, 80 Ga. 80, 4 S. E. Rep. 756.

of the land by complainant, the injunction was refused.

By ROBERT M. CHARLTON, Judge.

The bill in this cause alleges, that complainant, on the 30th August, 1834, purchased from Charles M. Goolsby, a certain tract of land, containing 500 acres, situate in the county of Bryan, and State of Georgia: that the said tract is entirely worthless and valueless, save on account of the timber and wood growing thereon: that Thomas Heery, the defendant, who owns, or pretends to own land, in the neighborhood of complainant's tract, has entered upon such land of complainant, (not in the occupancy of any one,) and has cut a great quantity of timber, among which are forty cords of fire-wood, amounting in value to \$160, and has carried off and converted the same to his own use, and has refused to restore the same, and continues to trespass upon such land, and to cut and carry away the timber thereon, and has declared his intention to take all the timber from said land: that the said Thomas Heery is insolvent, having taken the benefit of the "Honest Debtors' Act," at the last term of the Superior Court of Chatham County, and is entirely irresponsible, to make good any waste he has committed, or may hereafter commit. The bill then prays for an injunction, account, and general relief.

Although the practice of granting injunctions, in cases of trespass, is an innovation upon the ancient rule, yet looking to the principle, apart from all authority, I can see nothing in justice or equity, which would forbid the exercise of such power. To

524 deny \*it, where irreparable injury and damages would be the consequence of refusal, would seem to me to be unwarranted, by the principles upon which the system of Equity is founded. The decisions of late years furnish numerous instances, where the writ has been granted to restrain trespass, where irreparable injury would follow its denial. (*Hanson v. Gardiner*, 7 Ves. 304; *Earl Cowper v. Baker*, 17 Ves. 127; *Crockford v. Alexander*, 15 Ves. 138; *Shubrick v. Guerard*, 2 Dess. Rep. 616; *Livingston v. Livingston*, 6 John. Ch. Rep. 497.) So it will be granted to prevent a multiplicity of suits. (6 John C. Rep. 497; and see *Jerome v. Ross*, 7 John. C. Rep. 330, et seq.) Looking to the bill alone, I should have been inclined to award this injunction. The complainant has there made out a very strong case. He alleges that the defendant is wholly insolvent, and unable to respond to the damages which may be recovered against him, in a Court of law. The case of trespass, committed by a pauper, is one of those put by Mr. Chitty, in his great work on Practice, (1 Vol. 722, 3,) in which injunction ought to issue.

But I must refuse this injunction, upon the facts disclosed in the answer. The defendant denies, under oath, that he has ever committed any trespass, or waste, upon any land of complainant, in the county of Bryan. He swears, that for a considerable time past, he has been engaged in cutting wood, upon



two tracts of land, in Bryan county, to which he deduces a regular chain of title, commencing anterior to the right or grant of Goolsby, (the vendor of complainant, and who claims under a grant, issued by the State of Georgia, in July, 1832.) He states, that he, defendant, has claimed and held these tracts, in right of his children, under the titles which he deduces, and that under such claim and right, he has been in actual possession, ever since the 28th November, 1831, when the title was made to his children, by A. D'Lyon; and that at the time of the alleged sale by Goolsby to complainant, the said Goolsby was out of possession of said tract, and that there was then an adverse possession. If all this is true,

525 (and for the present, I must assume it to be so,) the defendant has removed all claim, which the complainant could have to the intervention of the strong arm of this Court. Very few cases can be found, where an injunction has been granted in trespass, when the title was in dispute. Lord Eldon had never known of such a case; (*Norway v. Rowe*, 19 Ves. 146;) and Chancellor Kent, in *Storm v. Mann*, (4 John. C. Rep. 21,) refused the injunction, in consequence of the same difficulty. No reasons are assigned for granting the injunction, in *Shubrick v. Guerard*, (2 Des. Ch. Rep. 619,) and that cause stands unsupported, by previous or subsequent decisions. And most certainly, no case can be shewn, where such writ has issued in trespass, when the defendant has shown, by his answer, that the complainant has neither a legal nor equitable title, and where, if the statements of the answer are true, both complainant, and his vendor, have been brought within the penalties of the statute of maintenance, and the principles of the common law, applicable thereto. A purchaser of land, claiming under one, who was out of possession himself, might expect but little favor from a Court, either of Law or equity, when asking it against a person, who had been in actual adverse possession, at the time of the sale. The complainant's counsel has felt the pressure of the answer, and has attempted to obviate it, by the suggestion, that it is not specific, that it does not furnish the boundaries of the land, thus claimed by defendant, and that the Court cannot ascertain, therefore, if it is the same locus in quo the trespass was committed, as alleged by complainant. That argument may be briefly answered, by the remark, that if it is the same land, the defendant has "answered the complainant out of Court," and if it is not the same land, then as defendant has sworn, that he has committed no trespass upon any land in Bryan county, owned by complainant, he has sworn away all the Equity of the bill. Injunction refused.

M'Allister & Henry, for complainant—*L. S. D'Lyon*, contra.

526 \*Robert Habersham, Adm'r D. Blake, Compl't, v. Farish Carter et al., Def'ts.

May Term, 1837.

Executors and Administrators—Injunctions—Bond—

**Statute.**—The Act of December 16th, 1811, in reference to injunctions, applies to all persons, in whatever capacity they apply for the writ. An Executor or Administrator cannot obtain the injunction, without giving bond and paying costs as required by such statute.

By ROBERT M. CHARLTON, Judge.

An application for injunction was made to me, at the last term of this Court, by the complainant in the above cause, and although I suggested to his counsel at the time, the doubt which I had, whether it ought to be granted, without costs being paid and security given for eventual condemnation money, in terms of our statute, yet, as the danger was pressing, and a great difference of opinion existed at the bar, as to the true construction of that statute, I thought proper to let the writ issue until further order, leaving it to the defendants' counsel to argue the point, on a motion to dissolve the injunction. That motion was made at the close of the last term, by Mr. Millen, counsel for Benjamin F. Petton, one of the defendants, and without touching the equity of the bill, he insisted, that under our statute and rule of Court, "no injunction shall be sanctioned or granted by any Judge of the Superior Courts of this State, until the party requiring the same, shall have previously given to the party against whom such injunction is to operate, by application to the Clerk of the Superior Court for the purpose, a bond, with good and ample security for the eventual condemnation money, together with all future costs; which said bond shall be lodged in said Clerk's office, subject to the order of the Court; and have paid all costs which may have accrued in the case, the subject of the injunction." Neither of these requisites having been complied with, he contended

527 that the injunction could not be sustained. Mr. \*Berrien, of counsel for complainant, denied that an administrator was within the spirit of the statute referred to. (*Prince's Dig.* 223-4.) He affirmed, that great injustice and hardship would result from a strict adherence to the letter of the law, and illustrated his argument by a reference to the facts of this case, and the situation of the complainant as the representative of an insolvent estate, to shew, that he was entirely remediless without the intervention of the strong arm of this Court, and he urged, that to require the administrator of an insolvent estate, to give bond to a creditor thereof, for "the eventual condemnation money," and costs, would be to deny the writ of injunction, since no one, with a proper regard to his own interests, would enter into such a stipulation.

Arguments of inconvenience are only entitled to weight with a Court, in new or doubtful cases. If the letter of the law is clear, and there is nothing to shew, that such letter is at variance with the reason and spirit, a Judge is bound to adhere to the letter. With the hardship, the inconvenience, the unreasonableness of the law, he has nothing to do. Where there is no am-

biguity in the law, "ubi nulla expositio contra verba expressa fienda est:"—"When I find the words of a statute perfectly clear, I shall adhere to the words." Per Denman, Ch. J., in 4 Neville & Manning 426. "The English Judges have frequently observed," says Chancellor Kent, (1 Vol. Com. 467, note (d.) 3d edit.) "in answer to the remark, that the Legislature meant so and so—that they in that case have not so expressed themselves, and therefore the maxim applied, quod voluit non dicit." (See also Rex v. Stoke Damerel, 7 Barn. & Cress. 569; Rex v. Ramsgate, 6 P. & C. 712; The King v. Skone, 6 East. 518.) "Our decision," said Lord Ten-terden, in Rex v. Barham, (8 B. & C. 104,) "may, perhaps, in this particular case, operate to defeat the object of the statute; but it is better to abide by this consequence, than to put upon it a construction not warranted by the words of the Act, in 528 \*order to give effect to what we may suppose to be the intention of the Legislature." (And see Notley v. Buck, 8 B. & C. 164.) "It is much safer to adopt what they have actually said, than to suppose what they meant to say." (Ashurst, J., in Jones v. Smart, 1 Term Rep. 51.)

There can be no doubt that the letter of this law includes all persons, whether seeking to protect their own rights, or those of others, to whom they stand in a fiduciary character. The statute declares that "no injunction shall be granted," without security being first given for eventual condemnation money and payment of costs, and the 7th equity rule of Court requires, that the Clerk's certificate of payment of costs and security being given, as required by law, shall be annexed, when a bill praying an injunction is presented to the Judge, for his sanction. Whatever doubt may exist as to the intention of the Legislature, in reference to injunctions, where there could be no eventual condemnation money, I see none when the object of the injunction prayed for, is to restrain a plaintiff from proceeding at law. They have said, in such case, emphatically, and without making any exception, that "no injunction shall be granted or sanctioned," until bond has been given for such eventual condemnation money, and costs have been paid. The mischief which the Legislature sought to avoid, was the facility with which men might be delayed from prosecuting their legal rights, by the intervention of a Court of Equity; the remedy provided was, to require that injunction should not issue, a party should not be hindered, unless he were secured in the eventual condemnation money, if he should prove ultimately, to be in the right. The counsel for the defendants, in this case, has argued, that an executor, administrator, &c. may commit as much injury as if he was acting in his own right, and that he is, therefore, as much within the mischief and the remedy as any other person; and there is force in the argument. And in the case of Pelot, et al., pl'ffs. in ex'on. v. Maxwell, et al., trustees and ex'ors, 529 cl'ts, decided by Judge \*Andrews,

at Chatham Superior Court, January term, 1837, where a motion for a new trial was made, on the ground that damages had been awarded under our statute, for a frivolous appeal, against the claimants, who acted in a representative capacity, the Court refused to sustain the motion, alleging that such a claimant might endamage the plaintiff as much as any other person, and that if the statute of the State had meant to except executors, &c. it would have said so. "He that would except himself from the operation of a law, must shew the law that excepts him," was the language of the Judge.

That this adherence to the plain and positive terms of the statute, may occasionally work hardship and injustice, is no argument with me. No human law can be framed, that will not sometimes have that effect. The great object of a law-giver, is to provide a rule, that will do most good and least harm. And I think that I have given sufficient authority to show, that a Judge is bound to enforce a law when it is clear, without reference to the inconveniencies that may result from it. And it is alike useless to contend, that an injunction will never be granted to an administrator, unless a sufficient cause be shewn, and therefore, that a Judge will take care that it is not made an instrument of oppression, nor suffer a party to be restrained, unless he ought so to be. The same argument will apply to an individual asking for this writ in his own right, and yet the law has declared in substance, that however strong may be the case presented, though injustice will inevitably result from its refusal, though the most gross and palpable fraud has been, (and will continue to be,) committed, the writ shall not issue, until security has been given for the eventual condemnation money, and costs have been paid. I will mention two cases occurring under this law, quite as hard as the present. Ware died indebted to some orphans, and they filed their bill in Richmond Superior Court, alleging that the deceased had been 530 their guardian, and had \*died indebted to them as such; that their claim, according to the law of Georgia, was of superior dignity to any other—that the other creditors of deceased, were proceeding with their cases to judgment, and prayed an injunction to restrain them, but they offered no security, and insisted that the statute did not embrace their case; but Judge William Schley, (the present Governor of Georgia,) after "full consideration, refused the injunction, unless security should be given, believing that the law was imperative, and left no ground for doubt." So in the case of Read, et al. v. Dews, Sheriff, et al. in Chatham Superior Court,\* where the complainants claimed to be preferred to the individual creditors of intestate, because they had a lien on the specific property, and also a preference over all other creditors, by virtue of the Act of Georgia of 1799, entitled an

\*Supra. p. 356.—(Ed. of Original Edition.)



Act for the better security and protection of orphans, and their estates, although Judge Law doubted, whether the statute requiring security before injunction could be granted, embraced cases where there was no condemnation money, yet required the security in the case before him. The argument of inconvenience and hardship, if proper to be addressed to a Judge in answer to the positive provisions of a statute, might have been listened to with as much patience in either of the cases just cited, as in the cause now before me, and yet such arguments were urged in vain.

When this motion was made to me, at the close of the last term, I thought that it was one of those matters, which would authorize me in soliciting the advice of all the judges of the Superior Courts of the State of Georgia. It seemed to me, that the true construction of an Act passed in 1811, and in a matter of daily occurrence and of great importance, ought not still to be vexata questio, and that the present occasion offered an opportunity of settling it throughout the State. Without

531 having much doubt on it myself, \*I was determined to adhere to the opinion of a majority of the Judges of the State, in order that a certain rule might be established, where hitherto so much uncertainty had prevailed. In the answers which I have received to my communications, several cases have been mentioned in which the point has been determined. Judge Cobb, whilst Judge of the Oakmulgee\* Circuit, decided in the case of Beaty's Ex'ors v. Beaty's Creditors, on solemn argument, that the Executor had the right to file an injunction without bond and security. Judge Crawford (Wm. H.) made similar decisions in the Northern circuit in Cheves' Ex'or v. his creditors, in Taliaferro county, and Heard's Ex'ors v. his creditors, in Elbert county; and it is mentioned upon the authority of the Hon. Charles J. McDonald, formerly Judge of the Flint circuit, that the point was similarly settled there, "by analogy to the statute allowing appeals to Executors, &c. without security." Judge Polhill, the present Judge of the Oakmulgee circuit, who furnishes me with these cases, says, that he should feel himself bound by these adjudications, and would grant the injunction for the protection of representatives and estates, without bond. Judge Harris of the Western circuit, is of opinion, that a fair construction of the statute, would allow an injunction to issue, without the formality of the bond as mentioned in the statute, "in cases of administrators, guardians, or where the party applying for the injunction, has entered an appeal previously, and given the necessary security." He says, that where security has been given faithfully to apply the funds as in case of administrator's bonds, the object of the statute is answered, but that the writ ought not to issue at the instance of an executor or trustee, where no security had been given faithfully to execute the trust. Judge Andrews of the Northern

circuit, adverts to the same distinction between executors and administrators, and though he does not give a decided opinion, yet says, that he feels "well satisfied, that neither an executor nor administrator should give a bond for the whole debt of their decedent, when for the want of assets,

they may be condemned to pay a part 532 \*only; neither the spirit nor literal construction of the statute requires it." I am neither desirous, nor willing to array myself against the authority of these cases or opinions, but I may be permitted to remark, that the distinction between executors and administrators has not been observed in practice, since all the cases adduced, in which injunction has issued without bond in favor of a representative of an estate, are instances in which it has so issued at the prayer of an executor, and although it is true, that the bond given by an administrator affords some security to the creditor of an estate, yet, the argument which is deduced from this fact, while it professes to be founded, on the supposed intention of the law giver, yet leaves unprotected a multitude of cases of equal hardship and inconvenience, where the spirit of the law, as contended for, ought equally to be observed. I can scarcely believe, that when the Legislature declared, that no injunction should issue without bond to the party for the eventual condemnation money, they meant, that an administrator's bond payable to the Register of Probates for the county, with a very different condition, should be considered as a compliance with the law; and if they did not so mean, and we are now making the exception to suit the hardship of the case, we are legislating judicially, and substituting the "crooked cord of discretion for the golden metwand of the law." And in reference to the case decided in the Flint circuit "upon the analogy to the statute allowing appeals to executors, &c. without security," I remark, that this doctrine of analogy ought not to be carried too far; that the statutes are not in *pari materia*, and are not therefore to be taken together. The statute in relation to appeals was passed in 1799, in reference to a proceeding at common law, and after directing, that all persons so appealing should pay all costs and give security for eventual condemnation money, adds, "except executors and administrators, who shall not be liable to give such security." The law under discussion was enacted in 1811, in reference to the equity proceeding of injunction, and does not except administrators and executors 533 &c. Even in the case \*of statutes in *pari materia*, when the Legislature are found sometimes inserting, and sometimes omitting a clause, it is to be presumed, that their attention has been drawn to the point, that the omission is designed. (*Moser v. Newman*, 6 Bingham 561.)

I have stated the cases and opinions adverse to the construction my own mind

would give to the statute. I proceed to motion those in support of my views. Judge Shly, of the Middle circuit, says, "My opinion upon the law is this; that in all cases where an injunction is prayed, and the object is to stay a proceeding at law, the party must give the security in terms of the statute, but when an injunction is prayed to stay waste, &c. the Court will be governed as is usual in such cases in equity. The Legislature in passing the Act, having failed to exempt executors and administrators, will it not be judicial legislation for the Court to make the exception, the words of the statute being plain and imperative on the Judge." Judge Warner, of the Coweta circuit, says, "at the Convention of Judges in May, 1833, the question was submitted by Mr. Cone, of Greene county, and argued at some length, in favour of granting an injunction at the instance of an administrator, without security, inasmuch as he had already given security. My impression was at that time, in favour of granting the injunction, but the other Judges advised the Judge of the Oakmulgee circuit to refuse his sanction. without security, being of opinion, that the statute of 16th December, 1811, was imperative, in which opinion, from a careful examination of that statute, I now would yield my assent." Judge Iverson, of the Chattahoochee circuit, writes, "my opinion of the subject is this, that as the law requiring bond and security is general, in cases of injunction, and the law excepting administrators, executors, &c. from giving security in cases of appeal, is an exception to a general rule, it cannot be applied to any other case, than such as is embraced specifically in the statute making the exception. I am of opinion, that the usual bond and security ought to be required." I am sure that

534 I shall be pardoned \*by my much respected brothers for having given their opinions to the public, and for the commentaries which I have made upon them. I repeat, that I should have decided this point in accordance with the opinion of a majority of the Judges of the State. I should have been content to have announced, that the question was settled by a majority of the highest branch of the Judiciary department, without offering to disturb it, by adding my own feeble opinion, adverse to such decision. But the scales being even, I was compelled to throw my own weak judgment in the balance, and in doing so, I felt bound in justice to myself, and through respect to those from whom I differ, to state the reasons which operated in my mind, and compelled me to dissent from them. I could not discharge this duty properly, without commenting upon their reasons, and I felt more strongly the necessity of doing this, from the knowledge of the weight of authority which their names and opinions would carry with them. I have used these opinions for another object; to shew the different reasons urged for that construction of the statute, which would allow the injunction to issue without bond, and the various

exceptions taken—to give a practical illustration of the difficulties of reasoning away the plain letter of a positive statute, and the danger and uncertainty of such a course; and lastly, that I might advert to the expression used by Lord Ellenborough, C. J., (in *Rex v. Inhabitants of Leek Wootton*, 16 East. 122,) that "when there are conflicting decisions upon the constructions of a statute, the Court must refer to that which is and ought to be the source of such decision, that is, the words of the statute itself."

It is worthy of remark, that the opinion expressed by the convention of Judges in 1833, upon this identical point, was made up with the knowledge of the decisions of Judges Cobb, Crawford, and in the Flint Circuit—that it is the last judicial construction given to this statute—that it was pronounced after the point had been argued before the Judges, and that it may be considered as  
535 \*having been unanimously expressed, the only dissenting Judge then, having since, upon a careful examination of the statute, "yielded his assent." Upon the authority of that opinion, and the advice given to me by Judges Shly, Warner and Iverson, (in whose views of the question, I fully concur,) and in obedience to the plain and unambiguous letter of the statute, not variant, so far as I can ascertain it, from its spirit and reason, I must dissolve this injunction, and it is accordingly dissolved.

N. B.—After this injunction was dissolved, I received the reply of the Hon. Angus M. D. King, the present Judge of the Flint circuit, an extract from which I subjoin. He says, "the only case where this question has been decided within my hearing or knowledge, was in the case of *Pridley v. the Ex'ors of Blackshear*, a case that some years ago, excited a good deal of interest in the Superior Court of Twiggs county: there a demurrer was sustained to an injunction obtained by the executors, because the security was not given as in other cases." He adds, that, he gives this case from hearsay, and that he has heard it objected to more than once. "This brings me," (he proceeds to observe,) "to what I have myself looked upon as the line of distinction to be observed, in granting injunctions with or without security, which is, that if the case against which the injunction is sought, goes to charge the estate merely for any cause, arising in the life time of the testator or intestate, then, I think, that there can be no question but that they are entitled to all the benefits of a full defence or prosecution, without incurring any increase of personal liability; but on the other hand, where the proceeding assumes the shape of an action against the executor or administrator in his individual or personal, rather than in his representative character, I think the security ought to be required, although in the bill or declaration they may be named and set forth as the representatives of an estate, or of a person or persons deceased."

I have also received the answer of



536 the Hon. A. A. Morgan, \*Judge of the Southern circuit. He writes, that "some time in 1824, Judge Harris, the presiding Judge of this circuit, in the case of the Ex'r of Jonathan B. Bacon v. Thomas F. Bacon, decided, that executors, administrators, &c. were not exempt from the operation and requirements of the statute, and construed the Acts strictly. At the subsequent session of the Legislature, an attempt was made to alter the law in this regard, but the bill having such alteration in contemplation was lost. I am of opinion, and should so decide, if the case were to come before me, that the requisitions of this statute must be complied with, and I should be unwilling to exempt executors, administrators and guardians as not being included within the spirit of the law."

The fact, that the Legislature with their notice specially called to the inconvenience, &c. had refused to exempt executors, administrators, &c. from the operation of the statute, would have had great influence on my mind in determining this question. I am happy to find in the letter of Judge Morgan a corroboration of my views.

I have added these opinions, for the benefit of the profession.

Berrien & Law, for complainants—John Millen, contra.

### 537 \*A. A. Smets v. Thomas and Riley Weathersbee.

May Term, 1837.

**Statutes—When They Go into Operation.**—If no time be fixed by a statute for it to go into operation, it takes effect from its date.

**Attachments—Amendments—"Something to Amend by."**—Where an attachment was directed to the "Sheriff of the county of Chatham," instead of, "to all and singular the Sheriffs and Constables of this State," HELD, that it might be amended, it having been addressed to one of the individuals entrusted by law with its execution, and there being something, therefore, to amend by.

**Same—Statutes Relating to.**—All the statutes relating to attachments, being in *pari materia*, must be taken together.

By ROBERT M. CHARLTON, Judge.

A motion has been made to dismiss this attachment, upon the ground, that it is directed "to the Sheriff of Chatham County," instead of "to all and singular, the Sheriffs and Constables of this State," which is the form prescribed by the Act of 29th Dec. 1836. The motion has been submitted without argument, accompanied, however, with the remark of the Counsel for the attaching creditor, that the attachment has been properly issued, under the provisions of the law regulating attachments, in force anterior to the Act of 29th Dec. 1836, and that by reference to the date of this process, it will be

perceived, that they could have had no knowledge of the existence of the latter Act, at the time this proceeding was taken out.

The rule of law is now well settled in the United States, that a statute, when duly made, takes effect from its date, when no time is fixed by the Act itself for it to go into operation. (Matthews v. Zane, 7 Wheaton 104; Brig Ann, 1 Gallison 62.) Chancellor Kent says, (1 vol. Com. 458, 3d edit.) that this rule is deemed to be fixed beyond the power of judicial control, and no time is allowed for the publication of the law before it operates, when the statute itself gives no time. This rule does operate with great hardship, in some cases, but it is an improvement

538 upon the old English \*principle, which carried back the operation of an Act, by relation to the first day of the session in which the statute was passed, and which might be weeks or months before it was introduced into Parliament. (4 Inst. 25.) This doctrine of relation, some times had the effect of making an Act murder, which could not have been so without such relation. (King v. Thurston, 1 Lev. Rep. 91.) The cases of the Attorney General v. Panter, (6 Bro. P. C. 553,) and Latless v. Holmes, (4 Term Rep. 660,) are instances of great hardship, but the Court considered themselves bound by the rule, and it continued to be acted upon until the statute of 33 Geo. III. ch. 13, declared, that statutes should take effect only from the time they receive the royal assent.

Our Legislature have done much to guard against the rigor of the rule. Before the passage of this Act, a joint resolution was concurred in, and approved of by the Governor, (Resolutions of House of Representatives, Pamphlet Acts, of 1836, p. 33,) requiring the Executive to have published, in such of the public Gazettes of this State, as he might select, "all Acts of the present Legislature, that may be of a public or general character." Such requisition, I believe, has been complied with.

I must declare this law to have taken effect, on the day it was assented to by the Governor, viz: on the 29th December, 1836; and as this writ was issued after that time, it must be governed by it.

I have examined this attachment, to see if it could not be amended. The modern rule of practice in England, draws a distinction between a deviation from a form enjoined by a statute, and one prescribed by a rule of Court. The Courts are much less strict, in reference to amendments in the latter, than in the former; but though they have shewn a strong disinclination to allow an amendment of irregularities, contravening the forms prescribed by the uniformity of process Act,

(2 Wm. IV. c. 39,) yet even there, when 539 \*the statute of Limitations would otherwise bar the remedy, they have interfered. (Horton v. Borough of Stanford, 2 Dowl. 96. See 3 Chitty's General Practice, 54, 5, 173, 4, 234, 5.) I do not consider myself bound by the authority of the recent English cases, because the distinction I have adverted to, has been established by the Judges, from a desire to compel the observance of the

\*The principal case is cited in note to Ellison v. Ga. R. Co., 87 Ga. 723, 13 S. E. Rep. 809.

directions in the uniformity of process Act. (2 Wm. IV. c. 39.) The Courts in England do not doubt their power to permit amendments, in all cases, where there is any thing to amend by, and I feel myself authorised to allow it in this process. Throughout our statute book, the great desire of our Legislature is shewn, to do away with the stern principles of the ancient law, and to allow amendments of form, not affecting the real merits of the cause, and I confess, that in this matter, I much prefer the modern doctrine. I do not like to stand super antiquas vias, when by doing so, I would sacrifice the principles of justice to the worn out technicalities, of a by-gone age. Whenever, therefore, an amendment can be made without violating any established principle; when the proceeding, though defective, still has something to amend by; whenever I feel that I have a discretion in the matter, I will always take pleasure in permitting the error to be corrected.

In all frankness, however, I would remark, that notwithstanding this inclination of my mind, I had at first some difficulty in permitting the amendment in this case. This difficulty proceeded from a principle of law, and a provision of another statute, which I will now refer to. The attachment law, of 18th Feb. 1799, (Prince's Dig. 18, 19,) after prescribing the manner in which attachments shall issue and be returned, declares, "that all attachments issued and returned, in any other manner than is herein before directed, shall be, and the same are declared, to be null and void." The principle of law to which I have last adverted, is, that all statutes in *pari materia*, are to be taken together, as if they were one law. The Act

of 29th December, 1836, repeals only such laws, or parts of laws, as militate with that Act; the section, therefore, of the statute of 18th February, 1799, above referred to, is still of force, so far as to make all attachments not issued and returned, in the manner prescribed by that Act, as amended by the Act of 1836, null and void. However, after the most careful examination of both Acts, I am satisfied, that the words "all attachments issued and returned in any other manner, than is herein before directed," do not refer to that portion of the general section, or division, which requires the attachment to be directed to, and served by, the Sheriff of the county where the property may be found, or his deputy, or any constable, and I think, by reference to the context, and to the spirit of the law, that it will be apparent to any one, that this clause refers to the formalities of bond, affidavit, attestation by the Magistrate granting, mode and time of return, or at least, that it was not intended by the Legislature, that any little deviation in the direction, should make the whole proceedings null and void, provided, that it was still directed to the proper officer. As an attachment was an extraordinary remedy, there was great reason in requiring, that the debt should be sworn to, previous to granting the writ, that the applicant should give bond and security,

to indemnify the individuals, whose property, (without notice to himself,) was to be levied on, and that the attachment should be attested by the Magistrate granting the writ, in order that it might be certified to all persons, that these formalities of bond and affidavit had been complied with; and that the Sheriff should so conduct his proceeding, by advertising the writ, at the proper place, and returning it into Court, at the proper time, so that notice might be brought home to the friends of the absent debtor; but such reason ceases to operate, when it is applied to an error in the direction, which could not at all prejudice the rights or interests of defendant.

I think, therefore, that an error in the direction, will not make the whole proceedings null and void, provided that it be such an error as leaves something to amend by. The writ must unquestionably be directed to the proper officer, or it will be inoperative. If it had been directed to the Governor of Georgia, for instance, it would not be operative and could not be amended; but in this case it is directed to the Sheriff of the county of Chatham, the officer of this court, one of the individuals to whom the present law declares it must be directed, and the most proper officer to execute the writ in the county of Chatham, where alone it was intended to be enforced. The object of the Act of 1836, in changing the law, and requiring all attachments to be directed to all and singular the Sheriff and Constables of the state, instead of "the Sheriff of the county where the property may be found, his deputy or any Constable," is very apparent, from the subsequent parts of the same section. It is ordered so "that an original attachment and copy shall issue, if the plaintiff shall desire, for any other county or counties, besides the one in which the first original attachment shall be issued." I have adverted to this difficulty, that it might not seem to have escaped my attention.

It is ordered, that the attachment be amended so as to conform to the Act of 1836, and that a term be given to the defendants.

William H. Stiles, for motion—Millen & Kollock, contra.

542 \*Henry Roser, Next Friend of Negro Woman Antoinette, and Her Two Children, and Negro Man Jack, v. Paul Marlow and Beal Edwards, Ex'ors of John Dugger, Jr., Dec'd.

May Term, 1837.

**Court of Ordinary—How Decision May Be Reviewed.**—A Certiorari may issue to bring up a decision of the Court of Ordinary, notwithstanding, that by the law of Georgia, an appeal is given from the same tribunal to the Superior Court.

**Certiorari—Who May Apply for.**—The petitioner for Certiorari must either be a party to the record, or one who has a direct and immediate interest in it, or is privy thereto.



**Same—Common Law and Statutory Writ.\***—The writ of Certiorari issues as well at common law, as by statute. It is a Constitutional writ. The Judiciary Act of 1799, so far as it relates to Certiorari is an affirmative statute without a negative, express or implied. The mode prescribed by it is accumulative: at all events, so far as relates to the proceedings of other Courts than the "Inferior Court."

**Court of Ordinary—No Exceptions Necessary.**—It is not necessary, that exceptions should be taken in the Court below, in order to bring up a decision of a Court of Ordinary.

**Manumission.**—Construction of the laws of Georgia concerning manumission.

**Wills—Manumission of Slaves—Validity†—Case at Bar.**—A will which directs the executor to apply to the Legislature for the manumission of certain slaves, and if that cannot be accomplished, in that manner, that they should be sent out of the State, to where it can be done, is not illegal and does not controvert the policy of our statutes.

By ROBERT M. CHARLTON, Judge.

The application for certiorari in this case, sets forth, that John Dugger, jr. deceased, a short time before his death, made his last will and testament, containing, (amongst others) a clause in the words following. "It is my will and desire, should it please God to remove me at this time, that my negro woman Antoinette, and her two children, together with my negro man Jack, should be emancipated and set free, if that can be done in any manner, either by the Legislature or otherwise, and if it cannot be accomplished, then I direct my executors, herein after named, to send them where it can be done out of the state:" that said will was presented for probate at the March term of the Court of Ordinary of Effingham county, by the defendants, the executors \*of said John

Dugger, but that said court, under a "mistaken apprehension of the legal effect and meaning of a certain statute of this state, prohibiting under certain penalties, the probate of instruments, having for their object the emancipation of slaves, and being also mistaken as to the operation of said statute upon the aforesaid clause in said will, determined that such clause was contrary to the laws of this state, and absolutely void, and passed an order prohibiting the Clerk of said court from recording the same." A certiorari is therefore prayed for.

I cannot accede to the truth of the proposition, (advanced by the counsel for the executors, who resist this application,) which denies that a certiorari can issue, to bring up a decision of the Court of Ordinary. It is true, that under the Constitution of our state, an appeal is allowed from the decision of that court to the Superior Court, and the Act of 1805, (Prince's Dig. 166,) provides, for

\*The principal case is cited in note to Low v. Goldsmith, R. M. Charl. 290.

†Slaves—Manumission.—The manumission of slaves to be sent out of the state, *it would seem*, is not in conflict with the public policy of the laws of Georgia. Cleland v. Waters, 16 Ga. 496, citing the principal case at page 518.

The principal case is also cited in dissenting opinion of BENNING, J., in Adams v. Bass, 18 Ga. 159.

the manner in which that appeal shall be entered; but the Constitution also declares, that the "Superior Courts shall have power to correct errors in inferior judicatories by writ of certiorari." There is nothing in the Constitution or laws of our state, which prohibits a certiorari from being issued, because an appeal is given from the same tribunal to which it issues. The Judiciary Act of 1799 provides, both for an appeal and a writ of certiorari, from the Inferior Court. The nature of the two remedies is well understood, and one of the distinctions which has been drawn between them, is, that an appeal can only be had when it is expressly given, and a certiorari always lies, unless it has been expressly taken away. (2 Chitty's Gen. Prac. 374, 5.) "Where any court is erected by statute, a certiorari lies to it." (1 Lord Raym'd. 469; Groenvelt v. Burwell, S. C., 1 Salk. 144.)

This point has been determined by one of my predecessors in the case of McCaskill v. McCaskill, (T. U. P. Charlton's Rep. 151,) and the language used, is, "the party has now his election either to apply for a certiorari upon the basis of error, or to 544 appeal." \*The judgment of this court upon the first must be error or no error, upon the latter, an affirmance or reversal of the inferior judicatory."

Nor do I consider the objection, that the applicant was not a party in the court below, an insuperable bar to his present application. I think, that the proper rule is, that the petitioner for certiorari must either be a party to the record, or one who has a direct and immediate interest in it, or is privy thereto. The rights and interests of heirs, devisees, executors and administrators are recognised, as well as those of the original parties. (See Bath Bridge and Turnpike Company v. Magoun, et als., 8 Greenleaf 292, citing Porter v. Rumery, 10 Massachusetts Rep. 64; Shirley v. Lunenburgh, 11 Massachusetts Rep. 379; Grant v. Chamberlain, 4 Massachusetts, 611; Haines v. Corlis, ib. 659; Glover v. Heath, 3 Massachusetts Rep. 252. Ruffin, J., (in delivering the opinion of the Superior Court of North Carolina, in the case of Perry v. Perry, 1 N. C. Term Rep. 184,) says, "I think it may be laid down as a safe rule, that any person affected in interest by *ex parte* proceedings in an inferior court, shall have, upon a proper case, a certiorari. Their rights shall not be concluded by an *ex parte* transaction." When I remember, that the real parties in interest in this application, were unable to guard themselves from this decision of the Court of Ordinary, and that those who should have protected their rights, are now warring against them, and that upon the determination of this question depends their right to freedom, I think that I ought not to limit the application of the above rule. I am of opinion, therefore, that they have a sufficient interest in the proceedings, to allow them, by their *procchein ami*, to maintain this writ.

Nor do I now think that the objection, that no exceptions were taken in the Court below, is fatal to the present application. A Cer-

tiorari is an original writ. (Fitzherbert's *Natura Brevium*, 554, A.) It issues at common law, as well as by statute. "Where  
545 "any Court is erected by statute, a certiorari lies to it." Commissioners of Sewers refused to obey a certiorari, but they were all committed, "and yet the statute does not give authority to this Court, to grant a certiorari, but it is by the common law that this Court will examine if other Courts exceed their jurisdiction." (Per Holt, C. J., in *Groenvelt v. Burwell*, 1 Lord Ray'd. 469; S. C., 1 Salk. 144, and see *Rex v. Inhabitants of Glamorganshire*, 1 Lord Ray'd. 580. (A common law certiorari is mentioned in 12 Wendell, 262.) It is also a constitutional writ. (See Const. of Georgia, art. III, sec. 1.) The writ of certiorari being therefore, a constitutional and common law writ, and one which always lies, unless expressly taken away, (2 Chitty's Gen. Prac. 374, §,) the question arises, how is it affected by the Judiciary Act of 1799. (Prince's Dig. 218.) That Act seems to me, (so far as it relates to this proceeding, (to be an affirmative statute; it has no negative, express or implied, and the rule is, that a statute made in the affirmative, without any negative, express or implied, does not take away the common law. (2 Inst. 200; 1 Inst. 111; Harg. and But.: Co. Litt. 115, in notis.; Dwaris on Statutes, 637: IX. Law Library edit. p. 8.) The party may waive his benefit, by such affirmative statute, and take his remedy by the common law. (Bro. Parl. Pl. 70; 1 Rep. 64; Cro. Eliz. 104; Dwaris on Statutes, 638; IX. Law Library edit. p. 9.) And see the rule further exemplified, in reference to this very subject of certiorari, in Bacon's Ab: title Certiorari, (D.)

Is it necessary that exceptions should be taken at common law? The decision in *ex parte Simpson*, (decided by Judge Thomas U. P. Charlton, at Chambers, of Chatham Superior Court, July, 1821,\*) declares, that a certiorari may issue without such exceptions having been taken, unless in cases of certiorari to the "Inferior Court," which, the

Judge who decided that case, thought  
546 \*was alone referred to by the statute.

On application for certiorari, to any other Court, than the "Inferior Court," the Judge says, "a petition stating in extenso, the errors of the inferior judicatory, and verified by the applicant," will be sufficient to obtain the writ. The case of *Low, Taylor & Co. v. Samuel Goldsmith*, (determined by Judge Law, at Chambers of Chatham Superior Court, in 1829,†) was an application for certiorari, to the "Inferior Court," and the exceptions, which were signed by the Justices of said Court, after it had adjourned, and which were presented to the Judge of the Superior Court, in support of this application, were contradicted by a statement, signed by the same Justices, and presented by the opposite party. That decision must be read, in reference to the case presented, and seems to have been dismissed, as much

from the contrary statements of the Justices, as from the want of exceptions taken at the proper time. The party had attempted to bring up the matter, by the statutory proceeding, without complying with its provisions. There was a denial, too, by the individuals composing the Court, of the facts presented by the applicant, and the Judge, in his discretion, "upon the great irregularity of the proceedings," refused the rule. The question, whether the applicant could not have procured the constitutional certiorari, (as contradistinguished from the judicial,) was not presented, and at all events, this was an application for certiorari, to the "Inferior Court." The present application steers clear of all the difficulties suggested in that decision. There are no conflicting statements of facts. The object is, to bring up a written document, which will speak for itself, in order that it may receive a judicial construction, and it is to be directed to a Court, not proceeding according to the course of the common law. The New-York decisions, referred to by Judge Law, are founded upon the statute of that State, which is a copy of the statute of Westm. 2. Without desiring to overturn the decisions of any  
547 \*of my predecessors, (for all of whom I

\*feel respect, and for one of them, veneration and affection,) I may place this decision upon the distinction taken in *ex parte Simpson*, between the constitutional and judicial writ of certiorari—the latter of which is there declared to be alone applicable to the "Inferior Court;" and as the application in this case, seeks to bring up the decision of the Court of Ordinary—a tribunal not proceeding according to the course of the common law, and not being identified with the "Inferior Court," and having a Clerk appointed in a different manner, (although the Court itself consists of the same individuals, who preside over the common law tribunal, denominated *par excellence*, the "Inferior Court,") I may, without disrespect, declare, that on such an application, to remove the decisions of such a tribunal, the provisions of the judiciary Act of 1799 either have no applicability, or are accumulative to the remedy and mode existing anterior to its enactment.

Having got clear of the forms, let us look to the merits. I do not acquiesce in the decision of the Hon. the Court of Ordinary, in causing the whole of the clause relating to the slaves, to be expunged from the will. It is a cardinal rule, in the construction of wills, that the interpretation should be favorable, and as near the mind and intent of the party, as the rules of law will admit. So it is, that if the words will bear two senses, one agreeable to, and another against law, that sense shall be preferred, which is most agreeable thereto. Taking these rules for our guides, we might make this will perfectly legal and operative, in regard to these slaves, by expunging the words "either" and "or otherwise," (and it is only the illegal part, that ought not to be recorded,) and then it will read thus: "It is my will and desire, should it please God to remove me at this

\*Supra, p. 111.—(Ed. of Original Edition.)

†Supra, p. 288.—(Ed. of Original Edition.)



time, that my negro woman Antoinette, and her two children, together with my negro man Jack, should be emancipated, and set free, if that can be done in any manner by the Legislature, and if it cannot be accomplished, then I direct my executors herein-  
 548 after named, to send them where it can be done, out \*of the State." Is there any thing illegal in this? Would such a will come in conflict with the policy of our statutes on the subject? John Dugger might, in his lifetime have applied to the Legislature, to manumit these slaves, without incurring any penalty, and may he not ask his legal representative, to make the same application after his death? And at all events, if the rights of creditors do not intervene, (and the executors have not shewn such rights to exist,) an individual has, assuredly, the power, to send his slaves out of the State, for any purpose, although he might not be permitted to bring them back. Can he not ask, by his last will and testament, that this should be done by those to whom he has entrusted his property, and who are sworn to obey his injunctions?

The intent of the statutes is expressed in the preamble to the Act of December 19th, 1818, (Prince's Dig. 465.) The object of the statutes relating to manumission, was, to prevent a horde of free persons of color, from ravaging the morals, and corrupting the feelings of our slaves. Experience had taught our Legislators, that such a class, lazy, mischievous and corrupt, without any master to urge them to exertion, and scarcely any motive to make it, was an extremely dangerous example to our naturally indolent slaves. They therefore declared, that such a class should not be increased by manumission, (save by consent of the Legislature,) or by the admission of such persons from other States to reside therein.\* The Legislature is then the proper tribunal, (if I may use that term,) to determine whether the case presented is one in which none of these dangers exist, one, for which reason and humanity plead. To them, the executors in the discharge of one of the most solemn of all duties, the performance of the dying injunctions of their friend, should make the application, and if it should be refused, then they should fulfil the alternative command of their testator, by sending these slaves out of the State.

549 \*I am of course to be understood, that the rights of creditors must be protected, and that these are superior to the claims of the applicants, but the executors have not answered the bill that has been filed, have not set forth any debts due by testator, which, without the sacrifice of these slaves, they are unable to discharge, and I am not therefore to presume, that any such demands exist.

\*Since the decision in this case, the Editor has met with the case of *Jordan v. the heirs of Bradley*, (Dudley's Rep. 170.) which confirms his own opinion, on this point.—(Ed. of Original Edition.)

This decision has been written under the combined pressure of business and affliction, and in contemplation of the speedy resignation of the office which I now hold. I would regret any errors contained in it, did I not know, that upon the return to this certiorari, all the points contained herein may be revised by my successor, who may thus remove the evil which my hasty act may have occasioned. At all events, I have erred on the safe side. I can do no harm by granting this writ, save occasioning a few months' delay, whilst the refusal to allow it, would cause irreparable injury.

I cannot close this decision without declaring, that I have not meant to impute any dishonorable views to the executors, in the course they have adopted. It would be unpardonable in me, if I should cast a stigma upon the reputation or character of any one, until I was perfectly satisfied that it was deserved. The strong letter of the law concerning manumission, and the heavy penalty attached to the attempt to execute an illegal will, may well have alarmed those, who are unacquainted with the legal rules of construing statutes. I will not permit myself to doubt, that the executors are anxious to perform the dying request of their testator, if it can be done, without risk to themselves, and without violating any law of the land. Least of all, would I be understood, to cast any reflection upon the intelligence of the Court of Ordinary. That Court, as it is well known, is composed of gentlemen, selected for their talent and integrity, by the citizens of the county. Though clothed with immense power, both as a Court of Ordinary, and in

550 their common law tribunal, the "Inferior Court," and \*though often compelled to decide the most difficult and abstruse questions of law, yet, the individuals composing the Court, are not necessarily lawyers, and few of them have ever been bred to the bar. Such is our peculiar Judiciary system. An appeal is given to the Superior Court, by whom the errors of the inferior judicatory may be corrected, and it would astonish any one, who had not observed the workings of the system, to learn, how seldom that right of appeal is exercised, and how admirably justice is administered in the various counties, by the Justices of the Inferior Court, aided only by their own integrity and intelligence, and by those principles of justice and reason that are innate in the breasts of honest and discerning men. To suppose, however, that they should never err, when called upon to decide technical questions, would be outraging common sense. In this case, I think that they have adhered too much to the letter, without looking to the spirit and equity of the statute, but surely, it does not impeach their wisdom or their virtue, to declare, that they have erred in the interpretation of an Act, concerning which many lawyers entertain a doubt, and upon which a different construction to that which I now give, has heretofore, I understand, been made in the county of Effingham.

It is ordered, that the writ of certiorari do

issue as prayed for, and that in the meantime, that all proceedings be stayed.

Nicholas Marlow, for applicant—L. S. D'Lyon, contra.

551 \*Jesse Sanderlin v. The Trustees of The Roman Catholic Church of Savannah.

July, 1837.

**Statute of Frauds—Sale of Goods—When within.**—A sale of goods at auction, for the price of £10 and upwards, is within the statute of Frauds.

By ROBERT M. CHARLTON, Judge.

This application for Certiorari, was handed to me yesterday, after I had prepared my resignation, as Judge of this Circuit. As I have determined to grant the writ, without the ordinary rule nisi, it is proper that I should give my reasons for doing so, in a few words.

It seems to me, that the only question submitted to me, is, are sales at auction, of goods, for the price of ten pounds sterling, and upwards, within the statute of frauds? I put the question in this shape, because, though the subject matter of the sale was a wooden house, or church, yet it might be removed from the freehold or soil, without injury to it, and one of the conditions of sale was, that it should be removed by the purchaser, within ten days after the sale. It was not a contract, therefore, for the sale of land, or any interest in or concerning it; if it had been, there would be less, (if indeed, there is any,) difficulty in the question presented.

I think that sales of goods at auction, for the price of ten pounds sterling, and upwards, are within the statute of Frauds. It is true that Lord Mansfield, in *Simon v. Metivier*, or *Motivos*, (1 Bl. Rep. 599,) expressed the inclination of his "present opinion," that auctions, in general, were not within the statute, and *Wilmot and Yates, J.*, added their doubts. If the question had been distinctly decided in that case, I should have been inclined to recognize its authority, inasmuch as the case was determined before our Revolution, and apart from this, the opinion of such men necessarily

552 \*carry with them great weight. But Lord Mansfield expressly says, (1 Bl. 601,) "this is not necessarily to be now determined, for if they are within it, the requisites of the statute are well complied with." It is worthy of remark, that the report of this case, in 3 Burr 1921, does not distinctly mention this point, as was observed by Lord Ellenborough, in *Hinde v. Whitehouse*, 7 East. 568. And the Lord Chancellor, in *Buckmaster v. Harrop*, 13 Ves. jr. 472, says, "I agree to the case of *Simon v. Metivier*, which establishes, not as a general principle, that sales at auction are not within the statute, but that a memorandum in writing, by the auctioneer, is binding upon both parties."

So that it seems to be a matter of doubt, whether *Ld. Mansfield* and the other Judges,

ever meant to deny, that these sales at auction were within the statute. At all events, they did not intend to decide it, and the weight of authority is clearly the other way. (*Hinde v. Whitehouse*, 7 East. 568; *Buckmaster v. Harrop*, 13 Ves. Jr. 456; *Blagden v. Bradbear*, 12 Ves. Jr. 466.) It has been repeatedly held that sales of land or any interest therein, at auction, are within the statute. (*Stansfield v. Johnson*, 1 Esp. 101; *Walker v. Constables*, 2 Esp. 659, and 1 B. & P. 306; *Buckmaster v. Harrop*, 7 Ves. Jr. 344.) In reference to this point, I can see no rational distinction between the sales of lands and goods; the terms as to the memorandum in writing are exactly the same. (*Lord Eldon*, in *Coles v. Trecothick*, 9 Ves. jr. 249; *Ross on Venders*, 12 Law Library 14. *Lord Erskine*, in *Buckmaster v. Harrop*, 13 Ves. jr. 459.) Indeed, without reference to any authority, if we profess to be governed by the statute, (and it is in force in our State,) it seems impossible to escape from the conviction, that sales at auction are included within it. The language of the Act is, that "no contract for the sale of goods," &c. Where the words of a statute are ambiguous, and will bear two constructions, one consonant to justice, equity and reason—and the other contrary thereto, Judges may, (and are bound to,) give to them

that construction, which will tend to 553 the advantage of \*the citizens of the State, but where the words of an Act are clear and we have no authority for saying, that the Legislature did not mean what they said, I am not a friend to the principle, which constitutes the Judge both the maker and the expounder of the law. As much fraud may be committed at a sale by auction, as at any other, and the equity of the statute, as well as its letter, will be better preserved, by declaring that such auction sales are within it. (See the remarks of the Master of the Rolls, in *Blagden v. Bradbear*, 12 Ves. Jr. 471, in reference to the contradictory swearing in that case.)

If I had any doubt in this matter, it would be dissipated by a statute of our own State. I allude to the Act of Dec. 27th, 1831, (Pamphlet Acts of 1831, p. 130,) which expressly declares, that no note or memorandum in writing, shall be necessary to charge the purchaser of any real or personal estate, at any sale which should thereafter be made at public outcry, by "any executor, administrator, guardian, or Sheriff,"\* but that such purchaser shall be bound, by reason of such real or personal estate being knocked off to him, as the highest bidder. *Expressio unius est exclusio alterius*. It is impossible to suppose that our Legislature were ignorant of the fact that there were other sales at "public outcry" than those enumerated by them. The statute book of the State would have reminded them, that there were vendue

\*As to whether Sheriff's sales of land are within the statute of frauds, see *Nichol v. Ridley*, 5 Yerger, 68; *Hanson v. Barnes*, 5 Gill & John. 350; *Simonas v. Catlin*, 2 Caines, 61; *Jackson vs. Catlin*, 2 John. Rep. 248.—(Ed. of Original Edition.)



masters appointed under the authority of the State, with "full power and authority to set up and expose to sale by public outcry and vendue, all and any houses, lands, ships, goods and property whatsoever." I think, therefore, that it is a fair conclusion, that when they declared that certain sales at public outcry should be valid without a memorandum in writing, they meant, 554 that all other sales at public \*outcry, should not be effectual, without the memorandum required by the statute of frauds, of force in this State.

The much agitated question whether the auctioneer is the agent of both parties, and may make the memorandum to bind the purchaser, does not arise in this case. There was no evidence given in the Court of Common Pleas and of Oyer and Terminer, that any memorandum had ever been made by the auctioneer or any one else. The question does not seem to have been asked. In this respect, this case somewhat resembles *Buckmaster v. Harrop*, (13 Ves. Jr. 473.) The Court below instructed the Jury, that such proof was indispensable to authorise a recovery by the plaintiffs, who were seeking to make defendant liable for the loss arising from his failure to complete the said alleged sale, the premises having been again sold at public outcry by the plaintiffs, at a reduced price. The Jury disregarded the charge of the Court and found a verdict for the plaintiffs, and in doing so, they assumed the right

to determine for themselves, a question of law. It is the duty of Courts of justice to see that legal rights are not destroyed in this or any other manner.

I think, therefore, that the applicant is entitled to his certiorari. I should have granted a rule nisi, and have heard argument thereon, if the posture of affairs would have admitted of it, but as I have determined to resign immediately my office, no alternative is left to me, but to grant the certiorari at once, which I am authorised to do, if I "deem the exceptions taken to be sufficient," which I do. To have made the rule nisi returnable to the next term, would have been delaying the plaintiffs in the Court below, unnecessarily; and as it is uncertain when my successor will be appointed, to have fixed a day for the argument anterior to November, would have been prejudicing the defendant, inasmuch as the day might arrive without any appointment having been made, and his property would be seised under a judgment, which I do not think has been legally obtained. On the return to the writ 555 itself, \*argument may be had, and a decision deliberately made, and I am sure I should regret if this galloping decision should have any influence upon the mind of the Court.

Let certiorari issue, and in the mean time let all proceedings be stayed.

L. S. D'Lyon, for applicant—N. Marlow, contra.

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2. It seems, that the right of adjournment may be exercised by any tribunal, when essential to the ends of justice. *Ibid.*

## ADMINISTRATION.

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## ADMINISTRATORS AND EXECUTORS.

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2. A general release or receipt, in full of all demands, will not extend to claims held by such releasor, as executor.

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4 *Quære*, if the non-resident next of kin, who are thereby prohibited from administration, can constitute an agent for that purpose. *Ibid.*

5. An heir or legatee is not entitled to take possession of any part of the estate of his ancestor or testator, until it be delivered to him by the act of the legal representative, or the law.

*Albritton v. Bird*, 93

558 \*6. A Court of Ordinary in all applications for probate or administration should conform to the practice of similar jurisdictions in England; at all events to such an extent as to give the appellate jurisdiction, a knowledge of the facts or doctrines, which formed the basis of the judgment of the inferior tribunal.

*Tupper v. Atwood*, 100

7. *Quære*, if the individual note of the executor of an estate, taken by a simple contract creditor thereof, would operate to charge the executor personally, and to discharge the estate from such debt.

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1. An appeal from the verdict of a petit Jury of the Inferior or Superior Courts to a special Jury of the Superior Court, is considered as a *de novo* investigation, and new and additional testimony may be admitted upon the trial of such appeal.

*Tupper v. Atwood*, 100

2. But an appeal from the Court of Ordinary to the Superior Court, is an appeal from the judgment of the former tribunal, founded on the evidence adduced to it, and no other evidence should be received by the appellate jurisdiction. *Ibid.*

559 \*3. An agent in fact who had applied for letters of administration, in the name of his principals, a commercial house resident and present, has no right to enter or prosecute an appeal from the judgment of the Court below, in his own name. 109

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*Boog v. Bayley*, 190

2. A *lis pendens*, either in Chancery, or



common law, may be submitted to arbitration by agreement, without an order of Court. Ibid.

3. And where by the agreement entered into, the award was to be made a rule of Court, and judgment entered thereon, and judgment was entered without objection, all pre-requisites will be presumed to have been complied with. Ibid.

4. When the arbitrators, meaning to follow the law, mistake it, it is a good ground for setting aside their award, so far as it is affected by that mistake.

Champneys v. Wilson, 206

5. But if, without reference to the law, they make an equitable decision, it is no objection to the award, that in some point, it is against law. Ibid.

6. Where by the terms of submission, two persons were to be appointed, with power, if they should disagree, to call in "a third," and upon such disagreement, a third person was called in, and signed the award with one of the other arbitrators; *held*, that such third person was only an arbitrator, and that therefore there was no necessity for him to convene the other arbitrators to deliver to them his decision. Ibid.

#### ARREST OF JUDGMENT.

1. Causes of arrest of judgment are confined to objections, which arise upon the face of the record itself, and the Court must be governed by that alone, in determining them.

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#### 560 \*ASSIGNMENT.

See Equity, 3.

#### ATTACHMENT.

1. Where an attachment was directed "to the Sheriff of the county of Chatham," instead of "to all and singular the Sheriffs and Constables of this State;" *held*, that it might be amended, it being addressed to one of the individuals entrusted by law with its execution, and there being something therefore to amend by.

Smets v. T. & J. Weathersbee, 537

2. All the statutes relating to attachments, being in *pari materia*, must be taken together. Ibid.

See Bills of Exchange and Promissory Notes, 3.

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#### BAILMENT.

1. In an action against a bailee, the question of negligence, is a question of law for the Court to determine.

Morel v. Roe, 19

2. But the facts from which it is, or is not inferred, must be found by the Jury. Ibid.

3. In contracts for conveying goods on freight, there is an implied undertaking by the carrier, that he has a competent knowledge of the navigation, and he will be liable for a loss, occasioned by a want of such knowledge. Ibid.

#### BANK NOTE.

1. A party who proves the loss of a Bank note, is entitled to have the same established as a lost paper, by pursuing the method prescribed by the rule of Court, and to require payment of said established note from the Bank from whence it issued.

Waters v. Bank of Georgia, et al., 193

2. But he will be compelled, before payment of the same, to indemnify the Bank from all liability on the original note. Ibid.

See Constitutional Law, 3.  
Criminal Law, 40.

561

#### \*BANKS.

1. If the capital of a Bank cannot be usefully employed in loans, there can be no objection to investing a portion thereof in the purchase of its own stock. And the Directors of the Bank have a right to dispose of the stock so purchased by them.

Hartridge, et al. v. Rockwell, et al., 260

2. And on the re-sale of such stock, the Stockholders of the Bank have no right to a preference in the purchase. Ibid.

3. The Managers or Directors of the affairs of a Corporation cannot be considered as Trustees, or prohibited as such, from the purchase of the trust property or stock, belonging to the Corporation. Ibid.

See Constitutional Law, 3.  
Criminal Law, 20.

#### BEDDING.

See Distress Warrant, 1.

#### BILLS OF CREDIT.

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#### BILL OF EXCEPTIONS.

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#### BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. The omission by the indorsee and holder of a note to charge in execution a prior indorser, (who had been surrendered by his bail before judgment, and discharged in consequence of such omission,) will not operate to discharge a subsequent indorser from his liability to such holder.

Wakefield v. Lambert, 13

2. A party to a negotiable instrument may

testify to facts, which do not prove it to have been originally void; as payment, &c.

Wendell v. George, 51

3. J. E. W., one of the mercantile firm of J. E. W. & Co. of Savannah—(whose commercial house was in Liverpool,) whilst in the latter place, drew his individual bill in favor of the plaintiffs, on his house in Savannah, who accepted the same, but afterwards suffered it to be protested for non-payment: *held*, that the payees of said bill were entitled to take out process of attachment, against the individual estate of the non-resident drawer, as drawer, in addition to the remedy by action against the firm of J. E. W. & Co. as acceptors.

Richardson, et al. v. White, 53

562 \*4. The payee or indorsee of a bill of exchange, may in default of payment, sue all the parties to it at the same time, and an action against one, will not debar his remedy against the others. *Ibid*.

5. And such payee or indorsee may maintain his action against the drawer, without previously suing the acceptor. *Ibid*.

6. The master of a vessel consigned to G. wrote a letter by H. the Pilot who carried the vessel out, informing G. that the ship had crossed the bar in safety, and requesting G. to pay H. \$35, the amount of pilotage due, "and oblige your obedient, &c." H. indorsed on the letter, "Pay to L. or order." D. a creditor of H. sued him, and garnisheed G. (as the creditor of H.) who returned under oath, that previously to such garnishment, L. had presented such letter indorsed as above, and that he (G.) had promised to pay the amount to L. *Quære*, if such letter was a bill of exchange, or an order in the nature of a chose in action.

Dibble v. Gaston, 444

7. *Held*, that if considered as a bill of exchange, the indebtedness of G. as acceptor, created a liability to L. the then holder, and not to H. who had parted with his interest in it. *Ibid*.

*Held*, also, that if it was a chose in action, the indebtedness of G. was created only by his promise, and that this being made to L. produced a privity of contract between G. and L. only, and that therefore G. had never been the debtor of H. *Ibid*.

#### BILL OF REVIVOR.

See Equity, 13.

#### BONDS.

1. A Bank was incorporated, with the power to appoint necessary officers, to take bonds from them, and to make all necessary by-laws, rules and regulations. By one of the by-laws of such corporation it was provided, that it should be the duty of every other officer of the Bank, to perform such services as might be required of them, by the President and Cashier. In an action against principal and sureties, on a bond given by a bookkeeper of said Bank, conditioned for the faithful performance of the duties of his office, and all other duties required of him

in said Banks, &c., *held*, that the bond was taken in conformity to, and authorized by the charter.

Planters Bank v. Lamkin, 29

563 \*2. And where such bookkeeper, whilst in the discharge of "other duties in said Bank," fraudulently took large sums of money therefrom; *held*, that the securities on his official bond, were liable to the amount of their bond. *Ibid*.

3. The failure of obligee to notify to the securities of the obligor, the delinquency of their principal, as soon as discovered, will not relieve them from their obligation. *Ibid*.

4. In an action of debt on a penal bond, conditioned for the payment of a lesser specified sum of money on a day certain, the sum mentioned in the condition, and all interest due thereon may be recovered, without reference to, and though it exceed the penalty of the bond.

Moss v. Wood, 42

See Interest, 1, 2.

Sheriff, 4, 5.

#### BRUNSWICK.

1. Neither the legal nor equitable title to the vacant lands in the town of Brunswick, resides in the Commissioners. If the State has made an improvident or mistaken grant thereof, the State only can take advantage of it.

Commissioners of Brunswick v. Dart, 497

#### BURGLARY.

See Criminal Law, 1, 2.

#### CERTIORARI.

1. The Constitutional writ of Certiorari is applicable to the errors of inferior jurisdictions, contra-distinguished from the "Inferior Court:" the Judicial writ of Certiorari is alone applicable to the "Inferior Court" as before distinguished.

Ex parte Simpson, 111

2. The necessity of exceptions and 20 days' notice, applies only to the judicial writ. *Ibid*.

3. It seems, that if a party seek to avail himself of an error of the Court, so as to carry up his case by Certiorari, he must reduce his exceptions to writing at the time, and tender them during the trial.

Low, Taylor & Co. v. Goldsmith, 288

4. And where no exceptions had been tendered during the term, but were presented to the individuals composing the Court, separately, and on a succeeding day, and 564 were thus signed by \*them, and such exceptions were contradicted by a statement signed by the same Judges, the rule was refused "upon the great irregularity of the proceedings." 288

5. Where a new jurisdiction is created by statute, proceeding according to the course of the common law, the Superior Court can cause its proceedings to be brought up, and correct its errors. But where such newly



created jurisdiction is summary, and does not proceed according to the common law, the Superior Court will, on Certiorari, confirm or quash its proceedings.

Commissioners of Pilotage *v.* John Low, et al., 298

6. A Certiorari may issue to bring up a decision of the Court of Ordinary, notwithstanding, that by the law of Georgia, an Appeal is given from the same tribunal to the Superior Court.

Roser *v.* Marlow, et al., 542

7. The petitioner for Certiorari must either be a party to the record, or one who has a direct and immediate interest in it, or is privy thereto. Ibid.

8. The writ of Certiorari issues as well at common law, as by statute. It is a constitutional writ. The Judiciary Act of 1799, so far as it relates to Certiorari, is an affirmative statute, without a negative express or implied. The mode prescribed by it is accumulative; at all events, so far as relates to the proceedings of other Courts than the "Inferior Court." Ibid.

9. It is not necessary that exceptions should be taken in the Court below, in order to bring up a decision of a Court of Ordinary. Ibid.

#### CHALLENGE FOR CAUSE.

1. The prisoner on being put upon his trial, challenged a juror peremptorily, and he was set aside. The Jury, after hearing the evidence, not being able to agree, were discharged by consent. The prisoner was again put upon his trial at the same term, and one of the jurors whom he had challenged peremptorily at the former trial, being again presented to him, was challenged by him for cause, and the cause assigned was, that he had set him aside peremptorily on the former trial, and thereby created a prejudice on his mind: *held*, that it was not a good challenge for cause.

State *v.* Henley, 505

565 \*CHANCERY.

See Equity, *passim*.

#### CHOSE IN ACTION.

See Bills of Exchange and Promissory Notes, 6, 8.

#### CIRCUIT COURT, U. S.

See Equity, 35.

#### CLAIM.

1. A claimant in a claim case, is confined to his own right, and cannot set up an outstanding title in a third person, to defeat the levy of plaintiff.

Forsyth *v.* Marbury, 324

#### COMMISSIONERS.

See Equity, 6.

#### COMMON AND STATUTE LAW.

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#### CONFESSION.

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#### CONSIDERATION.

See Deed, 1, 2.

Stat. of Frauds and Perjuries, 1, 2.

#### CONSTITUTIONAL LAW.

1. An ordinance of the City Council of Savannah, passed under the authority of an Act of the Legislature of Georgia, imposed a tax on all goods, &c. not the produce of the State, sold on commission by any person residing within the city: *held*, that such tax was not an impost or duty on imports, but that it was a legitimate exercise of the power of a State to regulate its internal commerce.

Cumming *v.* Mayor and Aldermen, &c., 26

2. The same ordinance required the city Treasurer, in default of any person to make his return of such sales within the time prescribed, to assess the value of goods sold by said defaulter, from the best information he could obtain, and to issue his warrant of distress for the amount of such assessment; *held*, that such arbitrary assessment was violative of private right, unauthorized by the State law, and unconstitutional. Ibid.

3. A Bank bill, issued by an institution taking its franchises from State authority, for the mere legal conveniences of a corporate body, is not a bill of credit, within the inhibition of the Constitution U. S.

State *v.* Calvin, et al., 151

4. The States retain the power to legislate upon the subject of Pilotage, within their own territories and over their own citizens, \*unless such legislation interfere with, or is contrary to an Act of Congress, passed in pursuance of the Constitution.

Low *v.* Commissioners of Pilotage, 302

5. It seems, that the constitutionality of a legislative act cannot be decided on, on application for certiorari, or other summary way. Ibid.

6. The negligence of a Pilot, which authorizes his suspension, is not a "crime," or "criminal proceeding," within the meaning of the Constitution of the United States, or the amendments thereof. Ibid.

7. Neither is the proceeding against him under the Legislative Act of Georgia, a "suit at common law," within the meaning of the VII Art. of the amendments of the Constitution U. S. Ibid.

8. The provision of the Constitution of Georgia, which directs that "trial by Jury as heretofore used in this State, shall remain inviolate," does not apply to a summary jurisdiction, (such as the Commissioners of Pilotage) existing in Georgia, before the adoption of the Constitution, and recognized by contemporaneous legislation, judicial exposition, and continual acquiescence. Ibid.

9. If there be a doubt upon the constitutionality of the law, the law ought to be sustained. *Ibid.*

10. A State law which impairs the obligation of a contract, made prior to its passage, is unconstitutional and inoperative.

*Forsyth v. Marbury*, 324

11. And it is equally so, whether the contract exists in its original shape, or has been merged in a judgment. *Ibid.*

12. A statute of limitations to be constitutional and operative, must give an allowance of time in futuro, to commence the action. *Ibid.*

13. A law which prohibits a levy on a portion of the debtor's property, previously subject to an existing judgment, is unconstitutional, as it impairs the obligation of a contract. *Ibid.*

14. Inspection laws may be constitutionally applied, not only to the produce of the country to be exported, but to imports brought in for the purpose of sale within the State.

*Green v. Mayor and Aldermen of Savannah*, 368

15. And therefore, an Ordinance of the city of Savannah, made under the authority of an Act of the Legislature of Georgia, inflicting \*a penalty on any person who should sell domestic liquors within the limits of the city, without having them gauged and inspected by the City Inspector, to whom a small compensation was to be paid by the vendor, was *held* to be an inspection law, and constitutional, both as to the thing to be done and the compensation to be made, and that its penalties might be properly enforced against the importer of the liquors in the original casks, who had sold the same, without having them gauged, &c. *Ibid.*

16. The Constitution of Georgia declares, that no bill or ordinance shall pass, containing any matter different from what is expressed in the title thereof; *held*, that although under this clause so much of a statute as contains matter different from what is expressed in the title thereof, will be void, yet that it was enough if the title was descriptive generally of the purposes of the Act, and that it was not necessary that it should particularize the several provisions and amendments contained in the body of the act. *Ibid.*

17. The term "State" when used in the Constitution of the United States, is confined to a member of the American Confederacy.

*Seton v. Hanham*, 374

18. So much of the Act of Congress of 27th March, 1804, as extends the provisions of the Act of 1790, (regulating the mode of proving in one State the judicial proceedings, &c. in another State,) to the Territories of the United States, so as to prescribe the mode of proof, or the effect to be given to a judgment of a Court of a Territory, in the Courts of a State, is unconstitutional. *Ibid.*

19. The States possess the right of legislating on the subject. *Ibid.*

20. An Act of the Legislature of Georgia passed in 1834, appointed the Mayor and Aldermen of Savannah, commissioners of the Jail of Chatham County, with power to appoint a Jailor. The custody of the Jail before the passage of this Act, was vested by law in the Inferior Court and Sheriff of the County. The Corporation of Savannah having appointed the Jailor, D. the then Sheriff, who had been elected before the passage of the Act of 1834, refused to deliver the possession of the Jail and the custody of the prisoners therein, on the ground, that

568 his \*term of office had not expired; that he was entitled by law to the possession of the Jail during such term, as incidental to his office, and that the Act of 1834 was unconstitutional, so far as it related to him: *held*, (on application by the Jailor appointed by the Corporation, for Mandamus, to obtain possession,) that said Act was not the exercise of judicial power, and therefore did not infringe the Constitution of the State, and that it did not violate the Constitution of the United States, by impairing the obligation of a contract; and Mandamus granted. *State v. Dews*, 397

21. Public officers under our Government, are but the naked agents of the body politic, and act only for its benefit. Such officers have no proprietary interest in their offices; and their duties, and rights which are the mere consequence of such duties, may be changed during their continuance in office, by the Legislature, without violating that clause of the Constitution of the United States, which forbids the passage of a law impairing the obligation of a contract. *Ibid.*

22. Laws passed in the exercise of the ordinary legislative power of a State, are not contracts within the purview of the Constitution of the United States. *Ibid.*

23. And laws which repeal or amend them, do not fall beneath the constitutional inhibition. *Ibid.*

See Mortgage, 5, 6.

## CONTEMPT OF COURT.

See Jury, 1, 2.

## CONTINUANCE.

See Practice, 1, 2.

## CONTRACT.

See Constitutional Law, 10, 11, 21, 22, 23.

## CO-PARTNERSHIP.

1. A creditor who has obtained judgment against one co-partner in his individual capacity, which judgment was anterior to the co-partnership, has the right to levy on the partnership effects and to sell his debtor's interest therein, without reference to the claim of the creditors of the firm.

*Ex parte Stebbins and Mason*, 77

2. Such judgment, being a lien on all the property of the debtor, which he had at the time of signing thereof, or which he 569 might \*thereafter acquire, supersedes



the claims of all subsequent creditors. Ibid.

3. S. was a co-partner with M. under the firm of M. & S., and with T. under the style of S. & T.: after the death of S., M. as surviving co-partner of M. & S., sued T. at common law, as surviving co-partner of S. & T., upon transactions which had been held between the two firms in the life time of S.—*held*, that such action could not be maintained.

Miller v. Thorn, 180

4. As a general rule, one partner cannot sue another at common law. Ibid.

5. A warrant of attorney to carry on a suit, was given to L. & M., attorneys at law and co-partners: judgment was obtained thereon, and after the death of L. sci. fa. was issued against the bail by M. & N., who had entered into co-partnership—*held*, that the co-partnership of L. & M. was revived as to the cases brought by them, by the co-partnership of M. & N., and that the latter firm had authority to prosecute such process, under such warrant of attorney.

Nichols, et al. v. Dennis, et al., 188

6. If on the dissolution of a firm, power be given to one partner to collect the debts thereof, such partner may execute a power of attorney for self and partners, for the purpose of authorizing a third person to collect the same. Ibid.

7. Upon the death of one member of a firm, the representatives of deceased partner, become tenants in common with the survivor, and are entitled to an account.

Shad v. Fuller, 501

8. But the survivor is alone responsible at law, for the joint debts, and therefore the right to the possession and disposition of the joint effects remains with him. Ibid.

9. An injunction will not be granted at the instance of representatives of deceased partner, to restrain survivor from selling joint effects at public sale, where there is no charge of fraud insolvency, or misconduct, alleged against such survivor, and where there is no proof that the account has been withheld for an unreasonable time. Ibid.

570 \*10. There can be no objection to a public sale of the joint effects, made after public notice, and at a proper time and place. Ibid.

CORPORATIONS.

1. Private Corporations cannot be deprived of their franchises, but by a judicial judgment upon a quo warranto, but public Corporations, created for the purposes of city government, may be controlled, and have their constitutions amended and altered by the legislative power.

State v. Mayor and Aldermen of Savannah, 250

2. If a corporation be dissolved or surrendered, the offices under it share its fate. Ibid.

3. A political corporation, created for the

purposes of municipal government, is liable to the superintendence and control of the Legislature, which may enlarge, modify, change or restrain its charter.

Mayor & Aldermen, &c. v. President, &c. of Steamboat Company, 342

4. But the legislature cannot divest such corporation, without its consent, of the property legally acquired by it. Ibid.

5. Nor can such corporation alien or grant the public property, for purposes different from the object of its original appropriation. Ibid.

6. Upon a re-organization of a corporate body, which is essentially changed thereby, in order to transfer to the new, the particular powers of the old corporation, there must be an enabling clause, empowering the new corporation to act in the particular case, or a general claim, which might embrace the particular case. Ibid.

7. Where the legal title to the soil is in a corporation, (or the public,) it may maintain an action of ejectment, to recover the possession of a street. Ibid.

8. But it seems, that where only the easement, and not the freehold is in the public, the only remedy for a violation of the rights is by public prosecution. Ibid.

See Banks, 3.

COURT OF ORDINARY.

See Adm'rs and Executors, 6.

Appeal, 2.

Certiorari, 6, 9.

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\*CREDITOR.

See Administrators and Executors, 3. Equity, 24, 44, 45, 46.

CRIMINAL LAW.

1. If on an indictment for burglary, the Jury find the prisoner "guilty of stealing from the dwelling house," the verdict will be set aside, and a new trial awarded.

State v. Thompson, 80

2. An indictment for burglary will not authorize a verdict of "larceny, by privately stealing in the house." The offences under the penal code of Georgia, are distinct in all their properties. Burglary must be committed in a dwelling house, and "larceny from the house," in a house "other than the dwelling house."

State v. Maloney, 84

3. It seems that the penal code of Georgia does not abrogate all the criminal law of England, in force anterior to its passage, but leaves it as it was, with a restriction only, as to any punishment, which may be incompatible with the nature and purposes of a penitentiary system. Ibid.

4. A person charged with a felony in another State, and fleeing to this, may, upon a principle of comity between sovereign States, be detained for a reasonable period, for the purpose of affording an opportunity to the proper authority, to demand the prisoner.

State v. Howell, 120

5. Where a felony of a high grade was charged upon a prisoner, it rests in the sound discretion of the Court, whether he shall be admitted to bail; and where, on such a charge, the affidavits against him are very positive, and there are no extrinsic circumstances in his favor, bail will be refused.

Ibid.

6. Where it appears upon a charge of homicide, that there are favorable circumstances in the case, and there is a presumption, that the prisoner has been guilty of manslaughter only, the Court will exercise its discretion by admitting bail.

State v. Wicks, 139

7. The right of a prisoner under the laws of Georgia, to have a copy of the indictment, and a list of the witnesses who gave testimony before the Grand Jury, is waived by not making the demand before arraignment.

State v. Calvin, et al., 142

8. The Court, on motion of the Solicitor General, and upon reasonable notice to the prisoner, (charged with felony, or with \*a crime, which might subject him to penitentiary imprisonment for three years,) will permit the names of witnesses to be endorsed on the indictment, who did not give testimony before the Grand Jury; and such witnesses may be examined before the Petit Jury.

Ibid.

9. But without such notice, such witnesses cannot be sworn or examined.

Ibid.

10. The 49th Sec. of the 6th div. of the penal code of Georgia, prescribes the punishment to be inflicted on a person, who shall falsely and fraudulently make, sign, or print, &c. any counterfeit note or bill of a bank, &c. The 52d Sec. declares, that if any person shall falsely and fraudulently pass, pay, &c. any false, forged, counterfeit or altered note, as aforesaid, &c.: *held*, that the latter section must be taken in connexion with the former; that the term counterfeit was sufficient. without the addition of the words "in imitation of," "or purporting to be"—and that there was no repugnancy or inconsistency in the sections.

State v. Calvin, et al., 151

11. An indictment must pursue the very words of the statute upon which it is founded.

Ibid.

12. But it is sufficient, if the counts taken collectively, pursue the words.

Ibid.

13. The indictment charged, that the counterfeit bill was a note, purporting to be a note of the P. & M. Bank of So. Ca., which was the name given by the charter; the tenor of the note as set forth, was "The President, Directors & Co. of the P. & M. Bank of So. Ca.": *held*, that the addition of the words, "The President, Directors, & Co." in the note, was a mere designation of the persons composing the corporation, who made themselves liable for the payment of the note, and that there was no variance or repugnancy between the tenor and purport.

Ibid.

14. In an indictment for forgery, it is not necessary to allege an intention to defraud,

where the statute, upon which such indictment is founded, does not contain these terms—such intention is embraced in the words "falsely and fraudulently."

Ibid.

15. Where principal and accessory in a felony are jointly indicted, it is a matter of discretion with the Solicitor General, whether they shall be jointly or severally tried, particularly when they have joined in the general issue.

Ibid.

16. An accessory jointly indicted with principal in a felony, may be a witness for the State, but it seems, not for the prisoner.

Ibid.

17. On an indictment founded on a statute, for the forgery of a bank note, it is sufficient to prove it counterfeit by proof of any imperfections. It is not indispensably necessary to disprove the hand-writing of the payee or President. One skilled in the matter, is competent to prove, by a comparison with a genuine bill, that the note, the subject matter of the indictment, is a counterfeit.

Ibid.

18. Presumptive evidence will be received in proof of any fact involved in a criminal prosecution.

Ibid.

19. If the evidence raises a violent presumption, that the offence for which the prisoner is indicted, was committed in the county where he is tried—it is sufficient.

Ibid.

20. The penal code of Georgia prescribes the punishment for counterfeiting, &c. the note of any incorporated Bank, "whose notes are in circulation in this State." Is the word "are" to be construed as relating only to Banks, whose bills were in circulation in this State at the time of the passage of the Act. *Quære*.

Ibid.

21. Penal statutes cannot have a retrospective operation.

Spencer v. Negroes Amy and Thomas, 178

22. Felony, in Georgia, is the commission of a crime, which subjects to infamous punishment.

A. v. B., 228

23. Forfeiture of lands or goods, is not in Georgia, a component part of the punishment of felony.

Ibid.

24. Perjury is felony, under the criminal laws of Georgia.

Ibid.

25. Perjury at common law is abrogated in Georgia.

Ibid.

26. To bring an offence under a statute, one of these two courses must be adopted: to prefix to the general conclusion, "contrary to the form of the statute in such case made and provided," or, to recite the tenor and substance of the statute, upon which the indictment was founded.

Ibid.

27. The Judges of the Superior Court in Georgia, have a discretionary power, (governed by the circumstances of the case,) to bail in all cases whatsoever.

State v. Abbott, 244

28. It is not a sufficient ground for bail, that the verdict of the Coroner's



574 \*Jury does not charge the prisoner with felonious homicide, if the affidavits and depositions taken by Coroner and the committing Magistrate, taken in connexion with the verdict, shew that a felony has been committed, or is charged. Ibid.

29. And where on such charge, it appears that the prisoner has confessed that the death was caused by him, he will not be bailed, unless there be the existence of some special cause to induce it. Ibid.

30. Though the prisoner, on his trial, is entitled to have the whole of his confession given in evidence, if any part is offered, yet on application for bail, the exculpatory circumstances stated by him in such confession, will not be sufficient to sustain the application, unless supported by other testimony, or strong intrinsic presumptions of their truth. Ibid.

31. A person charged with felony, cannot make the omission of a public officer to prosecute at the succeeding term, a ground for bail, unless such omission has operated, or may operate oppressively. Ibid.

32. The words "ex post facto laws," are to be applied exclusively to criminal law. Forsyth v. Marbury, 324

33. When two distinct felonies are charged upon the prisoner in one indictment, the Court may, before plea, quash the indictment, or after plea, compel the prosecutor to elect, on which charge he will proceed. State v. Hogan, 474

34. But this rule is to be exercised by the Court in its discretion, and will be enforced, when the prisoner may be confounded in his defence, or prejudiced in his challenges, or where the attention of the Jury will be distracted by such joinder. Ibid.

35. And it does not apply, unless the charges are actually distinct, and grow out of different transactions. Ibid.

36. The Court will not compel the prosecutor to elect, upon an indictment charging prisoner with larceny, and receiving stolen goods, &c. where it appears by the indictment, that the charges relate to the same transaction, modified to meet the proof. Ibid.

37. It seems, that if an existing indictment be altered by the prosecuting officer, and submitted, thus changed to the Grand Jury, who again, return "True Bill" thereon, such informality will not destroy the second indictment, even though 575 Nol. Pros. be \*subsequently entered on the minutes, in reference to the first indictment. State v. Allen, 518

38. Evidence must be given, on an indictment for Larceny, that the thing stolen is of some value. Ibid.

39. But it is not necessary, that the subject matter of the Larceny should be of value to third persons, if valuable to the owner. Ibid.

40. Where the indictment alleged, that the notes stolen, were "notes of the Georgia Rail Road and Banking Company," and the owner proved, that he received them from such Banking Company; *held*, in the absence of all proof to the contrary, that this was sufficient proof of their genuineness to support the allegation. Ibid.

See Challenge for Cause, 1.

Evidence, 1, 8.

Insolvent Debtors, 5.

New Trial, 12, 13, 14.

## DEED.

1. If a specific consideration be mentioned in a deed, proof of another consideration inconsistent with that mentioned, is not admissible.

Norris v. Ham, et al., 267

2. But under the words "divers good and sufficient considerations" any sufficient consideration may be shewn. Ibid.

See Record, 1, 2.

## DEMURRER.

See Equity, 22, 23, 25, 26, 27, 28, 48.

## DISCOVERY.

See Equity, 28.

## DISTRESS WARRANT.

1. The necessary equipments of a militia soldier, implement of trade, necessary wearing apparel, and bedding for self and family, cannot be made liable for debt by any process, particularly a distress warrant.

Hendricks v. Lewis, et al., 105

## DIVISION OF CONTRACT.

See Justice's Court, 1.

## EASEMENT.

See Corporations, 8.

Way, 1, 2.

## EJECTION.

See Corporations, 7.

Savannah, 2, 3, 4, 5.

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## \*ELECTION.

1. The legislative Act of Georgia, authorized the Corporation of Savannah to elect Commissioners of Pilotage; several of the Commissioners were afterwards appointed by the Corporation, by resolution: *held*, that as the statute prescribed no mode of election, this was a good exercise of the power conferred.

Low v. Commissioners of Pilotage, 302

## ENGLAND.

1. The common and statute law of Great Britain, as it prevailed in this province on the 10th of May, 1776, has been adopted in Georgia.

Moss v. Wood, 42

2. And decisions of the English Courts of Justice made after that date, contravening

decisions made prior to that period, are wholly inoperative in Georgia. Ibid.

3. It seems, that the penal code of Georgia, does not abrogate all the criminal law of England, in force anterior to its passage, but leaves it as it was, with a restriction only as to any punishment, which may be incompatible with the nature and purposes of a penitentiary system.

State v. Maloney, 84

4. Modern decisions of Courts of England subversive of the ancient common law or Statutory principles adopted in Georgia, are of no authority in this State.

A. v. B., 228

## EQUITY.

1. The equitable powers of the Superior Courts of Georgia in suppressing frauds, will be exercised in aid of a mortgagor, seeking to be relieved from a usurious contract, notwithstanding, that the judiciary Act points out a method, by which he may, at common law, dispute the sum due.

Winn v. Ham & Mara, 70

2. On the application for an injunction, a Chancellor may go into the consideration of the merits, as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges. Ibid.

3. Though a bond and mortgage have been assigned, if the bill alleges that such assignment was colorable, and that the assignee had notice of the usury pervading the original contract, in the absence of a specific reputation of such allegations, the Court will grant an injunction. Ibid.

577 \*4. If sufficient grounds are shewn for an injunction, it may be granted, to restrain the proceedings of a Court of common law, at any stage of such proceedings.

Albritton v. Bird, 93

5. An injunction will not be granted, if the person seeking it, could by proper vigilance, have protected himself from injury, by the ordinary means at law. Ibid.

6. Where the party has been prevented from availing himself of his legal defence, by the irregularity of the commissioners, nominated by himself to take testimony, or the misconduct of his attorney, he will not be entitled to an injunction. Ibid.

7. The references of a bill in chancery are a part thereof. Where a bill in chancery, seeking an injunction, refers to another bill pending in same Court, in *pari materia*, and intimately connected with it, the Court may invoke the allegations of the latter bill and the answer thereto, in deciding upon the prayer of the former.

Bolton v. Flournoy, 125

8. The powers of the "Superior Courts" of Georgia, as Courts of equity, are co-extensive with those of a Court of chancery in England. Ibid.

9. Is a Jury required by law in a chancery case in Georgia.—*Quære*. Ibid.

10. The Judge of the Superior Court, act-

ing as Chancellor, has the power to appoint a master in chancery, *pro hac vice*. Ibid.

11. And where the title is in dispute, and facts are necessary to be ascertained, to determine such dispute, it will be referred to such master, to examine and report thereon. Ibid.

12. Although the practice in Georgia is, to associate a special Jury with the Judge of the Superior Court, in the determination of chancery causes, there is no law which imposes the necessity of such association.

McGowan v. Jones, et al., 184

13. The practice and rule of Court, requiring that a bill of revivor should be filed, to make the legal representative of a deceased complainant, a party to the suit in chancery, may be waived by agreement between such representative and defendant.

Boog, et al. v. J. & J. Bayley, 190

14. And a replication will be dispensed with under similar circumstances.

Ibid.

578 \*15. The death of one defendant to a suit in equity, only abates the proceeding quoad him.

Howard v. Bank of Darien, 216

16 In general, an injunction will not be granted *ex parte* and before answer.

Hartridge v. Rockwell, 260

17. But in cases of great urgency, or where irreparable injury may ensue, as in waste, &c.: where the application follows quickly after the injury complained of, the Court will grant the injunction without notice, or appearance, or subpœna served. Ibid.

18. And it will not be granted *ex parte* and before answer, where it would deprive defendant of a right, for which no redress could be given, and where its refusal, though productive of possible injury to complainant, could not divest him of any right. Ibid.

19. Relief may be granted under the general prayer of a bill, where it is consistent with the case made by the bill, and not inconsistent with the specific relief prayed.

Marine & Fire Ins. Bank v. Early & Brown, 279

20. The doctrine of the equitable lien of vendor of land for unpaid purchase money, recognized, where no title had passed, and the intention of the parties to look to the property itself, was manifest. Ibid.

21. And where no title has passed, the lien will be preserved against purchasers by act of law, as assignees of a Bankrupt, and creditors claiming under a conveyance from vendee. Ibid.

22. Where a defendant answers part of a bill, such answers will overrule a demurrer on the record, or *ore tenus*, going to the whole bill.

McDermott v. Blois, et al., 281

23. If the cause assigned on the record, for demurrer, be bad or insufficient, other cause may be assigned *ore tenus*. Ibid.

24. A creditor at large, or one whose debt has not been carried to judgment, cannot



call upon a Court of Equity, to afford its aid in setting aside conveyances, alleged to be voluntary and fraudulent, made by the supposed debtor, of his property. Ibid.

25. Quære, if a bill charges combination, must a demurrer so far answer, as to deny the charge. Ibid.

26. If a case is made out in which a Court of Equity gives relief, a demurrer cannot be sustained.

Morel v. Houstoun, 285

27. Secus, where the equity of plaintiff is not stated with sufficient certainty. Ibid.

579 \*28. Where upon a bill for discovery and relief, the discovery sought will afford no ground for equitable relief, a demurrer to the relief, is good to the discovery also. Ibid.

29. All persons materially interested in the subject matter of the suit, must be made parties to a bill in equity.

Footman, et al. v. Executors of Pray, 291

30. But this rule is to be enforced under the discretion of the Court, and is subject to exception and modification, according to the circumstances of the case. Ibid.

31. The common exception in favor of creditors and legatees, will not extend, unless under special circumstances, to residuary legatees or distributees, all of whom must be made parties. Ibid.

32. Where a bill seeks discovery and relief, only against the acts of one of the executors of an estate, it is not necessary to make the other executor a party in the first instance. Ibid.

33. But it seems, that the co-executor may be made a party, during the progress of the suit, if it shall prove to be expedient or necessary. Ibid.

34. A mere witness ought not to be made a party to a suit in chancery. Ibid.

35. Injunction granted, to restrain the Sheriff from paying over money made on sale of an estate, under executions issued by individual creditors thereof, where such injunction was prayed for by bill in the Superior Court, alleging, that complainants had filed a bill in the Circuit Court of the United States for the District of Georgia, claiming a specific lien on said estate, and preference over individual creditors, which claim was still pending and undetermined.

Read, et al. v. Dews, et al., 355

36. The Judges of the Superior Court of Georgia, have the power in vacation, to dissolve an Injunction.

Read, et al. v. Dews, et al., 358

37. Under the rule of Court, which directs that all Injunctions shall be granted, "until further order," an Injunction may be dissolved before answer filed, on mere affidavit, denying the equity of the bill. Ibid.

38. And an Injunction will be dissolved on motion, when it appears to have been improvidently granted. Ibid.

580 \*39. An injunction will be granted, if the bill shews a probable right, and a probable danger to such right, without the special interposition of the Court. Ibid.

40. Where it appears, that the defendants have an established and legal right, which might be delayed and hindered unnecessarily, by retaining an injunction absolutely, it may be dissolved conditionally, and on terms which will protect both parties. Ibid.

41. Where a bill was filed, merely for the purpose of obtaining injunction, and after it was granted, other persons really and beneficially interested in the judgment at law enjoined, applied to be made defendants, the Court compelled the complainants (on pain of dissolution of the injunction if they refused), to amend their bill, by making the applicants defendants and parties, without prejudice to the injunction. Ibid.

42. Where the bill alleged, that complainant had performed medical services for negroes belonging to an estate, on the faith of such estate, and at the instance of the executor thereof, who had since died insolvent; held, that in equity, such creditor had a right to resort to the estate, in the hands of the administrator de bonis non, for payment.

Habersham v. Huguenin, et al., 376

43. An injunction may be retained under the special circumstances of the case, though the defendant has filed his answer, fully denying the equity set up by the bill.

Shellman, et al. v. Scott, 380

44. A creditor is not compelled to join the legatees in a suit in equity, brought against the executor of the debtor; it is his privilege, not his duty to join them. The executor is to sustain the person of the testator, and to defend the estate for creditors and legatees.

Maxwell v. Maxwell, 462

45. And the fact that the estate has been distributed, and is in possession of the legatees, does not vary the rule. Ibid.

46. A creditor having established his claim and obtained a decree against the estate of his debtor, authorizing a levy upon said estate, in whosoever hands it might be, will not be enjoined, at the instance of specific legatees, from proceeding against that portion of the estate in their hands, on the ground that the testator had set apart a

581 particular portion of his estate for \*the payment of his debts. Creditors having superior claims to volunteers, cannot be embarrassed or retarded by such a provision. Ibid.

47. The fact that fraud has been committed, will not per se, entitle complainants to redress in a Court of Equity, if a plain and adequate remedy at law can be afforded them.

Commissioners of Brunswick v. Dart, 497

48. Demurrer sustained for want of equity, where it appeared by complainants' bill, that they held the senior grants to the land in dispute, and that the junior grants issued by the State of Georgia to defendants, were examinable collaterally at law, the State having no title to the lands thus granted, and

such grants having issued contrary to the prohibition of a statute. Ibid.

49. An injunction may issue to restrain Trespass, where irreparable injury would follow its denial; as where defendant is insolvent.

Powers *v.* Heery, 523

50. But it seems, it will not be granted, where the title is in dispute. Ibid.

51. And where the answer set forth, that there was an actual adverse possession by defendant, at the time of the purchase of the land by complainant, the injunction was refused. Ibid.

52. The Act of December 16, 1811, in reference to injunctions, applies to all persons, in whatever capacity, they apply for the writ. An executor or administrator cannot obtain the injunction, without giving bond, and paying costs, as required by such statute.

Harbersham *v.* Carter, et al., 526

See Joint Debtors, 1.

Practice, 3, 4, 5, 6.

Surety, 1.

Trusts, 1, 2, 3, 4.

## EQUITY OF REDEMPTION.

See Mortgage, 8.

## EVIDENCE.

1. On an Indictment for keeping a common gambling house, presumptive evidence that the defendant is the keeper of the house, is sufficient to convict.

State *v.* Worth, 5

2. What a witness who is since dead, 582 testified in a former action \*between the same parties, when the same point was in issue, may be proved in a second action by one who heard him give evidence.

Jackson *v.* Soude, 38

3. But the witness must be competent to speak to the whole, and not to a part only of the testimony of deceased witness. Ibid.

4. Quære, If the second witness must be required to repeat the very words or the substance only of such testimony? Ibid.

5. A party to a negotiable instrument may testify to facts, which do not prove it to have been originally void; as payment, &c.

Wendell *v.* George, 51

6. If the witness can neither gain nor lose by the event of the suit, and the verdict in the case cannot be given in evidence either for or against him, he is competent to testify. All other objections go to his credibility. Ibid.

7. A copy of a receipt is not admissible, without proper notice to produce the original, or proof of its loss or destruction.

Ex parte Simpson, 111

8. Where the charter of a bank required that certain acts should be performed, before it should be considered as incorporated—proof that its bills were received by the public officers of the State granting the charter, in payment of public debts, and that such bills were in general circulation in said State, held sufficient evidence on an indictment for coun-

terfeiting its bills, that the conditions had been complied with, and that the bank was an "incorporated bank."

State *v.* Calvin, et al., 151

9. Presumptive evidence will be received, in proof of any fact involved in a criminal prosecution. Ibid.

10. An accessory jointly indicated with principal in a felony, may be a witness for the State, but it seems, not for the prisoner. Ibid.

11. If a party suffers improper evidence to be admitted without objecting at the time, it is a waiver of the objection.

Low *v.* Commissioners of Pilotage, 302

See Constitutional Law, 18.

Criminal Law, 17, 19, 38, 39, 40.

New Trial, 11.

## EXECUTION.

1. Where the judgment is for damages only, an execution issued \*for debt and damages, is illegal.

The Governor *v.* Daniel, 449

See Interest, 2.

Money, 1, 2, 3.

Mortgage, 2, 3, 4, 5, 8, 9.

Practice, 3, 4, 5, 6.

## EXECUTORS.

See Administrators and Executors, *passim*.

## EXECUTOR DE SON TORT.

1. It seems, that where possession of goods is taken by a vendee, after the death of vendor, under a deed fraudulent as to creditors, the vendee is liable to the creditors of deceased vendor, as executor de son tort.

Howland, Ward & Spring *v.* Dews, 383

2. And where the vendor remained in possession of the goods after the execution of the deed, and the vendee took possession the day before the death of the vendor, and whilst he was in extremis, and the Jury found, by their verdict, that such deed was fraudulent; *held*, that the vendee was chargeable to the creditors of deceased vendor, as executor de son tort. Ibid.

3. But it seems, in such case, that the vendee can only be charged at the suit of creditors of vendor, and that his legal representative has no remedy. Ibid.

4. And it seems, that the vendee is not chargeable as executor de son tort, if he took possession under mistake, or without fraud. Ibid.

5. If one takes possession of the goods of a deceased person, claiming to be executor, or does those acts which only an executor can do, he may be charged as executor de son tort, though there be a rightful executor or administrator. Ibid.

6. So if the intermeddling be before probate, or grant of administration to rightful representative. Ibid.

7. D, sued as executor of B, pleaded, 1st. "Ne unques executor; 2ly. Outstanding



debts of equal dignity with plaintiffs'." The acts done by him having made him executor de son tort, and the Jury having therefore found the first plea against him; *held*, that having plead a plea false within his own knowledge, he was liable to plaintiffs' demand, however small the assets in his hands; that he was not entitled to reduce the plaintiffs' verdict against such assets, by proof of outstanding debts  
584 of \*equal dignity, and that the verdict of de bonis testatoris, si vel non, de bonis propriis, for the whole of plaintiffs' demand, was proper. Ibid.

#### EX POST FACTO LAWS.

See Criminal Law, 32.

#### FARO TABLE.

1. A house, in which a faro table is kept for the purpose of common gambling, is per se a nuisance, and it is not necessary to constitute it such, that there should be proof of frequent frays and disturbances committed there.

State *v.* Doon & Dimond, 1

2. The use of a faro table for the purpose of gambling, is not rendered lawful by the tax imposed on the instrument. Ibid.

#### FEEES.

See Sheriff, 1, 2.

#### FELONY.

See Criminal Law, 4, 5, 15, 16, 22, 23, 24, 31. Malicious Prosecutions, 1.

#### FEMME COVERT.

See Will, 1.

#### FORECLOSURE.

See Mortgage, 10.

#### FORFEITURE.

See Criminal Law, 23.

#### FORGERY.

See Criminal Law, 10, 13, 14, 17.

#### FRAUD AND FRAUDULENT CONVEYANCES.

See Equity, 47.

Executor de son tort, 1, 2, 3, 4.  
Insolvent Debtors, 1, 2.

#### FUGITIVE FROM JUSTICE.

See Criminal Law, 4.

#### FUNERAL EXPENSES.

1. Funeral expenses, regulated by the circumstances of the deceased, and the usage of the Country, constitute a lien of debt on the estate of the deceased, superior to all other claims

Palmes, et al. *v.* Stephens, 56

#### GARNISHMENT.

See Bills of Exchange and Promissory Notes, 6, 7, 8.

#### GRAND JURY.

See Presentment of Grand Jury, 1.

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#### \*GRANT.

See Equity, 48.  
Statute, 7.

#### GUARANTEE.

1. Where an offer of guarantee is made, accompanied with a request for an answer, in order to make it binding upon the individual offering, it is necessary that he be informed by the person to whom it is offered, of his assent to such offer.

Valloton *v.* Gardner, 86

2. Where no such assent is signified, and the note of the individual for whose benefit the guarantee was offered, is taken by the creditor, after the debt or liability which formed the subject matter of the offer, has been incurred, it is a complete waiver of the guarantee. Ibid.

#### HABEAS CORPUS.

1. On a Habeas Corpus at common law, the Court (or Judge presiding on the return), has the power to change the custody of an infant child, if its interests require it. In the matter of Mitchell, 489

2. And this discretion is more properly to be exercised, when the infant is too young to make a proper election. Ibid.

3. The writ of habeas corpus at common law, applies as well to cases of illegal detention, as illegal confinement or restraint. Ibid.

See Infant, 1, 2.

#### HEIR.

See Administrators and Executors, 5.

#### HIGHWAY.

See Way.

#### HUSBAND AND WIFE.

1. A settlement made by the husband on the wife, after the marriage, without valuable consideration, and not executed in pursuance of any agreement entered into before marriage, is a mere voluntary conveyance, and void as against prior creditors of husband.

Deubell *v.* Fisher, 36

#### IMPORTS.

See Constitutional Law, 14, 15.

#### IMPOST.

See Constitutional Law, 1.

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#### \*INDICTMENT.

See Criminal Law, 7, 8, 10, 11, 12, 13, 14, 17, 26, 33, 34, 35, 36, 37, 40. Malicious Prosecution, 1, 2.

#### INFANT.

1. When it appears, that the grandmother of an infant of tender years, is unable properly to maintain and educate her, the Court,

on the application of the guardian of such infant, will direct her to be delivered to him, she being too young to make a proper election.

*Ex parte Ralston*, 119

2. Where an infant is of sufficient discretion to make a free and unbiased election, the Court will permit her to go where she pleases. *Ibid.*

See *Habeas Corpus*, 1, 2, 3.

*Parent and Child*, 1, 2.

### "INFERIOR COURT."

1. The "Inferior Court" as established by the Constitution of Georgia, and distinguished from other inferior judicatories ordained and established by the General Assembly, has the power to grant new trials.

*Ex parte Simpson*, 111

2. The Constitutional writ of *Certiorari* is applicable to the errors of inferior jurisdictions, contradistinguished from the "Inferior Court:" the Judicial writ of *Certiorari*, is alone applicable to the "Inferior Court" as before distinguished. *Ibid.*

3. The Justices of the Inferior Court are eligible to legislative and military appointments, in addition to their judicial duties, and if so elected, and the respective duties happen, to be contemporaneous, may elect which to perform.

*Presentments of Grand Jury*, 149

4. The Justices of the Inferior Court are not liable to the performance of militia duty. *State v. Fort*, 272

### INJUNCTION.

See *Equity*, 2, 3, 4, 5, 6, 7, 16, 17, 18, 35, 36, 37, 38, 39, 40, 41, 43, 46, 49, 50, 51, 52.

*Co-partnership*, 9.

### INSANITY.

1. Where previous insanity is shewn, 587 the burthen of proof is \*thrown on the party, why seeks to establish an act as done in a lucid interval.

*Griffin v. Griffin*, 217

2. But proof that the act done, was in itself natural and rational, will control evidence of habitual insanity. *Ibid.*

See *Will*, 2.

### INSOLVENT DEBTORS.

1. Upon an issue formed between an insolvent debtor and his creditors, of "fraud or not fraud," the Jury should find the affirmative or negative of the issue. A general verdict of "guilty" is improper and illegal.

*Ex parte Simpson*, 111

2. It seems, that where improper evidence has been received by the Justices of the Inferior Court, on the trial of an insolvent debtor for fraud, or where the Jury have not found a verdict conformable to the issue, upon the refusal of said Justices to grant a new trial, a mandamus to them will be awarded. *Ibid.*

3. Where an insolvent debtor is discharged in the manner prescribed by the laws of

Georgia, the fees of confinement must be paid out of the debtor's property, which he has assigned for the benefit of the creditors.

*State v. Simpson*, 122

4. If there is no such fund, the fees must be paid by the committing creditor. *Ibid.*

5. The confinement of an insolvent debtor, convicted of fraudulent practices, under the insolvent laws of Georgia, is merely a continuation of the confinement under civil process; it is not a punishment inflicted for a crime. *Ibid.*

6. If the creditors at whose instance such debtor so convicted, is confined, refuse to pay his jail fees, he will be entitled to his discharge. *Ibid.*

### INSPECTION LAWS.

See *Constitutional Law*, 14, 15.

### INTEREST.

1. Where a suit was instituted on a bond given for a certain sum of money, and conditioned for the performance of a duty, without any stipulation as to interest, and the Jury on an issue of fact submitted to them, found the bond declared on, to be the deed of defendant, and assessed nominal 588 damages; *held*, that \*interest could be awarded on such bond only in the shape of damages assessed by a Jury.

*The Governor v. Daniell*, 449

2. *Held*, also, that the verdict rendered, only found the debt mentioned in the bond, and as that contained no stipulation for interest, the execution, which had issued for principal, and interest from the date of the bond, was illegal. *Ibid.*

3. The Judiciary Act of Georgia, which directs that "no interest shall be given on any open account, in the nature of damages," does not prohibit a Special Jury, on an appeal trial, from assessing damages on the principal sum, for a frivolous appeal, though the action was in its inception founded on open account, if such Jury are satisfied, that the appeal was frivolous and intended for delay only.

*Fell v. Abbot*, 452

4. And the question whether such appeal be frivolous, is exclusively for the Jury. *Ibid.*

5. Where a verdict has been rendered by a Petit Jury on an open account, and such verdict has been appealed from, it seems, that interest can only be computed on such demand, from the verdict of the Appeal Jury. *Ibid.*

See *Bonds*, 4.

### JAIL.

See *Savannah*, 1.

### JAIL FEES.

See *Insolvent Debtors*, 3, 4, 6.

### JAIL OF CHATHAM COUNTY.

See *Constitutional Law*, 20.  
*Savannah*, 1.



JOINDER OF FELONIES.

See Criminal Law, 33, 34, 35, 36.

JOINT DEBTORS.

1. In Equity, the payment by, or the release and discharge of one joint debtor, will not operate as a discharge of the debt as to all, unless the intention of the parties and the justice of the case, require such a construction of the payment.

Norris v. Ham, et al., 267

JUDGMENT.

1. A creditor who had obtained judgment against one co-partner in his individual capacity, which judgment was anterior to the \*co-partnership, has the right to levy on the partnership effects, and to sell his debtor's interest therein, without reference to the claims of the creditors of the firm.

Ex parte Stebbins & Mason, 77

2. Such judgment being a lien on all the property of the debtor, which he had at the time of the signing thereof, or which he might thereafter acquire, supersedes the claims of all subsequent creditors. Ibid.

3. If an appeal be entered from the verdict of the Petit Jury, although it is prudent to enter up final judgment, within the four days after the adjournment of the Court, an omission to do so will not defeat the verdict, upon such appeal being set aside or withdrawn.

Kane v. Hills, 103

4. The judgment may be filed, nunc pro tunc, after the appeal is set aside. Ibid.

5. A judgment creditor who has given indulgence to his debtor, for 1, 2, and 3 years, upon a mortgage being executed by a third person to secure the payment of such judgment, has a right to proceed on his judgment to collect the instalment as they become due.

Norris v. Ham, et al., 267

6. A judgment, in Georgia, constitutes a lien from its date on all the property of the debtor, and is constructive notice to all the world.

Forsyth v. Marbury, 324

7. And this lien is effectual against all subsequent claims to the property, derived from and through the debtor. Ibid.

8. Quære, if such lien is retained on property of debtor sold under a junior judgment, or attaches itself solely on the proceeds of the sale. Ibid.

See Constitutional Law, 11, 13.  
Execution, 1.  
Statute 5.

JUDICIAL POWER.

See Legislative Power, 2.

JUDICIARY DEPARTMENT.

See Militia Duty, 1, 2.

JURISDICTION.

1. Where a new jurisdiction is created by statute, proceeding according to the course

of the common law, the Superior Court \*can cause its proceedings to be brought up, and correct its errors. But where such newly created jurisdiction is summary, and does not proceed according to the common law, the Superior Court will, on certiorari, confirm or quash its proceedings.

Commissioners of Pilotage v. John Low, et al., 298

2. Where a new jurisdiction is created by statute, without prescribing its form of proceeding, such jurisdiction may pursue its own forms and regulations, if not inconsistent with the laws of the land. Ibid.

3. But notice to a defendant, is an implied and indispensable prerequisite to the exercise of jurisdiction. Ibid.

4. Neither consent, nor the act of one party, can confer jurisdiction. Ibid.

5. In tribunals of special and limited jurisdiction, every fact or thing essential to confer the jurisdiction, must in some manner appear in their proceedings.

Low v. Commissioners of Pilotage, 302

6. Tribunals of summary and extraordinary jurisdiction, are to be reviewed with the utmost liberality as regards regularity and form. Ibid.

See Justice's Courts, 1.

JURY.

1. It is a contempt of Court, if the jurors, after they have retired to decide on a criminal case, hold communication with persons other than the officers of the Court.

State v. Helvenston, et al., 48

2. So, if one juror separates himself from his associates, and mingles with the community at large. Ibid.

See Challenge for Cause, 1.  
Equity, 9, 12.

JUSTICE'S COURTS.

1. An entire contract cannot be divided, for the purpose of maintaining several suits, and bringing them within the jurisdiction of a magistrate.

Ex parte Gale, 214

LAND.

See Equity, 20, 21.  
Way, 1, 2, 3, 4.

591 \*LARCENY.

See Criminal Law, 38, 39.

LEGATEE.

See Administrators and Executors, 5.  
Equity, 31, 44, 45, 46.

LEGISLATIVE POWER.

1. The Legislature have power to destroy all offices (except those held by constitutional officers), which are made for civil government, and thus to put an end to the functions of the incumbents, before their term of office shall have expired.

State v. Mayor and Aldermen of Savannah, 250

2. Definition of, and distinction between legislative and judicial power.

State *v.* Dews, 397

See Corporations, 1.

### LIEN OF VENDOR.

See Equity, 20, 21.

### LIS PENDENS.

See Arbitration, 2.

### MALICIOUS PROSECUTION.

1. An action for a malicious prosecution, in cases of felony, cannot be maintained, without previously obtaining the order of the Court for a copy of the indictment.

A. *v.* B., 228

2. An action for a malicious prosecution cannot be sustained in Georgia, on an indictment for perjury at common law. Ibid.

### MANDAMUS.

1. If a party on a return to an alternative mandamus, shew cause against the admission or restoration of a person to an office, on the ground of non-election, he must make a direct and issuable denial of the fact.

State *v.* Mayor and Aldermen of Savannah, 250

See Constitutional Law, 20.

Insolvent Debtors, 2.

### MANSLAUGHTER.

See Criminal Law, 6, 28, 29.

### MANUMISSION.

See Slaves.

### MARRIAGE SETTLEMENT.

See Trusts, 1, 2, 3, 4.

### MASTER IN CHANCERY.

See Equity, 10, 11.

### \*MILITIA DUTY.

1. The Justices of the Inferior Court are not liable to the performance of militia duty.

State *v.* Fort, 272

2. And it seems, that such duty cannot be required from the officers of the Judiciary Department, as organized by the Constitution. Ibid.

### MILITIA SOLDIER.

See Distress Warrant, 1.

### MISTAKE.

See Arbitration, 4.

### MONEY.

1. Money may be taken in execution, if in possession of defendant.

Rogers *v.* Bullen's Adm'r, 196

2. Where money is made by a sheriff at the suit of A., who has a legal or equitable claim to it, the Court, on the return of the

writ, will, on motion, direct the sheriff to pay the money over to an execution against A. Ibid.

3. And when such money was made at the suit of A., as administrator of B., the Court will direct it to be paid over to an execution against A., as administrator of B., where it appears to be the eldest judgment against the estate of B., and no interfering or conflicting claims by administration or other parties are shewn to exist. Ibid.

### MORTGAGE.

1. Any Judge of the Superior, or Justice of the Inferior Court in Georgia, (without reference to the residence of defendant,) may issue the fiat for the foreclosure of a mortgage of personal property.

Guerard & Polhill *v.* Polhill, 237

2. When such fiat is granted by a Judge of the Superior Court, the clerk of the Superior Court of a different County and Circuit from that in which the fiat was granted, may issue the execution. Ibid.

3. And it seems, that the execution may be directed to all and singular the Sheriffs of the state. Ibid.

4. Where one action of a statute without negative words, introduced a new mode of foreclosing a mortgage of personal property, and pointed out a method, by which, the mortgagor might dispute the sums due on the execution founded on such foreclosure, and a subsequent section of the same statute, also \*without negative words, allowed a defendant to make an affidavit of illegality, in all cases where execution had issued illegally; *held*, that the remedy in the latter section, was not cumulative to the former, and that it referred to executions, other than those mentioned in the first section. Ibid.

5. It seems, that under the mode prescribed by the 18th section of the Judiciary Act of 1799, the mortgagor may enter into any defence which may entitle him to relief from the execution. Ibid.

6. There is nothing unconstitutional in said section. Ibid.

7. A bond was made payable at a distant day, with lawful interest payable annually, to secure which, a mortgage was given with a proviso, that in default of payment of the principal sum, or the interest, at any time when the same should become due, it should be lawful to foreclose the same: *held*, that the mortgagee had the right, from the contract of the parties, to foreclose the mortgage, and collect the whole debt, principal and interest, on the failure of the mortgagor to pay the first year's interest when it became due.

Shellman, et al. *v.* Scott, 380

8. A creditor who has obtained judgment against his debtor, and levied his execution upon property mortgaged to another person anterior to his judgment, and which mortgage has been properly recorded, can only sell the equity of redemption, of his debtor.

Jewitt, et al. *v.* McGowen, 391



9. And therefore, such creditor, and not the mortgagee, is entitled to the proceeds of the sale under such execution. *Ibid.*

10. A foreclosure of a mortgage, under the statute of Georgia, does not vest the absolute estate in the mortgagee; it only authorises a sale of the property, and the surplus, after payment of the mortgage and costs, belongs to the mortgagor. *Ibid.*

See Equity, 1, 2.  
Purchaser, 1.

#### MOTION.

See Practice, 3, 4, 5.

#### NEGLIGENCE.

See Bailment, 1.

#### NEW TRIAL.

1. The affidavits of jurors are not admissible, on the motion for a new trial, to impeach the verdict.

State *v.* Doom & Dimond, 1  
594 \*2. A motion for a new trial on the ground of surprise, will not be sustained, where by the exercise of proper diligence, such surprise might have been guarded against.

Sheftall *v.* Clay, 7

3. The "Inferior Court" as established by the Constitution of Georgia, and distinguished from other inferior judicatories ordained and established by the General Assembly, has the power to grant new trials.

Ex parte Simpson, 111

4. Where the Jury, acting under the charge of the Judge, base their verdict upon a point not in issue, a new trial will be granted.

Crane *v.* Bulloch, 318

5. Secus, if substantial justice has been done by the verdict. *Ibid.*

6. Where substantial justice has been done by the verdict, a new trial will not be granted, although there may have been error.

Forsyth *v.* Marbury, 324

7. If a verdict be clearly against evidence, a new trial will be granted.

Fell *v.* Abbot, 452

8. But where has been conflicting testimony, and the case has been fairly submitted to the Jury, and it does not appear that any rule of law has been violated, or injustice done by the verdict, a new trial asked for, on the ground, that such verdict is against the weight of evidence, will not be granted. *Ibid.*

9. A new trial may be granted on terms. *Ibid.*

10. A new trial will not be granted, to furnish an opportunity to impeach the credibility of a witness, who gave testimony on the trial.

State *v.* Henley, 505

11. After verdict, when the motion for a new trial is considered, the Court must judge not only of the competency, but of the effect of evidence. *Ibid.*

12. After conviction, the prisoner moved for a new trial, producing the affidavit of prosecutor, that he had sworn falsely on the trial, and that prisoner never stabbed him. But it appearing to the Court, that the prosecutor had been drinking liquor, and that his mind was clouded thereby, at the time such affidavit was administered; that the contents of such affidavit were not read to him by the Magistrate, and that he was sworn thereto, upon his saying that he knew the contents—that said affidavit was made by prosecutor, with the intention of immediately leaving the State; that there was strong ground to believe \*that he was tampered with; and the identity not being clearly proved, and his testimony given on the trial, having been confirmed by two disinterested witnesses—the motion was refused. *Ibid.*

13. Quære, If a new trial can be granted on the merits, in a case beyond a misdemeanor? *Ibid.*

14. But such new trial will not be granted, when the presiding Judge is satisfied of the correctness of the verdict. *Ibid.*

See Verdict, 1.

#### NEXT OF KIN.

See Administrators and Executors, 3, 4.

#### NOL. PROS.

See Criminal Law, 37.

#### NOTICE.

See Criminal Law, 8, 9.

Evidence, 7.

Jurisdiction, 3.

Purchaser, 1, 2.

Record, 2.

#### NUISANCE.

See Faro Table, 1.

#### OFFICES.

See Constitutional Law, 21.

Corporations, 2.

Legislative Power, 1.

Mandamus, 1.

Statute, 2.

#### OPEN ACCOUNT.

See Interest, 3, 5.

Unliquidated Demand, 1.

#### ORDINANCES OF CITY OF SAVANNAH.

See Constitutional Law, 1, 2, 15.

#### PARENT AND CHILD.

1. The father has the legal right to the custody of his children.

In the matter of Mitchell, 489

2. But Courts of justice may control this right, when the safety or interests of the child imperiously require it. *Ibid.*

#### PARTIES.

1. The same person cannot be plaintiff and defendant in the same suit, at common law.

Miller *v.* Thorn, 180

See Amendment, 1.

Co-partnership, 3, 4.

Equity, 29, 30, 31, 32, 33, 34, 41, 44, 45.

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### \*PAYMENT.

1. A payment to a person who has no power to receive, becomes valid, by a subsequent ratification by the creditor.

*Dews v. Pickard*, 479

2. But where the creditor does not ratify the act of an individual, receiving money for him without authority, but merely assents to receive the liability of a third person, for the payment of the debt due by his debtor, the latter will not be discharged, unless it be expressly agreed to run the risk of the solvency of the person who comes in aid of the debtor, and to discharge the latter, or unless the creditor has thereby received payment of his debt, or has debarred himself from recovering by laches. *Ibid.*

3. Thus, where M., without any authority from the creditor D., for his own convenience, entered into an arrangement with the debtor P. (his partner,) by which M. assumed the payment of the money due to D., but there was no agreement in relation to this settlement, between P. the debtor, and D. the creditor, and the only evidence of assent shown on his part, was, a charge made by him against M. of the amount of the due bill of P. in an account exhibited for the purpose of submitting all matters between them for arbitration, *held*, that these facts did not constitute a legal payment of the debt from P. to D. *Ibid.*

4. Where neither debtor nor creditor has directed the application of the payment made, the Court is vested with the discretion to apply it, according to the justice of the case. *Ibid.*

### PENAL CODE OF GEORGIA.

See Criminal Law, 2, 3, 7, 8, 9, 10, 20.  
England, 3.

### PERJURY.

See Criminal Law, 24, 25.  
Malicious Prosecution, 2.

### PERSONAL PROPERTY.

See Possession, 1.  
Purchaser, 1.  
Record, 1.

### PILOTS AND PILOTAGE.

1. The neglect or refusal of a Pilot to board a vessel, by which damage ensues to her, may be proceeded against under the 5th Sec. of the Act of 1799, if the claim for damage does not exceed \$100.

*Commissioners of Pilotage v. John Low, et al.*, 298

597 \*2. And the claim, and not the measure of damages assessed by the Commissioners, is the test of the jurisdiction. *Ibid.*

3. But the non-payment of the fine as-

essed under the 5th Sec., will not authorize the Commissioners to suspend the Pilot, from the exercise of his duties. *Ibid.*

4. The 7th Sec. of the Legislative Act of 1799, directs that the license of a Pilot shall be revoked by the Commissioners of Pilotage, "if he shall be found not sufficiently skilled, or shall become incapable of acting, or shall be negligent, or misbehave in his duty towards the Commissioners;" *held*, that the neglect of a Pilot, in not boarding a vessel when he ought to have done so, would authorize his suspension under this section.

*Low v. Commissioners of Pilotage*, 302

5. And it is not necessary to make the sentence of suspension legal, that a formal judgment should be entered up. *Ibid.*

6. The office of a Pilot is not a public one; it is a private profession, trade or calling. *Ibid.*

See Constitutional Law, 4, 6, 7, 8.  
Election, 1.

### PLEA.

See Process, 2, 3.

### PLEADINGS.

1. When the proper pleadings have been dispensed with by agreement between the parties, they may be entered at any time, *nunc pro tunc*, for the sake of the record.

*Boog, et al. v. J. & J. Bayley*, 190

See Amendment, 1.

Arbitration, 1.

Executor de son tort, 7.

### POLITICAL CORPORATIONS.

See Corporation, 3, 4, 5.

### POSSESSION.

1. Possession of personal property, is *prima facie* evidence of title.

*Cumming v. Early*, 140

### POWER OF ATTORNEY.

See Co-partnership, 6.

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### \*PRACTICE.

1. A defendant has a right to demand the trial of the cause, unless it can be continued on legal grounds, and the Court will not continue the cause from motives of delicacy, in opposition to such right.

*Simons v. Sheftall*, 90

2. It is not a sufficient ground for continuance of a cause, that the presiding Judge had in another capacity, expressed an opinion on one of the points involved. *Ibid.*

3. When the process of the Court is attempted to be used oppressively, and against justice, as by levying an execution after judgment had been satisfied, the Court will grant relief upon motion.

*Watts & Joyner v. Norton*, 353

4. And if it requires information of matters of fact, it will cause an issue to be made up for that purpose. *Ibid.*

5. And where the party moving, was not



prepared with his proofs, and modified his motion by asking for a rule on the plaintiff to shew cause at the next term, the Court granted the motion, but without stay of proceedings. Ibid.

6. A Court of Equity, under such circumstances, is the proper tribunal to grant relief. Ibid.

See Criminal Law, 7, 8, 9.

Equity, 12, 36, 37, 38, 40, 41.

## PRESENTMENTS OF GRAND JURY.

1. The presentment of a Grand Jury, will on motion, founded on sufficient reasons, be expunged from the minutes.

Presentments of Grand Jury, 149

## PRINCIPAL AND ACCESSORY.

See Criminal Law, 15, 16.

## PRINCIPAL AND SURETY.

See Bonds, 1, 2, 3.

## PROCESS.

1. Service of petition and process on agent of defendant, is null and void, under the law of Georgia.

Welman *v.* Polhill, et al., 235

2. Where the service of process is null and void, appearance and plea to merits will not cure it. Ibid.

3. And objection may be taken to such process at any time. Ibid.

See Practice, 3, 4, 5.

## 599 \*PROMISSORY NOTES.

See Administrators and Executors, 7.

Bills of Exchange and Promissory Notes, *passim*.

## PROSECUTOR.

See New Trial, 12.

## PUBLIC SALE.

See Co-partnership, 10.

## PURCHASER.

1. If the mortgagee of personal property fail to record his mortgage, a bona fide purchaser claiming under mortgagor, without notice, will be entitled to retain the property.

Cumming *v.* Early, 140

2. A purchaser for valuable consideration, without notice actual or constructive, will be protected, though he purchase from one who had notice. Ibid.

## QUO WARRANTO.

See Corporations, 1.

## RECEIPT.

See Evidence, 7.

## RECORD.

1. There was no law of Georgia in force in 1795, requiring a deed of personal property to be recorded.

Morel *v.* Houstoun, 284

2. A purchaser cannot be bound by the constructive notice afforded by the record of a deed, not required by law to be recorded.

Ibid.

## REFERENCES OF A BILL.

See Equity, 7.

## RELEASE.

See Administrators and Executors, 2.  
Joint Debtors, 1.

## RELIEF.

See Equity, 26, 28.

## REPLICATION.

See Equity, 14.

## SAVANNAH.

1. The jail in the City of Savannah, must, under the legislative Act of 1822, taken in connexion with prior acts and circumstances, be considered as the county jail, and as such, liable to the control of the Legislature, and the possession of the Sheriff.

State *v.* Mayor and Aldermen of Savannah, 250

2. By a legislative Act passed in 600 1760, the town common, streets, \*lanes, &c. in the town of Savannah, were declared to be the common property of the lot-holders in said town, and commissioners were appointed to carry the Act into execution. By an Act of 1787, a President and Wardens were directed to be chosen, with power to make by-laws, assessments, and to lease or sell any public lots, &c. By Act of 1789, the town was styled the City of Savannah, and a Mayor and Aldermen were directed to be elected, and were declared to be a body politic, with the power of acquiring and holding property, real and personal, for the benefit of said City; *held*, that by the Act of 1760, the legal title to the town common, streets, &c. vested in the lot-holders or public, in their collective capacity, and as a corporation sub modo, which became transferred by the Act of 1787, to the President and Wardens, as the legal representative of the public, and for its benefit, and finally, by Act of 1789, became vested in the "Mayor and Aldermen of the City of Savannah."

Mayor and Aldermen, &c. *v.* President of Steam Boat Company of Georgia, 342

3. *Held*, further, that if the legal title did not pass by the Acts of 1760 and 1787, to the public or lot-holders, as a corporation, sub modo, then as it could not vest in them individually, and there was no one capable of taking and holding at the time of the grant, such grant of the town common, streets, &c. must be considered as a dedication to public uses, which by operation of law, became vested in the Mayor and Aldermen of the City of Savannah, as soon as they were incorporated. Ibid.

4. *Held*, further, that for the purpose of

sustaining the action of ejectment, the term "lots" used in the Act of 1787, and which the Wardens were authorised "to let, lease or rent," might be construed to embrace the streets, town common, &c. so as to enable the corporation of Savannah to make a demise of a public street. Ibid.

5. And it seems, that the corporation having the legal title and possession of the street, might therefore, (apart from the construction given to the Act of 1787) have made a demise of it, for the purpose of sustaining ejectment. Ibid.

See Constitutional Law, 1, 2, 15, 20.

#### 601 \*SECURITY.

See Surety.

#### SERVICE OF PROCESS.

See Process, 1, 2, 3.

#### SHERIFF.

1. No private contract, nor extraordinary trouble, can authorize the Sheriff to receive other or higher fees than are prescribed by law.

Forbes v. Morel, 23

2. It seems, that the Sheriff is entitled to charge the legal fee for dieting negroes, levied on by him under execution, although such negroes were allowed to remain in possession of defendant, and no subsistence was furnished by the Sheriff. Ibid.

3. In such case, the Court will not grant an attachment against the Sheriff, to compel him to bring into Court, the money retained by him to answer this charge, but will leave the party to the prosecution of his ordinary remedy by action. Ibid.

4. Where an action is brought on the official bond of a Sheriff, in the name of the Governor of Georgia, in being, who is individually designated, and such Governor dies pending the action, it is not necessary to amend the suit, by the substitution of the name of his successor.

Rubun, Governor, &c. v. Fowler, 60

5. Can such bond be put in suit, without the previous order of the Judge of the Superior Court.—Quære. Ibid.

6. A Sheriff, in the State of Georgia, is entirely a ministerial officer, whose province is to execute duties prescribed by law, and which duties may be contracted or enlarged, at the will of the Legislature.

State v. Dews, 397

#### SLAVES.

1. A manumission subsequent to the Act of 1801, not sanctioned by legislative authority, is absolutely void, and produces no change in the condition of the slave.

Spencer v. negroes Amy and Thomas, 178

2. The Act of 1818, passed in relation to the attempt to manumit slaves illegally, being a penal statute, cannot be so construed, as to accumulate the penalties of the statute of 1801, to an act committed before the passage of the former statute. Ibid.

3. Construction of the laws of Georgia, concerning manumission.

Marlow, et al. v. Roser, 542

4. A will, which directs the executor to apply to the Legislature \*for the manumission of certain slaves, and if that cannot be accomplished in that manner, that they should be sent out of the State to where it can be done, is not illegal, and does not contravene the policy of our statutes. Ibid.

#### SPECIAL VERDICT.

See Appeal, 4.

#### STATE.

See Constitutional Law, 17, 18, 19.

#### STATUTE.

1. In general, a statute which introduces a new rule of law, and directs a particular method of proceeding under it, will, although it has no negative words, debar any other mode.

Guerard & Polhill v. Polhill, 237

2. If a statute destroys the character in which persons have acted in a civil or public trust, without pointing out a new mode in which the trust is to be performed, the latter is also at an end.

State v. Mayor and Aldermen of Savannah, 250

3. Quære, if a statute which acts retrospectively and divests a vested right, but does not impair the obligation of a contract, be absolutely void,

Forsyth v. Marbury, 324

4. A statute should be construed, (if consistent with its general scope,) so as to give it a prospective operation, where a contrary construction would divest a vested right. Ibid.

5. The Act of 19th December, 1822, which protects the property of the debtor from levy under a judgment, where such property for a definite period, had been in possession of a purchaser for reasonable compensation, and without actual notice of such judgment, may properly be construed, so as to refer only to levies founded on judgments, obtained since its passage. Ibid.

6. Such statute introduces a new rule of law, and is not declaratory of the old. Ibid.

7. A legislative Act appropriating property to the public, is an irrevocable grant of such property.

Mayor and Aldermen, &c. v. President, &c. of Steam Boat Company, 342

8. If no time be fixed by a statute for it to go into operation, it takes effect from its date.

Smets v. T. & J. Weathersbee, 537

See Criminal Law, 21, 26.

Jurisdiction, 1, 2.

Mortgage, 4.

#### 603 \*STATUTE OF FRAUDS AND PERJURIES.

1. To support a collateral undertaking to answer for the debt &c. of another, made subsequently to the original agreement, there



must be some new consideration shewn, growing out of, or having reference to such original agreement.

Crane *v.* Bulloch, 318

2. R. a feme covert, drew her draft in favor of C. on B. who accepted the same, payable when in funds. After this acceptance, J. S. B. the trustee of the drawer's separate property under a deed of marriage settlement, wrote upon the draft, "I will have this paid out of the next crop," and signed his name as trustee. On action of assumpsit brought by C. against J. S. B. upon this promise, *held*, that there was no consideration for the promise; that the case was within the provisions of the statute of frauds and perjuries, and that the action was not maintainable. Ibid.

3. A sale of goods at auction for the price of £10 and upwards, is within the statute of frauds.

Sanderlin *v.* Trustees of Roman Catholic Church, 551

### STATUTE OF LIMITATIONS.

1. It is a question of law for the Court to determine, as to what constitutes a sufficient acknowledgment, to take a case out of the statute of limitations.

Sheftall *v.* Clay, 7

2. An admission from which an existing debt may be necessarily inferred, is sufficient to take the case out of the statute, though it be accompanied with an express denial of the debt. Ibid.

3. A statute of limitations to be constitutional and operative, must give an allowance of time in futuro, to commence the action.

Forsyth *v.* Marbury, 324

### STREET.

See Savannah, 5.

### "SUPERIOR COURT."

See Criminal Law, 27.

Equity, 7, 8, 9.

Jurisdiction, 1, 2.

### SURETY.

1. A surety who pays the debt, is entitled to be substituted in the place of the creditor, as to all the security or means possessed \*by him, against the principal debtor, and all the co-sureties.

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Norris *v.* Ham, et al., 267

### TAX.

See Faro Table, 2.

Constitutional Law, 1, 2.

### TENANTS IN COMMON.

See Co-partnership, 7.

### TERRITORIES OF UNITED STATES.

See Constitutional Law, 17, 18, 19.

### TITLE OF STATUTE.

See Constitutional Law, 16.

### TOOLS.

See Distress Warrant, 1.

### TRESPASS.

See Equity, 49, 50, 51.

### TRUSTS AND TRUSTEES.

1. A Court of chancery, on sufficient grounds being shewn, will remove a trustee under a marriage settlement, and appoint a new one.

Gale, et ux., 109

2. If the original trustees are dead, the fact that the representative of one is temporarily absent, and the representatives of the other unwilling to act, is not per se, sufficient to justify the substitution of new trustees. The court has power to compel such representatives to assume the trusts. Ibid.

3. But the Court may with the assent of all parties, substitute new trustees. Ibid.

4. But to justify the removal of such representatives as trustees, their refusal or incapability must be shewn, either by answer to the petition for substitution, by affidavits of petitioners, or neglect of representatives to shew cause, on proper citation. Ibid.

See Banks, 3.

### "UNLIQUIDATED DEMAND."

1. The judicial and legislative construction in Georgia, of the words "unliquidated demand," and "open account," has been, to consider all as such, unless there be some written acknowledgment or promise by the debtor. A verbal acknowledgment of indebtedness in a definite sum, accompanied with a promise to pay, does not constitute it a liquidated demand.

Fell *v.* Abbott, 452  
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### \*USURY.

See Equity, 1, 3.

### VENDOR AND VENDEE.

See Executor de son tort, 1, 2, 3, 4.

### VERDICT.

1. A verdict clearly against evidence, may be set aside. But an application for this purpose will not be favorably received, where there has been conflicting testimony.

Sheftall *v.* Clay, 7

See New Trial, 1, 4, 5, 6, 7, 8, 10, 11, 14.

### VESTED RIGHTS.

See Statute, 3, 4.

### VOLUNTARY CONVEYANCES.

See Husband and Wife, 1.

### WAIVER.

1. If a party suffers improper evidence to be admitted without objecting at the time, it is a waiver of the objection.

Low *v.* Commissioners of Pilotage, 302

2. So, if after adjournment irregularly granted, he appears and goes to trial. Ibid.

## WARRANT OF ATTORNEY.

1. It is sufficient if a warrant of attorney be exhibited when demanded; it may be executed at any stage of the suit.

Nichols, et al. *v.* Dennis, et al., 188

2. A warrant of attorney continues to exist after judgment, if any other process is required to obtain the full benefits of such judgment. Ibid.

See Co-Partnership, 5.

## WASTE.

See Equity, 17.

## WAY.

1. The owner of land appropriated for a highway, retains the freehold in the soil, and subject to the easement, and not interfering with it, may use the land in any manner, and may maintain ejectment, trespass or waste, for any exclusive appropriation of it by another.

Mayor and Aldermen of Savannah, *v.*

President, &c. of Steam Boat Co., 342

2. And the statute of Georgia, which directs compensation to be made to the owners of land laid out for a highway, must be taken to provide for the purchase of the easement, and not of the land. Ibid.

606 \*3. As a general rule, the freehold in the highway must be taken to belong to the proprietors of the adjoining soil. Ibid.

4. But this rule being founded on the presumption, that such way was originally

taken out of the lands of the party who hath other lands adjoining, is not applicable, when such presumption cannot arise from the facts shewn. Ibid.

## WEARING APPAREL.

See Distress Warrant, 1.

## WILL.

1. It seems, that the will of a feme covert will have no efficacy, unless there be an agreement before marriage, giving her the power to make such will, or such right has been conferred on her after marriage, by some act analogous to an agreement before marriage; the mere parol assent of the husband, is not sufficient to give such a will validity.

McGowan *v.* Jones, et al., 184

2. A will set aside on the ground of insanity, against the testimony of the subscribing witnesses, where there was proof of previous insanity; where the disposition of the property was not rational or natural, and circumstances of mystery and suspicion were thrown around the subscribing witnesses.

Griffin *v.* Griffin. 217

See Slaves, 4.

## WITNESS.

See Criminal Law, 7, 8, 9, 16.  
Equity, 34.

Evidence, 2, 3, 4, 5, 6, 10.

New Trial, 10.

Will, 2.











# REPORTS OF DECISIONS

MADE BY THE

JUDGES OF THE SUPERIOR COURTS OF LAW  
AND CHANCERY

OF THE

STATE OF GEORGIA.

---

By G. M. DUDLEY,

ATTORNEY AND COUNSELLOR AT LAW, OF THE NORTHERN CIRCUIT.

---

Entered according to Act of Congress, in the year 1836, by

GEORGE M. DUDLEY,

In the Clerk's Office of the District Court of Georgia.



J U D G E S  
OF  
THE SUPERIOR COURTS OF LAW AND CHANCERY  
OF THE  
STATE OF GEORGIA,  
DURING THE TIME OF  
THE FOLLOWING VOLUME OF REPORTS.

---

HON. WILLIAM H. CRAWFORD.

“ WILLIAM LAW.

“ WILLIAM W. HOLT.

“ L. Q. C. LAMAR.

“ CHARLES DAUGHERTY.

HON. C. B. STRONG.

“ G. E. THOMAS.

“ L. WARREN.

“ JOHN W. HOOPER.

“ H. WARNER.

## TESTIMONIALS.

Lexington, 31st March, 1835.

Dear Sir,—I have perused the manuscript volume of the decisions of the Judges in Convention. It far surpasses my expectation. As a copious depository of law-learning it will not rank, of course, with similar productions in New York, Massachusetts, and some of the other States, highly distinguished for their legal science. I must insist however, that it will compare advantageously with the Reports in the adjoining States of North and South Carolina, Tennessee and Alabama.

The case of *Brewster v. Hardeman* and Others, in this County; and of *Wakeman and Wife v. Roache*, in Chatham Superior Court, may be placed on a level with the best productions of the American or English Bench.

It may be objected, that Reports should contain less of argument, and more of authority and precedent. As a general rule, this criticism would be just. But considering this volume as a pioneer, setting forth for the first time, the recorded opinions of our State Courts on many important principles of law and practice, is it not better, especially for the junior members of the profession, that the reasons of their adjudications should be given in extenso?

Organized as our judiciary is, the Courts look to the reason rather than the authority of adjudged cases—and with us the doctrine of "*sic ita lex scripta est*," has never been recognized. When, I would ask, shall we hear a Georgia Judge acknowledge with the venerable Lord Kenyon, "it is my wish and comfort to stand super antiquas vias."

I should delight, Sir, to see this Manuscript in print.

Very sincerely Yours,

JOS. HENRY LUMPKIN.

Washington, 11th Nov. 1835.

Dear Sir,—I have perused the larger portion of your manuscript Reports of Decisions, made by the Convention of Judges, with much interest and instruction. I regret that time was not allowed me to read the whole of the cases reported. I should like to see them published, for the benefit, not only of the profession, but of the community in which we live; for by some of the decisions, questions of importance and of frequent occurrence in our State are very solemnly settled. To say the least, they must be of as high authority as any Reports in the Lawyer's library.

They have one recommendation over all other Reports that I have read, and which I deem of no small consequence. It consists in the concise statement of the questions argued and decided. Every Lawyer will recollect how much he has labored and been confused, in comprehending the case stated in the commencement of the majority of the printed Reports. Though you have occupied but small space for this purpose, yet nothing has been omitted that would tend to a right understanding of the questions determined.

From the opportunities given the Judges to hear arguments and authorities, their decisions show much more learning than I had anticipated. In all candor I think they do much credit to the skill of the Reporter, and talents of the Judges who made them. I found the style easy and lucid, and have no hesitancy in saying that they should be in the library of every Lawyer, particularly in Georgia. No member of the profession should feel contented until he has read them, for, unlike other Reports, every case reported will be found instructive to the Georgia bar.

Very Respectfully,

GARNETT ANDREWS.

## PREFACE.

Uniformity in the administration of the laws, while it frees the Bench from many suspicions of partiality, and restrains its power to oppress, gives security to the citizen for the tranquil enjoyment of his rights, and often times protects the country from tedious and vexatious litigation. To produce results thus beneficial, as well as to ensure greater deliberation and research in the adjudication of doubtful questions, various efforts have been made by the best and wisest men among us, to effect such a change in our Constitution, as would give us the benefit of a Court of Errors—but hitherto their patriotic exertions have been rendered fruitless, and the State is at least twenty years in the rear of what ought now to be her judicial character. Without invading the Constitution, or doing violence to a single provision

of the laws, the Judges, in November, 1830, regardless of the additional expense and trouble, resolved to hold a Convention semi-annually for the purpose of advising with each other, and discussing freely and fully all questions of a doubtful and complex character, which might arise before each in their respective Circuits, and thereby to enable each Judge to decide such question in the light of the united wisdom of the whole Georgia Bench. The following decisions were made in pursuance of this plan, and it is obvious, that though decisions thus made may not fully atone for the want of a Court of Errors, they are made under the most favorable circumstances to command respect, which the Constitution and laws of the State would authorize at the time.

THE REPORTER.



# RULES OF PRACTICE AT LAW AND IN EQUITY.

## COMMON LAW RULES.

I. The order of pleading shall correspond with that laid down by Judge Blackstone; and in no case shall more than one counsel be heard in conclusion.

### *Appeals.*

II. No appeal shall be entered unless good security is given: Exceptions to the security on the appeal must be taken on or before the last day of the first term of the appeal; and if such exceptions are sustained, other and good security shall be given, or the appeal will be dismissed. If the security, good at first, becomes insolvent pending the appeal, the party appealing shall give other good security, in the discretion of the court, or the appeal shall be dismissed.

III. Appeals must be entered by the appellant in person, or by his attorney at law, or by an attorney in fact duly authorized by warrant for that purpose; which warrant shall be filed in the Clerk's office at the time of entering the same. Upon cause shown, the court will allow time to file such warrant; but such appeal shall be of course dismissed, and execution issue without further order, if such warrant be not filed within the time allowed.

IV. Appeals shall be tried at the first term after the appeal has been entered, unless good cause be shown for a continuance; among which good causes of continuance, a motion on oath, to make a substantial amendment to either declaration or answer shall be considered sufficient; unless the opposite party will permit the amendment to be made instant. No appeal case shall be continued more than twice by the same party, but for unavoidable providential cause.

V. When an appeal is entered, either of the parties litigant may make any amendment of the declaration, or answer, they may deem necessary. The party amending shall give notice thereof in writing accompanied by a copy of the amendment, to the adverse party, three months previous to the next term, after the appeal; and if the party amending fail to give such notice, and the adverse party will state on oath that he is taken by surprise, and is less prepared for trial in consequence of the amendment, the cause shall be continued at the instance of the amending party.

VI. The following shall be the form of the recognizance upon an appeal to be taken by the several Clerks of the Superior and Inferior Courts in all cases of appeal; which recognizance shall be entered on the minutes of the court, and attested by the clerk:

A. B. } — and verdict for the — for  
v. } — dollars and — cents and cost  
C. D. } —. The — being dissatisfied with the verdict of the jury rendered in the

above cause, and having paid all costs, and demanded an appeal, brings E. F. and tenders him as his security, and they the said — and E. F. acknowledge themselves jointly and severally bound to — the — for the payment of the eventual condemnation money in said cause.

In testimony whereof they have hereunto set their hands and seals, this — day of — 18—.

(L. S.)

(L. S.)

### *Answers.*

VII. In all cases, the answer of the defendant to a plaintiff's declaration shall plainly, fully, and distinctly set forth the causes and points of defence, and the evidence on trial shall be confined to the same.

### *Attorneys.*

VIII. Every person making application for admission to the bar must apply to some Superior Court in this State, and produce satisfactory evidence to the court of his being twenty-one years of age, of good moral character, and of his having read law. A certificate of good moral character, and of the applicant's being of full age, signed by any Judge of the Superior Court of this State, or any reputable practising attorney thereof, will be deemed sufficient; but from all other persons a written affidavit will be required—and shall undergo the whole examination touching his qualification in open court. All applicants for admission shall be examined on the principles of the common and statute law of England in force in this State, the principles of Equity, the Constitution of the United States, and of the State of Georgia, the statutes of this State, and the Rules of Court. And in no case, shall any person be admitted who shall not be considered by the court to be qualified for the practice of the law. And the following oath shall be administered to every applicant upon his admission, viz.: I A. B. do solemnly swear, (or affirm, as the case may be,) that I will justly and uprightly demean myself according to law, as an attorney, counsellor, and solicitor; and that I will support and defend the Constitution of the United States, and the Constitution of the State of Georgia, so help me God.

After which the following commission shall be issued by the Clerk:

State of Georgia. At a Superior Court holden in and for the County of — at — Term, 18—. Know all men by these presents, That at the present sitting of this Court, A. B. made his application for leave to plead and practice in the several Courts of Law and Equity in this State: Whereupon, the said A. B. having given satisfactory evidence of good moral character; and having been examined in open Court, and being

found well acquainted and skilled in the laws, he was admitted by the court to all the privileges of an attorney, solicitor and counsellor, in the several Courts of Law and Equity in this State.

In testimony whereof the presiding Judge has hereunto set his hand, with the seal of the Court annexed, this — day of — in the year 18—.

C. D., Judge, Superior Court, Georgia. (L. S.)  
E. F., Clerk.

IX. No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been fully pronounced, on pain of being considered in contempt.

X. In all cases where payment or satisfaction shall be made on any judgment or execution, either in whole or in part, it shall be the duty of the attorney receiving the same, forthwith to enter an acknowledgment thereof, and affile the same of record in the office of the Clerk of the court where such judgment was rendered; and such Clerk is required to record such acknowledgment among the other proceedings in the cause, and also to make a note thereof on the docket of judgments, opposite the place where such judgment is entered. And any attorney failing to comply with this rule, on or before the last day of the term next succeeding the making of such payment or satisfaction, shall be considered in contempt, and shall pay a fine not exceeding twenty five dollars, which it shall be the duty of the Court to impose, and he shall thereupon moreover direct the recording and noting of such payment or satisfaction.

XI. Writs and other proceedings may be signed by professional firms.—When there is no firm, the christian name of the attorney shall be added; but the usual abbreviations and initials of all christian names, shall be sufficient.

XII. No attorney, or other officer of court, shall be taken as bail in any suit or action depending or undetermined therein, or as security on any appeal or other proceeding. And for a violation of this rule, the attorney or officer in court so offending, shall be punished as for a contempt, and the party shall be compelled to give other bail or security.

#### *Bail.*

XIII. In any case where a defendant, who has given bail, and has final judgment obtained against him, is confined in any jail in this State, other than that of the county from whence the first process issued, the *capias* ad satisfaciendum against such defendant shall be considered as executed so far as to release the bail, when placed in the hands of the sheriff of the county where the said defendant is confined; and when the plaintiff or his attorney is notified of such confinement, and neglects to charge him with the said *capias* ad satisfaciendum, within a reasonable time, the same shall be considered as executed, so far as to release the bail, and

the bail, on motion and proof thereof, shall be discharged.

XIV. Exceptions to bail must be filed within four days after the first meeting of the court after it is entered: If the term shall not continue four days, then on or before the last day of the term, in failure whereof the bail shall be deemed sufficient.

#### *Certiorari.*

XV. No certiorari will be sanctioned, unless the alleged error be distinctly set forth in the petition; and no other errors shall be insisted upon at the hearing, than those stated in the petition.

XVI. All writs of certiorari shall be copied and served as other writs, twenty days before the sitting of the court, to which they shall be returnable.

#### *Claims.*

XVII. In all cases of claims, as the burden of proof rests with the plaintiff in execution, he is entitled to the conclusion, but if the claimant introduces no evidence, he shall have the conclusion, and the plaintiff in execution shall in every case pay the jury fee. And in cases of illegality the plaintiff in execution shall in like manner pay the jury fee and conclude.

XVIII. In cases of claims, when either the plaintiff in execution or the claimant dies, pending the claim, their representatives may be made parties, on motion, and on producing letters testamentary or of administration.

XIX. When a claim case is called in its order for trial, an issue must be tendered within five minutes, or the levy will be dismissed, and no exceptions will be allowed to the bond or affidavit in cases of claims or attachments after issue joined, except such as are taken in writing, at or before the joining such issue.

#### *Clerks and Sheriffs.*

XX. When a civil or criminal process shall have been delivered to the sheriff, or his deputy, if no levy or service has been made in conformity with the exigency thereof, he shall state specially, in his return, the cause why such levy or service has not been made. If property which hath been levied on, remains unsold, it shall be his duty to state the cause of its so remaining unsold, and to give a particular description of the same.

XXI. The sheriff shall make a return to the clerk of the court at the opening thereof, of the names of the coroner and constables of the county, four of which constables the sheriff shall notify to attend each term, until the whole shall have served in turn; and the sheriff shall be bound always to have at least four staves for the constables.

XXII. Every clerk and sheriff who can-



not produce all the rules of court when required, shall be fined not exceeding ten dollars.

XXIII. The clerks shall keep a separate book in which they shall register the names of all persons who may be fined by the court, the time when, the offence for which, they are fined, the amount received and disbursed.

XXIV. No clerk shall suffer any original paper of file to be taken from his office in vacation, without an order from the Judge for that purpose.

XXV. The sheriff of each county shall keep a bench-warrant docket, on which he shall enter all bench warrants delivered to him, and the time when executed, if executed, the time when they may be delivered to him, and if not, the reason why they were not executed.

XXVI. The sheriff shall in all cases put the purchaser of real property at sheriff's sale into possession of the premises, without further order or proceeding, when the defendant in execution was in possession of the same at the time of the levy or sale. Vide St. 1823, Pam. page 158.

#### *Collateral Issues.*

XXVII. No appeal shall be allowed in collateral issues ordered by the court; but the court will, in its discretion, grant a new trial, upon such terms as shall appear just and reasonable. But where such collateral issue is tried in the Inferior Court, and said court is dissatisfied with the verdict, they may permit an appeal to the Superior Court at their discretion.

#### *Commissions.*

XXVIII. The following shall be the form of a commission to take testimony by interrogatories.

Georgia, ——— county.

By his Honor, ———, one of the Judges of the ——— court for the County and State aforesaid.

To . . . . . Esquire, Greeting.  
Whereas, there is a certain matter of controversy now pending in the ——— court for said county, between ———, and whereas ——— is a material witness in said suit, and cannot attend our said court in person without manifest inconvenience: Now, know ye, That we reposing especial trust and confidence in your prudence and fidelity, have appointed you, and you, or any two or more of you are hereby authorized and required to cause the said ——— personally to come before you, and after being duly sworn, to examine ——— concerning the said suit, agreeable to the interrogatories here unto annexed, and the answers to the same being plainly and distinctly written, you are to send the same closed up under your hands and seals, to our said court, to be held on the ——— day in ——— next, together with this writ.

Witness, the Honorable ——— one of the Judges of said court, this ——— day of ———.

XXIX. Commissions may issue in blank in so far as relates to the names of the commissioners, but the names of the witnesses intended to be examined shall be distinctly specified in the notice served upon the adverse party, preparatory to issuing the commission.—See 23d Section, Judiciary of 1799.—In Prince 22 See page 211.

XXX. The time to be allowed for the return of commissions from any part of the United States of North America, if less than one hundred miles distant from the place of trial, shall be one month; if at a greater distance, and less than five hundred miles, two months; if at a greater distance, three months; to any part of the West-Indies, or South America, four months; or to any part of Europe, eight months.

XXXI. When a commission is returned, it shall remain with the clerk, for the benefit of either party, and may be opened by consent of both parties, such consent being written on the cover of the commission, or by an order of the Judge, either in term time, or in vacation, but such order, if applied for in vacation, must be upon five days' notice to the adverse party, or his attorney, and in cases of commission returned not executed or directed according to rule, either party in the cause shall upon five days' notice to the adverse party, or his attorney, be permitted to return the commission and its contents to the commissioners to be properly executed and directed.

XXXII. Commissions may be sent and returned by mail, to entitle the party to open the commission, the post-master, his deputy or assistant, must receipt on the back "received from A. B. one of the commissioners," the names of the commissioners must be written across the seals of the envelop, and the commissioner have such direction as will enable the court to know that it was intended for the court, and the usual abbreviations or initials of christian names of the commissioners, witnesses, attorneys, clerks, magistrates and post-masters, shall be sufficient.

XXXIII. When a commission issues to examine a witness, its not having been returned shall be no cause of continuance, unless the party seeking the continuance will make the same affidavit of the materiality of the testimony as in the case of an absent witness. Vide Title Interrogatories.

#### *Consent.*

XXXIV. No consent between attorneys or parties will be enforced by the court, unless it be in writing, and signed by the parties to the consent.

XXXV. No consent to dispense with pleading will in any case be allowed, nor will any evidence be received of the con-

tents of any written agreement between attorneys alleged to be lost, other than a sworn copy of said agreement.

*Continuance.*

XXXVI. In all applications for continuances upon the ground of the absence of a witness, it must be shown to the court that the witness is absent, that he has been subpoenaed, that he resides in the county where the case is pending, that his or her testimony is material, that such witness is not absent by the permission, directly or indirectly, of such applicant, that he or she expects and believes that he or she will be able to procure the testimony of such witness at the next term of said court, and that such affidavit or application is made, not for delay, but to enable the party to procure the testimony of such absent witness or witnesses, and must state the facts expected to be proved by such witness.

XXXVII. When on an application for a continuance, the party makes an affidavit of the facts which he expects to prove by the absent witness, the opposite party shall not be allowed to force a trial by an admission of the facts stated in such affidavit.

*Default.*

XXXVIII. Upon opening a judgment by default, the defendant shall plead instanter to the merits of the action; and no default shall be opened but upon payment of all costs which may have accrued, including two dollars of the attorney's fee. The entry of default, upon the bench docket, shall be sufficient evidence of the judgment. If the plaintiff allege himself to be surprised by the plea, the cause shall be continued at the instance of the defendant.

*Dockets.*

XXXIX. After the court is opened, and until it adjourns each day, the Judges' dockets shall not be subject to the inspection of the bar, or their clients.

XL. A criminal docket, a docket of original writs and processes, claims and special writs, as also a docket of appeals, shall be made out by the clerk for the use of the court, copies of each of which shall be furnished the bar, and shall be delivered at the first opening of the term; and all causes shall be called and tried in the order in which they are docketed, without any preference or delay, unless it shall appear to the court that it shall be injurious to press a cause to trial, when regularly called. A different order in calling the docket may be pursued by the court, in its discretion, for the purpose of giving facility and expedition to its proceedings. The docket shall be called but once, but if parties by consent, under permission of the court, continue their cases from day to day, said cases shall not stand for trial until all the other business of the court is finished, and then they may be tried in their order, at the discretion of the court.

XL.I. The clerk of each court shall keep a motion docket, on which shall be entered all motions originating in the said court, or transferred for argument from other counties. A party applying to have a motion docketed, shall certify in writing to the clerk the delivery of a brief of such motion to the judge, and shall pay to the clerk one dollar at the time of docketing the same. All motions shall be called and heard in the order in which they are docketed, nor shall any motion be heard until the same shall have been docketed in conformity to this rule.

*Exceptions.*

XL.II. All matters appearing on the face of the declaration or process that would not be good in arrest of judgment, shall be taken advantage of at the first term, and will be immediately determined on by the court, unless where the court may entertain a doubt as to the law on the point: if so, the cause will be suspended, giving the defendant leave to plead his exceptions specially, together with any other matter which he intends to rely on in his defence. The exceptions thus pleaded shall be argued at a subsequent term,—and if not sustained, the plaintiff shall have his election to try them, or to continue without a showing.

*Executors and Administrators.*

XL.III. An executor or administrator shall not be permitted, in answer, to deny any deed, bond, bill, note, or other written instrument of his testator or intestate, being the foundation of the plaintiff's action, without an oath or affirmation indorsed on such plea or answer, that he has reason to believe and does verily believe that such plea or answer is true.

*Illegality.*

XL.IV. When an affidavit of illegality is made, on account of partial payment made on the execution, the defendant at the time of making such affidavit, must pay up the amount he admits to be due, or the sheriff shall proceed to raise that amount, and accept the affidavit for the balance.

XL.V. No second affidavit of illegality shall be received by any sheriff or other officer.

*Imparlance.*

XL.VI. No imparlance shall be allowed on writs of scire facias, issued to enforce recognizances, either on the civil or criminal side of the court, to make executors or administrators parties to a cause pending therein, or for the revival of judgments, unless upon special cause shown to the court.

*Interrogatories.*

XL.VII. When a cause is proceeding ex parte to a jury, interrogatories may be served by depositing a copy with the clerk, and posting a notice to that effect in his



office, addressed to the party in default, ten days before suing out a commission.

XLVIII. No exception to a written interrogatory on the ground that it is a leading question shall prevail, unless it be filed with the interrogatories before the issuing of the commission.

XLIX. All objections to the execution and returns of interrogatories on appeal trials, the form of the commission, or service of notice, must be made by the party seeking to avail himself of them, before the cause has been submitted to the jury, or they will not be heard by the court: provided that the said interrogatories have been twenty-four hours in the clerk's office; and if they have remained in the possession of the party intending to use them, they shall be communicated to the adverse party before the cause is called for trial.

#### *Justices of the Peace.*

L. The justices of the peace shall return all examinations and recognizances by them taken, or other papers that may be necessary to be acted upon by the Superior Courts of their respective counties, on or before the first day of the term of each court, except in the counties of Richmond and Chatham, where they shall make said return ten days before said courts, if taken that length of time before the sitting of the court.

#### *Lost Papers.*

LI. Upon the loss of any original declaration, plea, bill of indictment, or other office papers, a copy of the same shall be established instantler.

LII. Wherever a party wishes to introduce the copy of a deed or other instrument, between the parties litigant in evidence, the oath of the party, stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody, shall be a sufficient foundation for the introduction of such secondary evidence.

LIII. Wherever a party wishes to introduce the copy of a grant in evidence, the oath of the party stating that the original is not in his power or possession, and that he knows not where it is, shall be sufficient foundation for the introduction of such copy.

LIV. When any person shall seek to establish lost papers under the 6th section of the judiciary act of 1799, he shall present a petition to the Superior Court, together with a copy in substance, of the paper lost, as nearly as he can recollect; which copy shall be sworn to by the party or proved by other evidence: whereupon a rule nisi may be obtained, calling upon the opposite party to show cause (if any he have) why the copy should not be established in lieu of the original so lost, which rule shall be personally served on the party, if to be found within the State, and if he cannot be

found, then the said rule nisi shall be published in some public Gazette in the State for the space of three months.

#### *Motions.*

LV. All grounds of motion for nonsuit, in arrest of judgment, and for continuance, all objections to testimony, and all exceptions to declarations must be urged and insisted upon at once. And after a decision upon one or more grounds, no others afterwards urged will be heard by the court.

LVI. All motions for amendment of the declaration shall be made at the first term or after the case is continued at any subsequent term; and all motions for amendment of the answer shall likewise be made after the continuance of the case; and a copy of the amendment in either case shall be served on the opposite party. No declaration or answer shall be amended after the case has gone to the jury; and all exceptions to the declaration or answer to causes pending upon appeal, shall be taken and argued before the cause has been submitted to the jury.

LVII. On all rules to show cause, the party called on shall begin and end his cause; and on all special matters, springing out of a cause at issue, the actor or party submitting a point to the court shall in like manner begin and close, and in all cases arising ex delicto, if the defendant pleads justification, and takes upon himself the burthen of proof, he shall have the like privilege.

LVIII. Every motion for any rule or order, shall be submitted to the court in writing by the counsel who makes it, and if granted by the court, shall be delivered to the clerk.

#### *Notice.*

LIX. No notices under the 6th section of the judiciary act of 1799, hereafter to be served, shall be available unless the party for whose benefit they shall be served, or his agent, shall previously have made affidavit, (or his attorney stated in his place,) that the deponent or attorney has reason to believe the books or papers required to be produced, are or have been in existence, that he believes they are within the possession, power or control of the person notified, and that they are material to the issue, (which affidavit shall be filed in office before the notice shall be available,) nor unless the court shall be of opinion that the books or papers sought to be obtained are material to the issue. And it shall be deemed a sufficient compliance with the notice, (whether served heretofore or hereafter,) if the party notified being a resident of any other county of the State than that wherein the case is pending, shall make an affidavit in writing before some judicial officer of the State, that the books or papers required and not produced, are not, nor have been in his possession, power, or control since the service of such notice.

And if the person notified be or reside without the State at the time of receiving such notice, an affidavit to the foregoing effect taken before some judge of the Superior or County Court of the State or Kingdom in which he may be, shall be deemed sufficient.

LX. In actions of assumpsit for the recovery of unliquidated demands, a bill of particulars shall be annexed to the copy served on the defendant; and in every case where the plea of set-off shall be filed, a copy of the set-off shall be filed at the term of filing the answer: and when the bill of particulars is not annexed to the declaration, the plaintiff shall lose a term; and if service of said bill of particulars is not effected upon the defendant by the succeeding term, a non-suit shall be awarded.

LXI. When a merchant or tradesman being a party to a suit in any of the courts of this State, shall be notified to produce his books of accounts, or any of them to be used as testimony on the trial, if the party so notified shall transmit to the court in which case is pending, a transcript from his books of all his accounts and dealings with the opposite party, together with an affidavit (taken pursuant to the common law rule of court which regulates bills of particulars,) that the same is a fair and perfect transcript as aforesaid, and that he cannot produce the book or books required, without suffering a material injury in his trade, this shall be deemed a compliance with the notice; provided, if the adverse party will swear that he verily believes that the books contain entries material to him which do not appear in the transcript, the court will grant him a commission to be directed to certain persons named by the parties and approved by the court, to cause the adverse party to produce the book or books required, (he being first sworn that the book or books produced is, or are all that he has that answer to the description in the notice) and to examine said books and to transmit to the court a fair statement of the accounts between the parties, under their hands, sealed and transmitted, as on other commissions, which statement, when received, shall be deemed a sufficient compliance with the notice.

LXII. All notices required to be given to any officer of the court must be in writing.

#### *New Trials.*

LXIII. A motion for a new trial shall not operate as a supersedeas, unless the same shall be made during the term at which the cause is tried, and then only if after hearing the grounds of such motion, the court shall direct an order to that effect to be entered on the minutes.

#### *Prochein Ami.*

LXIV. No prochein ami shall be permitted to institute any personal action, in the name and behalf of an infant, until

such prochein ami shall have entered into sufficient bond to the governor of the State, for the use of the infant and his representatives, conditioned well and faithfully to account of and concerning his said trust, which bond may be sued by order of the court in the name of the governor, and for the use of such infant; and such bond shall be filed in the office of the clerk of the court in which the suit may be commenced.

#### *Recognizances.*

LXV. All recognizances taken by the clerk for the appearance of either parties or witnesses shall be written in a book for that purpose separate and distinct from the minutes, to which he shall affix an alphabetical index.

#### *Scire Facias.*

LXVI. Writs of scire facias, issued to revive judgments, shall be returnable to the next superior court of the county where the defendant or defendants reside, under the following regulations, viz: The parties suing out such writs shall procure a full exemplification of the record of the judgment, which shall be sent to the clerk of the superior court of the county where the scire facias is made returnable, and affiled with the same, whereupon judgment may be revived on such exemplification, in like manner as if the original judgment had been recovered in the county where the scire facias is made returnable.

LXVII. A suggestion of the death of either party, for the purpose of enabling the survivor, or the representatives of such deceased party to issue scire facias to revive, may be made either in term time or in vacation: in either case the order for issuing the scire facias shall be of course, and be granted by the clerk; and such suggestion and the order thereon shall be filed among the proceedings in the cause.

#### *Signing Judgments.*

LXVIII. In all and every case where a verdict has been obtained at common law and an appeal entered without judgment, signed upon the said verdict, judgment shall not afterwards be signed further back than the time of disposing of said appeal.

#### *Subpœna.*

LXIX. Subpœnas duces tecum may issue against third persons without order, at any time, upon application to the clerk.

#### *Surveys.*

LXX. County surveyors are required to deliver copies of re-surveys made by them, to each of the parties concerned, upon their application, and at their own proper costs, within ten days after such application is made, and the surveyor executing a survey shall be bound to attend court to prove the same, and shall be allowed the per diem pay of a witness attending upon subpœna.



LXXI. Surveys of lands in any quantity of two hundred acres, or less, shall be laid down by a scale of ten chains to the inch; all over that quantity, by a scale of twenty chains to the inch.

LXXII. Either party, in actions of ejectment, shall be entitled as matter of right to a rule of survey upon application to the clerk in vacation.

LXXIII. No survey made under the rule of court, shall be received in evidence, unless it appears that at least ten days' notice of the time of commencing such survey was given to the opposite party, by the one who offers it in evidence.

LXXIV. Every surveyor shall represent on his plat as nearly as he can, the different enclosures of the parties, and the extent or boundaries within which each party may have exercised acts of ownership.

LXXV. After a cause has gone to the jury,

and any evidence has been heard in it, neither party shall be allowed to make any objection to a rule of survey, made in the case, or the manner in which it may have been obtained, or the survey executed.

*Witnesses.*

LXXVI. Witnesses shall first be examined by the party introducing them, then cross-examined by the adverse party: further examination shall not be had, but by leave of the court first obtained, and then only upon the declaration of the attorney or witness, that a material fact has not been stated, to which all further inquiries shall be directed; and in all cases in which more than one attorney is retained on either side, the examination and cross-examination shall be conducted by one of the counsel only, and at the opening of the case, both parties shall state to the court to which attorney the examination and cross-examination of witnesses is confined.

## RULES IN EQUITY.

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I. When a bill has been sanctioned and filed, and the usual process taken out and served or advertised, according to the rules of court, and no answer shall be filed within the time allowed, if the defendant or defendants still remain in contempt at the next term thereafter, so as to entitle the complainant to have his bill taken pro confesso, the order shall be made by the court on application of the complainant; but such order shall only operate as an interlocutory decree, which shall entitle the complainant to have his cause submitted ex parte to a jury; provided always, that if the complainant or complainants shall swear or affirm, that the answer of the defendant or defendants, to the whole or part of the charges contained in the said bill is absolutely necessary, and that without such answer, he, she, or they cannot support the truth of his, her, or their allegations, the court may permit such complainant or complainants to make a special oath or affirmation (as the case may be) of what he, she, or they know or believe the said defendant or defendants could or ought to answer, and such oath or affirmation may be given to the jury together with the bill and other proof.

II. When a defendant or defendants reside out of the county in which a bill originates, and is sanctioned, which fact must be verified by affidavit, the court, or judge at chambers, shall pass such order for appearance and answer as the distance of the defendant's residence shall warrant, service or publication of which order, according to the exigency thereof, shall be deemed a sufficient service to compel an appearance; and subsequent proceedings shall be the same as if the defendant or defendants had been served with process by the sheriff of the county, where the subpoena is made returnable. And if it shall appear by affidavit that a defendant is absent from this State, or cannot be found therein, service may be effected by publication in a public newspaper, upon the order of the court, requiring him to appear and answer the complainant's bill, in such time as the court may direct.

III. A plea or demurrer, in part or to the whole of a bill, shall be filed at the return term, and shall be argued during the term, or upon motion and cause shown at such other time as the court may direct. The court will, however, in its discretion, upon sufficient cause shown, grant further time for filing such plea or demurrer, and such order shall express the time within which the same shall be filed, and the further time thereafter, within which it shall be argued,

or be considered as dismissed; and notice in writing of the filing of such plea or demurrer shall be given to the adverse party or his counsel at the time of the filing thereof.

IV. All answers shall be filed within four months after the adjournment of the court, to which the subpoena is returnable, unless further time be granted. Exceptions to answers must be filed before the hour for jury business on the second day of the term thereafter, or said answers will be deemed sufficient; and if such exception shall be sustained by the court, the defendant shall perfect his answer within such further time as the court may order. But if said amended answer be defective, the defendant may be punished as for a contempt, and shall pay all costs that have accrued up to the time of filing such defective answer. Nothing in this rule shall be construed to prevent the respondent from filing his answer at any time after the filing a bill for injunction against him, and moving the judge at chambers who granted the bill, for the dissolution of injunction, if the equity of the bill be sworn off by the answer; but in such cases, a rule nisi, stating the grounds of the application, and fixing the time and place of hearing the motion, shall be served upon the complainant, at least ten days before the hearing of any such motion. And the judge shall have power to order such amendments as are usually made in open court, and to hear and determine exceptions to answers.

V. A general replication to the answer shall be filed, and what is admitted in the answer shall remain admitted, notwithstanding such general replication. But the complainant may, by his replication, controvert any part of the facts stated in the defendant's answer, if he will admit the rest to be true; and such replication shall be confined to the particular matter controverted, and the defendant shall only be obliged to produce proof of such controverted matter. In either case, the cause shall be at issue after replication filed without rejoinder.

VI. In trials in equity, the jury shall be taken from the panel of the grand inquest, in the manner prescribed by law for the selection of special jurors.

VII. When a bill praying an injunction is presented to the judge for his sanction, there shall be annexed to it the clerk's certificate of payment of costs, and security being given as required by law; and on application to the judge, additional security may be ordered if circumstances require it.



All injunctions shall be granted until further order had thereon.

VIII. That an injunction shall not issue to stay proceedings at law in any action in which a verdict shall have been given for money, unless a sum of money equal to the amount which the party applying for the injunction acknowledges to be due, is deposited with the clerk of the court, to be paid to the adverse party, and a certificate of such payment shall accompany the bill.

IX. When either party in a suit at law shall be desirous of obtaining the interposition of the court, in the exercise of its equitable jurisdiction, in the prosecution or defence of the said suit, the application therefor shall be by bill, which may be sanctioned by the judge, upon such terms as shall seem just and reasonable.

X. Commissions shall be issued, returned, and published, and notice of interrogatories given in like manner as in cases at common law; and the like rules shall be observed on application for continuances.

XI. The oath or affirmation of a defendant, to his or her answer shall be in the following form: "You A. B. do swear, or solemnly, sincerely, and truly declare and affirm, (as the case may be,) that what is contained in your answer, as far as concerns your own act and deed is true, of your own knowledge; and that what relates to the act or deed of any other persons, you believe to be true."

XII. Bills may be revived by petition to the judge at chambers, or at term time; and upon the presentment of a petition for that purpose, an order for the revival of the bill nisi causa, on the first day of the term next thereafter shall be passed, a copy of petition and order shall be served by the sheriff on the defendant, at least twenty days before the meeting of the said court. No bill or subpoena will be required.

XIII. When a case in equity shall be tried by a jury, who shall render a verdict for a specific sum, a decree shall be entered for such a sum, and such execution may be issued thereon, as if the cause had been decided at common law. Where the finding of a jury is special, and requires the payment of money, and some duty to be performed, the sum so found may be recovered in the manner hereinbefore provided; and such duty shall be enforced by the court by attachment for contempt or otherwise, according to the course of proceedings in equity.

XIV. The clerk shall keep a docket for equity cases, distinct and separate from the causes at common law, in which shall be registered the names of the parties, and titles of all bills, at the time of filing the

same, with notices of the pleadings and orders in the cause up to the final decree.

XV. In all cases where the parties go to trial upon the bill and answer alone, the complainant's solicitor shall have the conclusion.

XVI. After appearance by the party, defendant to any bill in equity, by any solicitor of this court, the service of any subpoena to make better answer, or any rule or order of court on such defendant, or solicitor, shall be sufficient. Service upon complainant, or his solicitor, shall in like manner be deemed sufficient service.

XVII. Copies of all deeds, writings, and other exhibits, shall be filed with the bill or answer, and no other exhibit shall be admitted, unless by order of the court, for some special and good cause shown. The production of the original, if not admitted by the answer, may be required on the hearing; and upon application to the court, or to the judge in vacation, and cause shown, the original of any exhibit will be ordered to be deposited in the clerk's office for the inspection of the adverse party.

XVIII. Applications for writs of ne exeat other than such as are provided for by the act of December 6th, 1813, shall be upon bill filed, and sworn to or affirmed by complainant, or his attorney in fact; and such oath or affirmation shall particularly state the amount of the debt claimed, and that the sum to be mentioned is then due, and that there is reason to apprehend the loss of the whole, or a part of said sum, if the defendant should depart without the jurisdiction of the court. The sheriff shall discharge the defendant from custody under such writ, upon his giving bond, with two good securities, (who shall be liable to be excepted to, in like manner as in case of bail at common law,) conditions for the payment to the complainant, his executors, or administrators, of such sum as shall be decreed with interest and costs, and further, in all respects to do, conform to, and perform the decree of the court in the premises.

XIX. When auditors have made up their report, the same shall be returned into the clerk's office without delay, and shall remain open to the inspection of both parties.

XX. A docket of decrees, and also a docket of executions, or other process for the enforcement of decrees, shall be kept by the clerk, in cases in equity, in like manner as the dockets of judgments and executions at law; and the acknowledgment of satisfaction on decrees in equity, may be enforced in the same manner, and under the like penalties as judgments at law.

XXI. The rule at common law which requires a prochein ami of an infant to give bond to account, &c., shall also be observed in equity.

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# REPORTS

## OF DECISIONS MADE BY THE JUDGES OF THE SUPERIOR COURTS OF LAW AND CHANCERY OF THE STATE OF GEORGIA.

### Absalom Janes v. William Robinson.

In Taliaferro Superior Court, July Term, 1831.

**Executors and Administrators—Judgment against an Insolvent Defendant—Costs.**—Where the plaintiff as executor or administrator obtains judgment against the defendant who turns out to be insolvent, the officers of court cannot issue execution for their costs against such plaintiff; because such an execution would issue not only in the absence of a judgment on which to found it, but against a judgment in plaintiff's favor.

**Same—Debt Due by Estate—Judgment.\***—The practice of entering up judgment *de bonis testatoris, et si non, de bonis propriis*, is contrary to law; and if such a judgment cannot be entered up against an executor or administrator for a debt due by the estate they represent, still less can they be made liable for the costs of a suit brought by them, in their representative capacity, where they had obtained a verdict.

In this case the mortgaged property had been sold, and after the mortgage *fi. fa.* had been satisfied a balance of money remained which was claimed by Archibald Janes, who had taken a mortgage of subsequent date upon the property that was sold under the aforesaid mortgage *fi. fa.* This claim was resisted by the officers of the Court who claimed the money upon a *fi. fa.* issued for costs against the defendant. The defendant as executor or administrator of one Langdon had brought suit against ———, had obtained a verdict against ——— who had proved insolvent, upon which the said *fi. fa.* issued against Robinson the plaintiff in that case in his individual capacity. The question submitted to the convention of Judges, in this case, were these.

**\*Executors and Administrators—Judgment.**—In *Justices v. Sloan*, 7 Ga. 39, it is said: "The idea of the counsel for defendant, and of the court below, seems to have been based upon a practice which at one time obtained in the courts of this state, in a suit against an executor or administrator, to enter up alternative judgments—judgments *de bonis testatoris, si non, de bonis propriis*, and thus to charge him personally and representatively in the same action. According to principle, this practice was wrong, and was repudiated by the judges in convention. See *Dudley's Rep.* 2."

Also in *Guerry v. Durham*, 11 Ga. 15, it is said, that the order to make the money out of the individual property of the administrator was manifestly wrong, no doubt is entertained. In *Janes v. Robinson*, *Dud.* 1, the judges said: "This practice has not the sanction of a single decision."

1st. Can a defendant be made answerable under such circumstances? 2d. If yea, can an executor or administrator be made liable individually for costs under such circumstances?

The convention after deliberation upon the facts in the case, decides: 1st. That the act of 1812 authorizes an execution to issue against an attorney and his client who resides out of the county where the action is commenced, if the defendant is insolvent. It is somewhat difficult to discover the reason why the legislature should subject the plaintiff to costs in case of the insolvency of the defendant, where the

2 \*plaintiff resides out of the county where the action is commenced, and not subject plaintiffs who reside in the county to the same liability: It is perhaps still more difficult to discover why the attorney in the former case should be considered liable for costs, and not in the latter. At first blush it would appear that reason would make no difference between the cases, and that plaintiffs residing in the county with the defendant come within the reason and equity of the statute. Perhaps the best reason which can be offered for not applying the statutory provision to both cases, is that the general principle, that the costs of suit shall fall upon defendants and not upon plaintiffs is of such universal application and so uniformly established, that no exception from the rule is admissible except where such exception is expressly made by statute. The convention has however no hesitation in deciding, that the officers of court have no right at their whim and caprice and of their own authority to issue an execution against a plaintiff not only in the absence of a judgment, but against a judgment which was signed by the plaintiff's attorney.

2dly. A practice had been introduced in some of the circuits of entering judgments against executors and administrators to be levied upon the estate which they represented "*si non de bonis propriis*." This practice had not the sanction of a single legal decision, and has been over-ruled in the northern circuit upon argument and the production of authorities. The older elementary authorities say that an executor or administrator may make himself liable individually for debts due by the estate which he represents; but do not state with precision how that liability is to be enforced. On examination the modern authorities show that this liability is always enforced by



an action of waste; in which action the defendant is not permitted to plead plene administravit or any other matter in discharge. If a judgment cannot be entered against an executor or administrator in an action against them for a debt due by the estate they represent a fortiori, they cannot be rendered liable for the costs of a suit brought by them in their representative capacity, where they had obtained a verdict. In every event the *fi. fa.* for costs is illegal, and cannot be permitted to claim the money.

**John and C. Daniel v. The Justices of the Inferior Court of Taliaferro County, and Robert Gibson.**

In Taliaferro Superior Court, July Term, 1831.

**Constables—When Levy May Be Made on Negroes or Real Estate.**—No constable shall be authorized to levy on any negro or negroes, or real estate, unless there is no personal estate to be found sufficient to satisfy the debt, &c. (Prin. Dig. 249.) By virtue of the foregoing provision, the courts have required constables, before levying upon negroes or real estate, to enter on the execution. "No personal property to be found." And when such entry is made by the constable, it is not traversable.

In this case a previous certiorari had been obtained and \*sustained. In the case which had been brought up from the Inferior Court, money had been raised and brought into that court by a *fi. fa.* in the name of Robert C. Gibson, which had been obtained in the Inferior Court. The money was claimed by older *fi. fas.* from the justices' court in the name of John and C. Daniel, which had the entry upon them of "no personal property to be found." The first certiorari had been sustained, and a new trial ordered. When the case was called again for trial, the plaintiffs in *fi. fa.* in the inferior court traversed the return of the constable, and upon the hearing of evidence upon the trial of the traverse, the verdict of the jury was for the traversers, and the money was again awarded to the *fi. fa.* from the Inferior Court. The traverse of the constable's return was resisted by the counsel of the plaintiff in certiorari on the ground: 1st. That it was not traversable. 2nd. That the plaintiff in *fi. fa.* in the Inferior Court had no right to occupy new grounds upon the new trial ordered by the Superior Court: That the rule of Court which required all the grounds to be taken at once, governed this question.

**Decision.** The return of no personal property on *fi. fas.* from justices' courts is not required by statute. The statute only declares that a *fi. fa.* from a justice's court shall not be levied on land or negroes, if there is other personal property. The entry of no personal property has been required by the courts by virtue of the aforesaid provision in the statute. The decision of the

courts, that such return should be made on *fi. fas.* issuing from justice's courts, is believed to be salutary and for the benefit of all parties. If no such return was made, the purchaser of land or negroes under such *fi. fas.* might be required in all controversies touching such property, to prove there was no personal property. If such entry is required and made, and held not traversable, great security would be acquired by purchasers. But there are other reasons for deciding such return not to be traversable. If it should be held traversable, much vexation, embarrassment and delay to plaintiffs in execution, might be occasioned. When the constable should go to levy, defendants might by design keep all personal property out of the way. And when the proper return should be made, and a levy upon land or negroes entered, an affidavit of illegality might be made alleging that there was personal property out of which the *fi. fa.* might be satisfied. The defendant might have a watch in his pocket which would enable him to make the affidavit of illegality, and might by that means keep the plaintiff out of his legally established rights. The Judges are therefore of opinion that the return of a constable in such cases is not traversable, and that the Inferior Court erred in this case in permitting the return to be traversed, and that the certiorari ought to be sustained.

**\*Charles M'Dowell v. Archb'd R. S. Hunter.**

In Hancock Superior Court, April Term, 1831.

**Action of Covenant—Breach of Warranty—Averments.**—In an action of Covenant for breach of warranty the plaintiff must aver, if not on eviction, at least that he had abandoned the possession of the land after it had been found subject to the execution, or that the land had been sold by virtue of the execution, and that he had been deprived of his possession thereof: otherwise the declaration is demurrable, and a nonsuit will be awarded.

The plaintiff in this case declared on a breach of warranty in a deed executed by the defendant, conveying land to the plaintiff with warranty, and alleged for breach that the land had been levied on by an execution against one Soulard the grantee under whom defendant claimed; that plaintiff had interposed a claim; notified the defendant, and on the trial of the claim the land was found subject to the execution. The defendant pleaded by way of demurrer that plaintiff had alleged no eviction sufficient to entitle him to recover, nor that he had been dispossessed. Nonsuit was awarded with leave to move that the nonsuit be set aside and the case reinstated, and the motion was referred to the convention of Judges, who concurred in the following decision.

This is a case of general warranty of title. In such cases it is necessary to allege eviction and ouster. 2 Johnston, 1; 7 Johnston,

258, and 376; 4 Kent's Com. 467; 1 Mass. Rep. 466; 2 Mass. Rep. 461; 10 Wheat. 449. For the plaintiff it has been insisted that the verdict of the jury subjecting the land to the *fi. fa.* was an eviction in law which was sufficient to entitle the plaintiff to recover, and this case was analogized to a condemnation in a Court of Admiralty which had always been held sufficiently to entitle the insured to recover against underwriters or insurers. But the analogy is imperfect in this: condemnation in Courts of Admiralty are always preceded by the seizure of the vessel or merchandize, which seizure operates a complete ouster or dispossession of the party insured. A levy upon land leaves the tenant in actual possession and does not *ipso facto* operate his ouster or dispossession. Although in contemplation of law, land levied upon by the sheriff is considered in the custody of the law, yet it remains ostensibly in the actual possession of the defendant even after the sale of it by the sheriff who is bound upon the demand of the purchaser to give him possession, which can only be done by ousting the defendant in execution of the possession which is demonstrative evidence that he had not before been ousted. It is therefore determined, that in order to maintain an action of covenant for breach of warranty, in cases of this kind, the plaintiff should aver, if not an eviction, that he had abandoned the possession of the land after it had been found subject to the execution, or that the land had been sold by virtue of the execution, and that he had been deprived of his possession thereof. The motion to set aside the non-suit is accordingly discharged.

5 **\*The Executors of Flournoy v. William Coxe, Defendant in Execution. James Daniel and Others, Claimants.**

In Wilkes Superior Court, July, 1831.

**Motion for New Trial—Effect Where Cause Depends upon Question of Fact—No Fraud Attributable to Jury.**—In a case which turned entirely upon matter of fact, where the evidence was contradictory and the special jury had decided, and there were no suspicions of fraud or corruption against the jury, the court refused to grant a new trial.

Robert Flournoy, in his lifetime, had obtained a judgment against William Coxe, who was at the time insolvent. The defendant William Coxe, Zachariah Coxe, and Ann Coxe whose father lived in Fauquier county in Virginia, emigrated to this State about thirty years ago. Ann Coxe was single at the time she emigrated, and remained single to the day of her death. When she came to this State she brought two negroes with her, and hired them out, and managed them as her own without control. When her father died in 1803, he had made a will and given the said negroes to the said Ann Coxe in the following words, viz.: "Item, I give to my daughter

Ann Coxe, two negroes, Hannah and Jarrard, and which ever should die first, Zachariah or Ann, the surviving one shall come in for the other's part, if they should have no lawful heir," &c. The sum of the testimony on the trial may be stated thus: That the negroes in dispute were originally the property of Abram Coxe of Fauquier county in the State of Virginia—that about the year 1798, his daughter, Ann Coxe, a single woman about 21 years of age, brought said negroes to the county of Wilkes in this State, and exercised the usual acts of ownership over them—that she never returned to Virginia during the life of her father, who died in the year 1803—that on the 17th May, 1805, Ann Coxe sold Hannah to Andrew Ruddle, and executed an absolute bill of sale with general warranty—that at the time of sale Ruddle was informed by William Coxe the defendant in *fi. fa.*, that Ann Coxe had only a life estate in said negro and Ruddle said he did not care, that he would as soon purchase the life estate as the absolute title. The witness who proved that Ruddle had this information, and that he said he would as soon buy the life estate as the absolute title, was Frances Wright, a daughter of the defendant in *fi. fa.*, and it was proven that she was in a state of mental derangement about the time said negro was sold. It was proven by Thomas Terrell, who drew the bill of sale, that it was matter of notoriety that Ann Coxe had only a life estate in said negro under her father's will. Mrs. Hillhouse, a witness, swore that she was well acquainted with Ann Coxe and always understood from her that she owned said slaves in her own right—that she never understood from Ann Coxe or from any one else, that her title to the negroes was limited to a mere life estate. The claimants were purchasers under Andrew Ruddle, the purchaser under Ann Coxe.

6 William Coxe the defendant in execution \*had purchased from Zachariah Coxe after the death of Ann, his title to the negroes in dispute. The special jury found the property not subject to the execution—that is, in favour of the claimants. Plaintiff in *fi. fa.* moved for a new trial on the following grounds.

1. The verdict was contrary to law.

2. The verdict was contrary to evidence.

**PER CURIAM.** The evidence in this case was contradictory; viz., that Ann Coxe had but a life estate in the slaves, and that she claimed and exercised the rights of absolute ownership over them. It was the province of the jury to weigh the evidence and decide on the facts. This they have done, and on due deliberation it is conceived, that the verdict of the special jury ought not to be disturbed. If the jury, in weighing the contradictory evidence, which they had an unquestionable right to do, have given the preponderance to that which supports the title of the claimants, the verdict cannot be said to be contrary to law. Let the rule to show cause why a new trial should not be granted be discharged.



**George R. Gilmer, Governor, &c. v. Banks  
Blackwell and Benjamin Bourne.**

In Elbert Superior Court, March Term, 1831.

**Recognizance—Judgment on—Necessity of Notice to Sureties.**—Judgment cannot be entered upon a recognizance, until the securities have been required by scire facias, to show cause why judgment should not be entered against them.

**Same—Same—Same—Failure to Give Notice—How Taken Advantage of.**—And if judgment be so entered, and execution issues, it may be taken advantage of, by affidavit of illegality.

**Same—Same—Same—English Practice.**—For the English practice on this subject, see 2 Comyn's Dig. by Day, p. 54, et seq. and the authorities there cited.

In this case the recognizance of the defendants had been forfeited at the preceding term: a judgment had been signed, and an execution had been issued and levied upon the property of the defendants, who made the affidavit of illegality, alleging that the execution had issued illegally against them because there had never issued a scire facias—that until they had been required by scire facias to shew cause why judgment should not be entered against them, no judgment could be legally entered and that any execution issued otherwise than upon judgment after scire facias was illegal and void. The facts alleged in the affidavit of illegality were admitted to be true.

**Decision.** There is no state law regulating the subject. It is however admitted that the practice of issuing scire facias has been general throughout the state. The attempt made in this case to subject the defendants to execution without first calling upon them to show cause why judgment should not be entered against them, is a departure from that practice. It is understood that in Great Britain executions issue in the Courts of Exchequer upon forfeited recognizances without first requiring the parties to show cause. But the Court of Exchequer in England is by a

7 statute not in force \*in this State, entitled to give relief in a summary manner in all cases where parties are entitled to it upon principles of justice. In this State no such authority has, by law, been given to the courts. If the practice of issuing execution upon forfeited recognizances is sustained, the defendants in execution may be compelled to pay the amount of the penalty in which they are bound, when in justice they ought to pay nothing. This would happen, 1st. Where the principal for whose appearance they were bound had died before the day at which he was bound to appear. 2dly. Where the principal was detained in jail by legal authority at a different place from that where he was bound to appear. 3dly. Where the principal has fallen into the hands of public enemies, and been detained by them in captivity. In each of these cases the bail would be entitled to their discharge upon payment of the costs

of the scire facias. But in each of these cases they would be bound absolutely for the penalty, if the practice of issuing execution upon the forfeiture was sustained. The affidavit of illegality must be sustained.

**The Heirs of Peter Early v. Adiel Sherwood.**

In Wilkes Superior Court, July, 1831.

**Husband and Wife—When Husband Entitled to Wife's Property.**—When a man marries a woman holding property in her own right, he is entitled to that property, if he reduce it to possession in the life time of the woman: But if he does not, and dies, the property survives to the wife and does not vest in his executor or administrator.

**Same—Effect Where Property Given to Wife during Coverture.**—And if property be given to the wife during coverture, it vests absolutely in the husband, and need not be by him reduced to possession in the life time of the wife. Tayl. 44; 1 Hayw. 275 and 278; 2 Conn. Rep. 564; 2 Conn. Rep. 143; 2 Day's Comyn. 209; 1 Bac. Abr. 290.

The facts in this case are as follows. Mr. Francis Smith died in the year 1814, and by will bequeathed his land to be equally divided between his children at the death of his wife. Peter Early had intermarried with a daughter of Francis Smith. After his death, Peter Early died, and his relict intermarried with Adiel Sherwood, the defendant in this motion. Subsequent to the intermarriage, Mrs. Smith, the tenant for life died, and Mrs. Sherwood had previously deceased. The defendant in this motion applied for and obtained a writ of partition, which has been returned executed. The plaintiffs in this motion, within the time prescribed by law came into court, and moved to set aside the return, on the ground that the defendant in this motion was not entitled to that part of the land which had been given to Mrs. Ann Early, but that they the heirs of Peter Early deceased are entitled to it.

**PER CURIAM.** When a man marries a woman holding property in her own right, the husband is entitled to that property, if he reduces it to possession in the lifetime of the wife; but if he does not reduce it to possession, and dies, such property shall survive to the wife, and shall not vest in the executor or administrator of the husband. But where property is given to the wife during the coverture, it vests absolutely in the husband, and need not be  
8 reduced to possession \*by him in the lifetime of his wife. In the case under consideration, the property was bequeathed to Mrs. Ann Early, during the coverture, it therefore vested in her husband, and after his death in his heirs, of whom Mrs. Early was one. Adiel Sherwood, the defendant in this motion, is entitled to that part of the land bequeathed to which Mrs. Sherwood was entitled as one of the heirs of Peter Early deceased, and not to the whole of the land bequeathed, which vested in Peter Early in his life-

time; although the life estate created by the will had not expired at the time of Peter Early's death.

Motion to set aside the return, sustained.

**Middleton Pool, Appellant, v. Wm. Barnett, Respondent.**

In Washington Superior Court, Spring Term, 1831.

**Appeals from One Special Jury to Another—When the Right Exists.**—In this State the right of appeal from a special jury, to a hearing before another special jury, exists in Equity causes.

The question presented for adjudication in this case is the following: Does the right of appeal from a special jury, to a hearing before another special jury, exist in equity causes in Georgia?

By a majority of the Judges. The correct solution of this question depends upon the 5th section of the 4th article of the Constitution of 1798, Prin. Dig. 558, and the 16th sec. of the Judiciary act of 1792, Watk. Dig. 480, and section 8th of the Judiciary act of 1797, Watk. Dig. 632. It is readily admitted with Judge Law, who dissents from this opinion, that the right of appeal from the verdict of a special Jury in equity causes is not authorized by the Judiciary act of 1799. But if that act is taken as the sole rule of conduct in equity causes, how has it happened that bills in Equity are submitted to the decision of a special jury? There is no provision which authorizes that practice in that act;

**\*Equity Causes—Trial by Jury.**—In *Mounce v. Byars*, 11 Ga. 187, it is said, by NESBIT, J.: "Although the Act of '97 is repealed by this Act of '99; yet, its provision as to the powers of a jury, in equity causes, is saved by the constitution of '98. I mean to say, that if the Act of '99 be admitted to have repealed the Act of '97, in relation to the trial of causes in equity, by a jury, and thereby abrogated the trial by jury in equity, that, *pro tanto*, it is void, because repugnant to the constitution of '98. That constitution declares, that 'trial by jury, as heretofore used in this state, shall be inviolate.' \*Now, the Act of 1797, which re-enacted the Act of '92, was in force when the constitution of '98 was adopted. By the Acts of '92 and '97, the trial by jury was used in this state in equity causes, and it was used as prescribed in those acts. Any law, therefore, passed subsequent to the constitution, which repealed those acts, and defeated the usage of trial by jury, which they prescribed, is void. Thus it is, that the trial by jury, in equity causes, is derived from the Acts of '92 and '97. *Hargraves v. Lewis*, 7 Ga. R. 125; *Dudley's R.* 8; *Cobb's New Dig.* 467, 1143." See also, note to *Bolton v. Flournoy*, R. M. Charl. 125, in original edition where the *quære* in the headnote to the above mentioned case is answered.

But in *McGowan v. Jones*, R. M. Charl. 184, the first headnote is to the effect that, although the practice in Georgia is to associate a special jury with the judge of the superior court, in the determination of chancery causes, there is no law which imposes the necessity of such association.

yet special juries throughout the State decide all cases in Equity. This practice must have some legal foundation, or must have been introduced by judicial caprice. If the practice is to be traced to the latter origin, how has it happened, that it has been and continues to be uniform throughout the state? The universality of the trial of cases in Equity by special juries is at least a presumption in favor of its legality. The right of appeal upon bills in Equity is admitted in six out of the eight circuits, existing in this State. In two circuits only is the right refused. Both practices cannot be right, and it is important that the question be settled, that the administration of the law may be uniform throughout the State. That the practice of granting such appeals has not been the result of judicial caprice, may be safely concluded by all who were acquainted

9 \*with the character of the eminent jurists who then flourished in the middle and western circuits, where that practice is known to have been contemporaneous with the judiciary act of 1799. That act was manifestly drawn with great care, and in form is certainly an improvement upon all the preceding judiciary acts. It is understood to have been drawn by the late Judge Stith, and was doubtless intended to contain every thing necessary to the complete regulation of the judiciary department. Like all other human performances it has been found defective; for it has made no provision for the decision of bills in equity. If that act is now to be considered as the sole rule of conduct for the courts of this state, there is an end to the Equity jurisdiction of the Superior Courts, unless in defiance of that act, a practice supposed by some to be the result of judicial caprice is to be continued. But the Equity jurisdiction of the Superior Courts is believed to be derived from a higher source than the Judiciary act of 1799. The trial of bills in Equity by special juries is derived immediately from the 5th section of the 4th article of the constitution of 1798, (a) which declares that "Trial by jury, as heretofore used in this State shall remain inviolate." The question then to be solved is, What was the trial by jury theretofore used in this State? By referring to the judiciary act then in force, it will be ascertained what was the trial by jury declared by the constitution to be inviolate. If the Judiciary act of 1797, which was then in force made no change in the mode of trial by jury in the preceding judiciary acts, or in the last act upon that subject, no ambiguity can rest upon the point in discussion. The 16th sec. of the judiciary act of 1792, (b) vests the Superior Court with Equity powers in certain cases, until the case is set down for trial, which shall then be submitted with the evidence to a special jury, who shall give their verdict on the same, but if either party shall be dissatis-

(a) Prin. Dig. 558.

(b) Watk. Dig. 480.



fied with such verdict, an appeal may be entered in the clerk's office within ten days after trial, when a hearing of such cause shall again be had before another special jury, and such trial shall be final and conclusive. The act of 1792 was repealed by the act of 1797, which, however, contained the same provision in the same words as the act of 1792. It is by virtue of the two last recited acts, that bills in Equity are submitted to the verdict of a special jury, and if submitted to a special jury the right of appeal from such verdict is as plainly given as the English language could give it. This was the trial by jury as heretofore used, which has been adopted by the 5th sec. of the 4th article of the Constitution of 1798, and is of equal authority with the Constitution itself.

If this opinion be correct, and it is confidently believed to be so; it is unnecessary to examine the reasons and inferences of Judge Law upon the act of 1799. For admitting of the sake of argument that it was the intention of the judiciary  
 10 \*act of 1799, to take away the right of appeal upon bills in equity, it could not do it, because that right was secured by the Constitution of 1798. But it is necessary to remark that the act itself discovers no such intention; for that act does not direct bills in Equity to be tried by special juries, and therefore cannot be supposed to have intended to take away the right of appeal, where it had not directed a trial. It has been urged (not indeed by Judge Law) that the acts of 1792 and 1797, being repealed, could not have any application to the question. If there was any force in this it could apply only to the act of 1792, for the act of 1797 was not only unrepealed at the adoption of the Constitution, but was the only act in force upon that subject at the time of its adoption. But the objection is entitled to no weight in relation to the act of 1792. The Constitution says, "Trial by jury as heretofore used shall remain inviolate." Does not the act of 1792, show what was the mode of trial by jury used, before the adoption of the Constitution as clearly after its repeal as before it? If the Constitution had said by jury as now used, then resort would only have been had to the judiciary act of 1797; but when the word "heretofore" was used, it became proper to look behind the act of 1797, to see what was the mode of trial by jury in force before the act of that date.

Judge Law appears to be somewhat embarrassed with the idea which he has attached to the word appeal. It is generally true (as he says) that the idea of an appeal, is the rehearing of a cause before another and higher tribunal. This is the idea attached to appeals in the legislation of England, and it was the idea attached to it in the legislation of this State anterior to the act of 1792. But it will be readily admitted that the legislature was competent to call its own acts by such terms as to it seemed proper, and that it had a right to apply the term appeal, as it has

been applied in the acts of 1792 and 1797, and that the constitution had a right to adopt this new application as it has done. The term appeal as applied in these acts, signifies only a right of rehearing, before the same Court, with a different special jury. The Judge is also at some difficulty in finding a satisfactory reason for such rehearing. If the law itself is clear, it is enough. But if it is necessary to give a reason for the law, it is believed a satisfactory one can be assigned. In the case of ordinary appeals from verdicts at common law, the principal advantage in the estimation of the most skillful practitioners, is the ascertainment of the evidence of the adverse party and the discovery of the defects of the evidence produced by himself. The discovery made by the first trial enables both parties to come to the final trial with all the evidence applicable to the case properly arranged so as to establish the true merits of the controversy. If this is not the fact why are  
 11 there so few appeals \*by consent?

If the whole or even the principal reliance was in the special jury, trials before a petit jury would become obsolete. Every day's experience proves that trials before petit juries are constantly resorted to, and it must be for the reason just given. If a first trial be desirable in common law cases which are generally simple and by no means complicated, how much more desirable is such a trial in bills in equity which are almost always complicated, consisting of questions of account and the settlement of intestate estates, involving the management of those estates for a series of years, embracing returns of the hire of negroes and the rent of plantations annually. Whoever witnessed an investigation of a bill in equity for settling a large estate in the hands of an executor or administrator after a lapse of fifteen and twenty years, will easily comprehend the advantages of a first trial, of a first exhibition of evidence and documents, preparatory to a final adjustment of a large intestate estate.

JUDGE LAW, dissentient, delivered the following opinion:

I hold that the right of appeal from the verdict of a special jury to a hearing before another special jury, does not exist in Equity causes in Georgia; and for the following reasons.

1. Because the right is not expressly given by the existing laws of the State.

2. By a just construction of our judiciary act of 1799, such right cannot be derived by implication from any of its provisions.

3. The trial upon such appeal, being by a tribunal co-equal and the same in character, power and intelligence with that by which the first verdict was rendered, this right of appeal would be but a right to a new trial in all cases at the will of the party; and which by the constitution of 1798, and the judiciary act of 1799, the court has the power to grant, upon proper and legal grounds.

1. The first act authorizing an appeal from the verdict of a special jury in an equity cause, is the act passed in 1792, regulating the judiciary. This act was repealed by the act of 1797, which declares in sec. 86, "That all former acts for regulating the judiciary department of this State, be and they are hereby repealed." The act of 1797, however, literally re-enacts the provisions of the act of 1792, on this subject, viz. sec. 8th of act 1797. "The Superior Court shall in all cases respecting the discovering the transactions between co-partners, &c. be competent to sustain a suit by bill and proceedings therein, until the sitting down of the cause for trial; such Superior Court shall then submit the merits of the suit with the evidence thereon, &c. to a special jury who shall give their verdict on the same; but if either party shall be dissatisfied with such verdict an appeal may be entered in the clerk's office within ten days after trial, when a hearing of such cause shall again be had before

12 another special jury \*and such trial shall be final and conclusive." By the judiciary act now in force, passed in 1799, sec. 61, it is declared "That the act entitled 'an act to revise and amend the judiciary system of this State' passed at Louisville on the 9th. Feb. 1797, from the 1st to the 67th clause inclusive, be and the same is hereby repealed." We are thus brought down to the act of 1799, to which we must look for this right, if it exist, seeing that the previous acts by which it was conferred are repealed. It is believed that no such right is expressly given by the act of 1799, and if it be derived from that act, it must be by the construction which shall be given to the 26th or 53d sections; and this leads us,

2. To inquire whether this 26th section can be extended to embrace Equity causes. I hold the opinion that this section is alone applicable to proceedings at common law. This I think is abundantly manifest from the whole tenor of the act, which has exclusive reference to proceedings at common law until we arrive at the 53d section, where the special and equitable powers of the Superior Courts are pointed out and defined. But statutes "in pari materia," although they may have been repealed, furnish a just guide in the interpretation of a statute. To show that the legislature did not consider this section as embracing cases in equity it is only necessary to refer to the act of 1797, sec. 37, where we find a provision answering to the 26th sec. of the statute of 1799, and yet we have the special enactment as contained in the 8th section on the subject of appeals in Equity cases.

I cannot perceive either how it is possible to derive this right from the 53d section of the act of 1799. That section declares "That the Superior Courts shall exercise the powers of a Court of Equity in all cases where a common law remedy is not adequate, &c. and the proceedings in all such cases shall be by bill and such other proceedings as are usual in such cases until

the setting down of the cause for trial. If it be conceded as some have supposed, that at this stage, the proceedings usual in Chancery ceased, and the trial was to be had by a jury as in common law cases, still there can be no pretence for the exercise of this right of appeal; an appeal from one to another coordinate and coequal tribunal being an exception, and not sanctioned by the usual course of proceedings at common law. The term appeal denotes the removal of a cause from an Inferior Court or Judge to a Superior Court or higher tribunal—from a petit jury to a more enlightened special jury—but the idea of an appeal from one to the same tribunal is unknown to our laws except as herein before referred to and which have been shown to be expressly repealed. But it will, I think, more fully appear by the following suggestions under the third ground assumed, that this right cannot be implied from that section.

3. The constitution of 1789, art. 3, sec. 2, directs that "the \*general assembly shall point out the mode of correcting errors and appeals, which shall extend as far as to empower the Judges to direct a new trial by a jury within the county where the action originated, which shall be final." For the purpose of carrying this provision of the constitution of '89, into effect, the legislature anterior to the adoption of the constitution of 1798, had done no more than to authorize an appeal from a verdict rendered in the Superior Court, which appeal it is declared "shall be admitted and a new trial granted and tried the next term by a special jury." By the construction given to the constitution it seems to have been considered that the judges had no power to grant a new trial after the trial of the appeal, but in fact that the new trial intended was the trial upon the appeal, which was final. That such was the fact will be more apparent by referring to the provisos contained in the repealing section of the act of 1799—by which the act of 1797 is continued in force so far as relates to proceedings which originated under it; and the right of appeal according to the provisions of said act, saved, from all verdicts rendered in any of those cases which originated under the act of 1797, but which had been tried after the signing the constitution of 1798; and a further saving in relation to cases returned in any of the said courts prior to the constitution of 1798, which it is declared shall be tried and appeals allowed and tried according to the act of 1797. Then follows this further proviso—"That nothing herein contained shall prevent any person from applying for a new trial if he shall think proper, which the judges, or one of them, shall grant if the same can be done on proper and legal grounds as in cases arising under this act. If the judges had the power of granting a new trial in their discretion anterior to the constitution of 1798, and act of 1799, whence the necessity of this proviso, and why the peculiar



phraseology 'on proper and legal grounds' as in cases arising under this act." It seems to me very clear that the legislature considered the power to grant new trials after the trial upon the appeal as derived from the constitution of 1798; which declares in the 1st sec. 3d art. that the judges shall have power to order new trials on proper and legal grounds, and which is followed by the act of '99 which declares in the 55th section, that the Superior Courts shall have power to grant new trials in any cause depending in any of the said Superior Courts, in such manner and under such rules and regulations as they may establish, and according to law and the usages and customs of courts. And in the 57th section it is enacted "that in any case which has arisen since the signing the present constitution, or which may hereafter arise, of a verdict of a special jury being given contrary to evidence and the principles of justice and equity, it shall and may be lawful for the judge presiding, to grant

14 a new \*trial before another special jury, in the manner prescribed by this act. If the legislature conceived that the judges had the right to grant new trials after the verdict of a special jury, prior to the constitution of '98, it is not easy to comprehend the reason for the limitation in the aforesaid section to cases arising subsequently to the signing that constitution. Thus then the constitution of '89, makes the trial upon the appeal final. The legislature have so understood it, and have no where authorized a new trial after the verdict of a special jury upon the appeal. The constitution of '98 does give the judges the power of granting new trials after the verdict of a special jury, and the legislature have limited the exercise of that right to cases arising since the adoption of that constitution. It was, I apprehend, under this view of the subject that the apparent necessity of allowing an appeal in an equity cause, presented itself to the legislature prior to the constitution of '98. The propriety of an appeal from the verdict of a petit jury to a special jury, composed of the most respectable and enlightened individuals in the county, carrying with them to the trial, superior intelligence and greater capacity for doing justice, and less liability to prejudice and influence, is enforced by considerations which all feel and understand; but the allowance of an appeal from one special jury to another, equal in all respects in legal contemplation, is simply to grant a new trial in all cases at the will of the party. But the right to a new trial is put by the constitution of '98 on its proper ground, and is predicated on some error committed, or something unavoidably omitted, by which substantial justice has not been done. Hence it is, that whilst the 8th section of the act of '97 is expressly repealed by the act of '99 we find no express reenactment upon this subject in that act, nor any thing which in my judgment can at all authorize the conclusion, that it was intended to be embraced in any of its

provisions. On the contrary, for the reasons which have been assigned, I think it clear that the legislature did intend wholly to repeal this provision of the act of '97, and to leave parties, if injustice had been done, to their plain and obvious remedy by application for rehearing. In the eastern circuit there is no appeal in an equity cause. When this practice commenced I do not know. The reasons for it do not appear—there is nothing upon our minutes on the subject—but it is certain that the Judge before whom the question came must have arrived at the conclusion here stated as the practice shows.

# 15 \*State v. Alton H. Pemberton and Jacob C. Bugg.

In Richmond Superior Court, June Term, 1831.

**Lien for Taxes\*—Fl. Fa.—Priority.**—In a contest for money in the hands of the sheriff, between an execution for taxes, and fl. fas. in favor of individuals of older date, the court decided, that the former should be first satisfied: And the same decision would have been made, if the money had been raised by the individual execution.

The sheriff in answer to this rule returns that he has no money in his hands raised from the property of Jacob C. Bugg the defendant in one of the executions; but that he has money raised from the property of Alton H. Pemberton, which is claimed by older executions at the suit of individuals, and he prays for the order and direction of the court in paying it out. In the opinion of the court the dates of the contending claims, are not material in determining them. If the collectors' executions be considered liens in the hands of the sheriff, upon money raised from the sale of the defendant's property, then the 14th section of the tax act of 1804, must control the question; for it is there declared that "The taxes imposed by this act shall be preferred to all securities and incumbrances whatever." (a) The tax due is here considered a lien, and the 11th sec. of the same act shows it to be not upon the specific thing taxed, but upon the property generally of the taxable. "All persons whatever who are possessed of any land or slaves within this State, in their own right, or in the right of any other person, or in any way liable to pay tax by virtue of this act, shall pay, &c." "And if on the said first day of February, any person or persons shall be

\*Taxes—Liens—When Commences.—A lien for taxes takes effect when, by law, in each and every year the property is made taxable—that is to say, on the 1st of January. It is the imposition of the tax by law which appropriates, when needs be, the property of the citizen to the public use. The lien, therefore, does not commence with the return of the property or with the issuing of execution to enforce payment. *Gledney v. Deavors*, 8 Ga. 483, citing *State v. Pemberton, Dudley*, 15.

(a) Prin. Dig. 496, et seq.

in default, the collector of the county where such default shall happen, shall immediately proceed against such defaulter by distress and sale of goods and chattels, if any to be found, otherwise of the lands of such defaulter, or so much thereof as will pay the taxes due with costs." Here is then manifestly a general lien upon all the property real and personal of the taxable, and the manner clearly pointed out, by which satisfaction may be had, namely, by distress and sale. And by the 30th section it is made "the duty of the sheriff in each county to receive from the tax collector therein all executions that may be tendered him for taxes, and to levy and collect the same, and to make due returns to the collectors, &c." It then appears, that a debt due the State for taxes forms a general lien, equivalent to a judgment, upon all the property of the taxable, superior to every other incumbrance; that it may be satisfied by distress and sale, under execution to be issued by the collector; and that the Sheriff is bound to levy and collect all executions placed in his hands by the collector by distress and sale of the defendant's property. As between the State and individual judgment creditors, the liens being equally general, their rights to the money must be considered \*as if both were judgment creditors, and the State becomes entitled to priority of payment under the 14th section of the tax act, even if the contest were with the individual creditor whose execution had raised the money; which however does not appear to be the case here. This appears to be a sum of money raised by the sheriff from the sale of defendant's property, which is notified to retain for the satisfaction of two executions against the defendant, one at the suit of the State, the other of an individual, and both of which he is bound to execute by levy and sale. But why sell with the money of defendant already in hand applicable to the satisfaction of the executions, which immediately attach to the money and become executed pro tanto, or fully, according to the amount of money.

Let the tax executions be first satisfied, and any money which may remain be then paid to individual judgment creditors, according to priority.

### Thos. S. Martin, v. Administrator of I. W. Fyffe.

In Richmond Superior Court, June Term, 1831

**Evidence—When Books of Merchant Admissible.\*—A merchant's and shop-keeper's books are evidence**

\***Evidence—Account Books—Admissibility.**—In *Ganahl v. Shore*, 24 Ga. 17, it is held that, books of accounts in all occupations which require books to be kept, are admissible in evidence to prove the usual subjects of book charges in such business. And in the dissenting opinion of McDONALD, J., it is said: "I consider that question, however, as settled by the case of *Taylor v. Tucker*, 1 Kelly, 231. The

to prove the sale and delivery of goods, when it is shown that the books offered are of original entry—are in his hand writing—that he keeps fair books—has had dealings with the person charged, and that he kept no clerk:

**Same—When Books Kept by Clerk Admissible.**—Or if he kept a clerk who is dead.

**Same—Introduction of Books of Merchant—Right of Jury to Examine.**—When books are introduced, they are open to remark from the court, and to the strictest scrutiny by the jury, and if there be the least suspicion of fraud or unfair dealing they will be disregarded.

**Pleading—General Declaration for Merchandise—Bill of Parcels.**—A general declaration for goods, wares and merchandize, without a bill of parcels, is bad.

**Same—Same—Necessity for Proof of Particular Goods.**—And where the account sued on was a single item charged in the books, thus:—"Bills receivable to merchandize," and a verdict had been rendered for plaintiff, the court granted a new trial, declaring that the entry was too general to prove the sale and delivery of any particular goods, and although defendant had waived the bill of parcels, plaintiff must prove particular goods.

This attachment was sued out during the life of the intestate, and has been revived against his administrator. The declaration contains two counts, one upon a promissory note, the other for goods, wares, and merchandize, sold and delivered. No evidence was before the jury upon the first count, plaintiff having entirely failed in proving the note, which was denied on oath by defendant. Upon the second count the only evidence of sale and delivery offered, was plaintiff's book of original entries which was objected to by defendant's counsel, because at the time the entry was made, which was in plaintiff's own hand writing, he kept two clerks, both of whom wrote in his books. The objection was overruled, it being in proof that the clerks were dead. A merchant's and shop-keeper's books are, by constant practice, received as evidence to prove the sale and delivery of goods, when it is shown that the books offered are of original entry, are in his

court held, in that case, that the books of a party kept by himself, and, in that instance much less, an account kept on a loose piece of paper, by the party himself, with the additional proof that the party kept correct accounts, and that that was the only account kept by him, was sufficient evidence to entitle the party to recover an account for lumber sold and delivered. The court there considered it a rule, *ex necessitate*, to accommodate small dealers who are unable to keep clerks.

"Long before the establishment of this court, the judges of the superior courts adopted the same rule. A case of the sort decided in 1831, twelve years before the Act of 1843, *Martin v. the Adm'r of Fyffe*, is reported in *Dudley*, 16. The judge before whom that cause was tried, remarks, that merchant's and shop-keeper's books are, by constant practice, received as evidence to prove the sale and delivery of goods, when it is shown that the books offered are of original entry, are in his hand-writing, that he keeps fair books, had had dealings with the person charged, and that he kept no clerk."



hand writing, that he keeps fair books, has had dealings with the person charged, and that he kept no clerk. In this case every preliminary proof was made but the last, which could not be made, as in fact the plaintiff did keep clerks. This sort of proof should be received and weighed with great caution, as it is an exception from a fundamental and very salutary rule of evidence, that a man shall not be permitted to

17 \*make testimony for himself: but it is an exception our courts have found it necessary to make, for the cause of truth and justice, and for the relief of those among us, (and they are not a few,) whose business obliges them to extend credit, but who cannot afford to keep clerks. Every guard should be thrown around a cause necessary to secure it from being prejudiced by such testimony framed to suit an occasion; hence the preliminary proofs always required. Had this plaintiff kept no clerks, his book would have been received without objection: had the entry been in the handwriting of one of the clerks, he being dead, the book might unquestionably have been received; but the entry happens to be in the plaintiff's own hand writing, and the only persons who may be supposed to have any knowledge of the affair are dead. Upon what principle does the case of the plaintiffs differ from that of one who kept no clerk? They are both alike dependent on their books for proof of sale and delivery, as they contain the only evidence of it. The testimony is only admitted in any case, as matter of necessity, arising from the want of better; and there is no particular merit in not keeping a clerk, nor particular fault in making an entry in one's own books. Whenever books are received they are open to remark from the court, and are subject to the strictest scrutiny of the jury, and if there be the least suspicion of fraud or unfair dealing, they will be disregarded. In this case had the clerks been in life, they should have been examined; but being dead, the only evidence left the plaintiff was his book of original entries, and there can be no danger in extending the exception from the general rule to a case such as this. The principal difficulty that the court finds arises out of the entry itself, which is simply, "Bills receivable to merchandize," and this additional entry, "Rec'd Isaac W. Fyffe's note for goods sold him this day, at 60 days, for \$703.81."

By our judiciary act, a plaintiff is required, plainly, fully and distinctly, to set forth his cause of action. The count in the declaration here contains but the general allegation, for goods, wares and merchandize sold and delivered, and is without a bill of parcels; which defect would have been fatal if insisted on according to the rule of court, but was waived by the defendant's consenting to go to trial without demanding it. Yet, though waived, the necessity of proving the particular goods sold was not dispensed with. The entry is too general, of itself, to prove the sale and delivery of any particular goods. From

this it cannot be known what one article, among the almost infinite variety of articles classed under the head of merchandize, was sold and delivered to the defendant; nor whether the price is just and reasonable, or unfair and exorbitant. To take the whole case, declaration and proof together, and it is impossible the defendant can be apprized, for what he is sued, or know 18 against what he is to \*defend. And besides the entry itself showed an outstanding security. There was an objection made to any proof whatever under this count because the attachment was sued out upon the note only. This objection was overruled, it appearing that before declaration filed, the attachment had been dissolved by defendant's giving special bail, and being in court might well be thus declared against. What effect this may have on the bail is a distinct question. The court has not changed the opinion it then expressed, but the point is open for argument, should the defendant in the future progress of the cause think proper to urge it.

As the court is not satisfied with the verdict for the reasons assigned in reference to the proof derivable from the entry in plaintiff's book, and believing as it does that justice requires a new trial; it is ordered that the verdict be set aside, and a new trial granted.

#### Luther Roll v. Edward J. Black.

In Richmond Superior Court, June Term, 1831.

**Trover—Insufficiency of Proof—Case at Bar.**—A. sold B. a carriage and harness, for which he gave him a bill of sale; the property was not delivered at the time of sale, but A. promised to deliver it, and in pursuance of his promise carried it to the river with a view to put it on a boat to be carried to Augusta and delivered to B.; which however was never done, nor his promise further complied with: B. called on him for the delivery of the property which A. refused: B. knew where the property was, and might have taken it when he pleased. The jury having found the foregoing facts to be true, and rendered a verdict for A.: The court refused to grant a new trial, holding that there was not such an actual or constructive conversion by A. as to enable B. to maintain trover against him.

At the trial, plaintiff offered a bill of sale under the hand and seal of defendant conveying to him the carriage and harness which are the subject of this suit. It was in proof that the carriage was not delivered by the defendant at the time of sale, but that he undertook and promised to deliver it; that in pursuance of such promise, he had it removed to Stone's landing on the Savannah River, with a view of placing it on a boat to be carried to Augusta where it was to be delivered to the plaintiff, which however was never done by him or his undertaking further complied with; that the plaintiff called upon the defendant, and demanded the delivery of the carriage,

which he refused. There was proof that the plaintiff knew where the carriage was, and that he might have taken possession of it at any time he had chosen, no impediment whatever being interposed by the defendant.

Upon these facts a legal question arises upon which the case entirely depends. It is this. Does the conduct of the defendant, amount to either an actual or constructive conversion of the carriage to his own use? If it do, there is ample evidence to entitle the plaintiff to a recovery, and a new trial should be granted. A conversion is a wrong done, by which the wrong doer deprives another of his goods altogether, or for a time only. To maintain an action for this wrong, the plaintiff must first prove his title to the goods, which is done in this case by the bill of sale; and next the

19 \*conversion which may be done either directly and positively or presumptively; that is, he must prove an actual conversion, or those facts from which it may be presumed. It is essential to a conversion that there be some tortious act. A mere nonfeasance is not sufficient. *Bromley v. Coxwell*, 2 B. & P. 488. In the case before us it is not pretended there was a tortious taking. The carriage was rightfully in defendant's possession who agreed to perfect the sale of it to the plaintiff, or rather, in pursuance of such sale to deliver it to him at Augusta. Nor is it pretended that there was an application of it to the use of the defendant in any manner whatever. But the plaintiff's counsel in argument considered the defendant as bailee of the carriage, from the time of the delivery of the bill of sale, and contended, that his removing of it to the landing and abandonment of it there was an actual conversion. If we consider the defendant as bailee of the carriage, his removal of it to the landing was in part performance of his undertaking to deliver it at Augusta and was in conformity with the object of the bailment and not contrary to it. The leaving it there was carelessness, or negligence, or at the worst, an abuse of the carriage, neither of which would amount to a conversion of it by him as bailee. 3 *Starkie on Evidence*, 1493. Reliance however, was chiefly placed upon the demand and refusal as presumptive evidence of a conversion. This presumption may be rebutted, and is not conclusive upon the defendant. *Stet presumptio donec probetur in contrarium*. And where it is apparent from other circumstances that there was no conversion, the evidence arising from a demand and refusal fails. 2 *Mod.* 245. In *trover* against a carrier, denial is no evidence of a conversion, if the thing appear to be really lost through negligence. It is different, however, if he have it in his custody and refuse to deliver it. *Salk.* 655. It is admitted the carriage was not in defendant's possession at the time of the refusal to deliver it, and though not lost, was negligently or wilfully left by him at the landing. For this negligence, abuse of the carriage and

failure to deliver it, defendant may be made to respond to the plaintiff, but not in this form of action. It must be upon his contract, unless we entirely confound the forms of action, and break down the statutory rule of law that the allegations and proofs must agree. The jury were instructed to find for the plaintiff, if the proof showed any application of the carriage to the use of the defendant, or any disposition of it by him to purposes other than those which were the object of the bailment, considering him as bailee, or if at the demand the carriage were in his possession, and his refusal were a tortious resistance to the plaintiff's right to possess it. But if the refusal to deliver were but a violation of defendant's promise and undertaking, and they found no actual conversion, their verdict must be for the defendant. \*They found for the defendant, and though the justice of the case may be with the plaintiff on the merits, a different verdict could not have been rendered in this form of action without a violation of law. The motion is therefore refused.

#### Antoine Picquet for the Use of Stephen Reed v. the Administrator of John Cormick.

In Richmond Superior Court, June Term, 1831.

**Court of Limited Jurisdiction—Set-Off Allowed for More Than Jurisdictional Amount—Effect on Appeal.**—In a court whose jurisdiction is limited to a particular amount, a set-off cannot be pleaded which exceeds that amount: and if such a set-off be pleaded in an Inferior Court of limited jurisdiction, and allowed, and there be an appeal although the cause comes up in its totality, it comes up subject to the same limitation and where a verdict had been given for the balance of a set-off on appeal under such circumstances, the court ordered it to be set aside and granted a new trial.

The suit was commenced in the court of Common Pleas of the city of Augusta to recover the amount of a note within the jurisdiction of that court. The note was given by John Cormick to Benjamin Picquet and transferred by him to the plaintiff, after its maturity. At the time of the transfer, John Cormick held a note given by Benjamin Picquet, for a sum greatly beyond the jurisdiction of the court of Common Pleas, which note defendant has pleaded as a set-off, and the verdict being for him, the plaintiff moves for a new trial, on three grounds.

1. Because the set-off exceeded the jurisdiction of the court below, and therefore ought not to have been allowed in this court.
2. Because the court rejected the testimony of Benjamin Picquet, a witness offered by plaintiff.
3. Because the verdict was contrary to law and evidence.

The Court of Common Pleas, from which



the case is appealed, is one of limited jurisdiction. By the act of 19th December 1828, under which this suit was commenced, the court is restrained from taking jurisdiction of any suit or action, *ex contractu* wherein the principal debt, exceeds two hundred and fifty dollars. The act of 17th December 1818, which enlarged its jurisdiction, declares that "The said court shall have cognizance of all causes of a civil nature, not involving title to real estate within the limits of the corporation of said city, where the demand shall exceed twenty dollars, and shall not be above two hundred." The words of the act of 9th December 1822, still farther enlarging the jurisdiction of that court, are, that it "shall have cognizance and jurisdiction of all cases of a civil nature, &c. when the debt or demand shall be over thirty dollars, and not exceeding three hundred dollars." And the act of the 21st December 1829, gives the court "jurisdiction in all civil cases, &c. where the sum claimed or the demand of the plaintiff, shall not exceed the sum of three hundred dollars, exclusive \*of interest."

These several acts are cited to show that in each the debt or demand or sum claimed not only limits the amount for which judgment may be given, but also the debt or demand which it can consider, or of which it can take cognizance. But they all refer to the claim or demand of a plaintiff. Nothing is said in any of the acts, except that of 1818, relative to the manner of defence. That act authorizes the defendant, to appear and make his "defence, or answer in writing which shall plainly, fully, and distinctly set forth the cause of the defence, &c." and may contain as many several matters not inconsistent with each other, as may be deemed necessary for his defence. This will allow the plea of set-off, where there exist mutual debts; but it will not enlarge the jurisdiction of the court, and enable it to take cognizance of a debt or demand set up by a defendant, which it would not entertain for a plaintiff. The limitation must apply alike to each party, and the court can no more take cognizance of a cause for one, than for another where the pleadings themselves show the debt or demand not to be within its jurisdiction. The demand set up in this plea, exceeds twelve hundred dollars. By our law, a defendant pleading a set-off, may claim judgment for any balance found due to him. In this case, it is apparent that no judgment can be rendered to the holder of the note set-off, but the question of jurisdiction is the same, as if Benjamin Picquet were the plaintiff. If then the amount for which judgment may be given, and not the claim presented were to be considered as limiting the jurisdiction of the court, a defendant might have its judgment for double the amount to which its jurisdiction directly extends, first against the plaintiff's demand, and then for the balance. But the claim or demand, no matter by what party advanced must form the limit, upon the principle that courts of limited jurisdiction

cannot take cognizance of a cause unless the pleading shows it to be within its jurisdiction; and here the pleading not only does not show the matter upon which its judgment is asked, to be within, but actually shows it to be without its jurisdiction.

This court which now has cognizance of the cause, being subject to no such limitation, it is contended cannot be affected by any want of jurisdiction in the court from which it was appealed, the appeal having brought the cause up in its totality. What do we understand by the appeal bringing the cause up in its totality, an expression we so often hear in our courts? It is a strong expression, and well calculated to convey the idea intended, and to show the effect of an appeal under our judiciary, upon the rights of the parties. The cause comes up by appeal in its totality, that is, the appellate court may not only correct errors in matters of law, but may try all matters of fact; the appeal having set aside the verdict below, and placed the parties before the appellate court, "in the same condition in which they stood in the court below, before trial. Hence upon an appeal from the Inferior Court, either party may amend his pleadings to suit the facts of his case, or perform any other act preparatory to trial, in the same manner he might have done had the amendment been moved for there; or had the case been commenced in this court; and the reason is obvious. The appeal but sets aside the verdict, and transfers the cause from one court to another of general jurisdiction, and each concurrent. The rights of the parties are in no way altered, and the cause stands before the court in its totality, that is, entire, as it stood in the Inferior Court. The appeal from the Court of Common Pleas, also sets aside the verdict and transfers the cause to the Superior Court entirely as it stood in the court below without at all affecting the rights of the parties or varying them from what they were in that court. And it follows, that before this court can take cognizance of a cause upon an appeal from that, it must appear that that court had cognizance of it. If the principle then be correct, (and it is believed to be) that the Common Pleas being of limited jurisdiction, cannot take cognizance of a debt or demand, in a plea of set-off, over which it could not entertain jurisdiction if presented by a plaintiff in his declaration, then the verdict of the jury was wrong, as the set-off was the only evidence to warrant it. This being the opinion of the court, it is unnecessary to consider the other grounds.

Let the verdict be set aside and a new trial granted.

The Justices of The Inferior Court of Columbia, for the Use of Griffin Edmondson, v. The Administrators of John Wynn.

In Columbia Superior Court, September Term, 1831.  
Bonds—Effect Where Statute Says Bond Not Taken

**Pursuant to It Void.**—When the statute prescribing a bond declares all bonds not taken pursuant to it void, the statute must be strictly pursued as bonds which do not conform to it are void by express enactment.

**Same—Failure of Some Conditions to Follow Statute—Effect.**\*—When the statute contains no such provision, the conditions of bonds taken under it, which are contrary to the statute, are alone void; as also are onerous conditions beyond the statute.

**Same—Omission of Beneficial Condition to Obligor—Effect.**—The obligor can in no case be permitted to take advantage of the omission of conditions when the omission is beneficial to himself.

**Same—Omission of Onerous Conditions to Obligor—Effect—General and Particular Duties Enumerated by Statute—Failure of Bond to State Particular Duties—Effect.**—When the conditions omitted are onerous to the obligor, they shall not be permitted to charge him; but if a statute prescribing the condition of a bond to be given by an officer, agent, trustee or other person, enumerate particular duties, and also contain general words which include his whole duty, an obligor in a bond taken under such statute, is not discharged from his general obligation by an omission of such particular enumeration.

At the last term this cause came on for trial, and objections being taken to the bond on which the action is founded, it was rejected, and a nonsuit awarded, with leave to move to set it aside. That motion was made and argued, and having been considered by the court is allowed.

The action is on an administration bond, and the objection taken to it, is its want of conformity to the condition prescribed in the act of 18th December, 1792, "To protect the estates of orphans, and make provision for the poor." This non-conformity consists in the omission of the words "or knowledge," in that part of the prescribed condition which requires the administrator to "make a true and perfect inventory of all and singular the goods, chattels, 23 and credits of the \*said deceased which have or shall come to his

**\*Bonds—Effect Where Some of the Conditions Are Contrary to Statute.**—In *Central Bank v. Kendrick*, Dud. 68, it is said, on the subject of statutory bonds generally, there are *dicta* and some decisions, which go to the extent, that the insertion of conditions not authorized by law renders such bond void *in toto*. 3 Wash. C. C. Rep. 10. This point, however, does not occur in the present case. If it did, it might be well worth consideration whether it would better comport with reason and justice that the unauthorized conditions only, should be held void, citing *Justices, etc., v. Wynn*, Dud. 22.

Also in *Governor v. Williams*, Dud. 245, the court said the strictness required by the courts in this state in the construction of statutory bonds, has been much relaxed by the decision in *Justices, etc., v. Wynn*, Dud. 22. In that case it was held that where a bond taken under a statute which did not declare all bonds taken contrary to this provision void, such conditions as were contrary to the provision of the statute, and such only were void. In this case (*Governor v. Williams*) the only condition of the bond is contrary to the statute, and therefore void according to the decision referred to.

hands, possession, or knowledge." It had been decided in this court in the case of the *Justices of the Inferior Court of Columbia County, for Jones v. Richard Eubanks et al.*, that the omission was a fatal variance, rendering the bond absolutely void. Upon the authority of that case chiefly, and upon the maxim *stare decisis*, it was that the court rejected the bond. Not satisfied, however, with the decision, and aware of the importance of the question, it has been attentively examined, and the result is a conviction in the mind of the court that it erred, and that the bond should have been received.

The principle assumed in the case of the *Inferior Court of Columbia v. Eubanks*, is, that "Whenever a statute prescribes a particular mode or form, that particular form must be pursued, and no other will be valid." This principle rests for support upon the authority of the Constitutional Court of South Carolina, in the case of the *Commissioners of the Poor of Laurence District, v. Gaines and Others*, 1 S. C. Rep. 459, and the dissentient opinion of Marshall, C. J., in the case of *Speake and Others v. The United States*, 9 Cranch. 28.

In the first case, the court, after adverting to the particular facts of the case before it, lays down this broad principle, that "where an act of Assembly requires a thing to be done in a particular way, that way and that alone must be pursued." Without doubting the correctness of the judgment of the court in that case, there may be great doubt, whether the principle laid down be of as universal application as the unqualified terms used by the court would import. The bond upon which that adjudication was made was a bastardy bond, taken *colore officii* under a magistrate's warrant, and not only did not conform to the act, but was opposed to it. The obligee in the bond was different from the obligee designed by the act; the uses to which the money was to be applied were different from those prescribed in the act; and the condition of the bond was opposed to that prescribed. The court is there considered as determining, that the bond having been exacted from the obligor under color of office while he was in arrest under a magistrate's warrant, was void as a voluntary bond at common law, and was void as a statutory bond, for the reasons above stated.

The case of *Speake and Others v. The United States* was upon an embargo bond, the objection to which was, that it was for more than double the value of the vessel and cargo, for which sum only it should have been according to the act. In opposition to the opinion of the Court, the Chief Justice "was rather inclined to think that the plea was good, which stated that the bond was given for more than double the value of the vessel and cargo. If the bond was given for more than double that value, he thought it was void in law."

These are the authorities upon 24 which the court is called \*upon to set aside an administration bond, sol-



emly, deliberately, and voluntarily entered into, because of the omission of a comparatively unimportant part of the duties of an administrator, as set forth in the form of the condition given in the act. For these authorities the court has high respect; but looking to the consequences of the decision it is about to pronounce, not alone upon the interests of the present plaintiff, but of perhaps more than half of those interested in administration bonds throughout the State, it would yield to the force of the authorities only from a conviction that they contain incontrovertible evidence of the law; and that the principles they assert are strictly applicable to such a case as this before the court. The reason assigned for the rejection of the bond is that it is void in law. That it is void by common law is not pretended. The condition contains nothing *malum in se*, nothing immoral or of turpitude or crime, nothing against public policy or interest, nor any thing which the obligor might not most honestly and legally perform. If void in law then, it must be by reason of some statutory provision either general or special. No legislative enactment is known to the court which adopts the general principle that "whenever a statute prescribes the particular mode or form, that particular form must be pursued, and no other will be valid." Indeed it seems at variance with the spirit that usually pervades our legislation, which sacrifices form to substance rather than substance to form. Nor is there any thing in the act which prescribes the form of an administration bond, that specially declares all other bonds not in the given form to be void. On what then does the principle rest? It must be on the authority of courts, and is but a rule adopted by them to carry into effect the legislative will, as supposed to be manifested by declaring a form. And it is a rule too, by no means universally adopted by the courts. The Court of King's Bench in England do not adopt it as may be inferred from the case of Rogers and Reeves, 1 Term Rep. 418, in which a simple contract security entered into under 23 Hen. 6, ch. 9, which prescribes a bond is declared void, and the reason assigned is that "The statute in this case having prescribed the form of security and having declared that all others shall be void, the security must be in the particular form marked out by the statute. But it is held under this statute, thus strict, that though a sheriff may not depart from the prescribed form, a plaintiff may. The Supreme Court of the United States do not adopt it as we have seen in the case of Speake and Others against the United States. It is not the rule in the Supreme Judicial Court of Massachusetts, as we learn from the case of Morse v. Hodsdon and Others, 5 Mass. Rep. 314. That was an action upon a replevin bond not taken in conformity to the form prescribed, and is a case very apposite to the one under consideration. Parsons, Ch. J., in delivering the opinion of the court,

says, "Indeed we do not recognize any principle of the common law, by which the bond in this case is void at law. If it be void, it must be so in consequence of the statute directing the form of the writ of replevin. True it is, that the condition in this case is variant from the form there directed; but that statute does not prohibit the taking a bond of any other form, or declare a bond of any other form void." And in conclusion he adds, "But without regarding the inconveniences that may result to either party, the bond must be good, unless it be declared void by the common or statute law, and we know of no law by which it is made void."

The Supreme Court of New York do not adopt it. In the case of the supervisors of Allegany County v. Van Campen and Others, 3 Wend. 48, on a question, such as the present, which arose upon the legal effect of a want of conformity between the bond of the defendant, and that prescribed by the statute, that court says "There is nothing in the bond which is not prescribed in the statute, and it contains in substance every thing which the act requires. Its legal effect and operation is the same." And further "the act does not declare that a bond in any other form than that prescribed shall be void, as does the act concerning sheriffs, &c." The plea is therefore bad.

It is not the rule in the Courts of North Carolina. In the case of Williams v. Yarbrough, 2 Dev. N. C. Reports, 14, Henderson, J., says, "I am satisfied that almost all courts have gone too far in enforcing the rule, that a bond required by a statute must in all respects conform to the regulations of the statute, otherwise it is void, or that it cannot be treated as a statutory bond, but must be enforced, if at all, as a voluntary one. I perfectly agree that in all essential points, the statute must be observed—that no other or greater obligation must be imposed by the bond than the statute authorizes. But I think that he who is called upon to fulfil it cannot say the bond is void, or even without the statute, as to the obligations which the bond imposes, because there are other obligations which ought to have been imposed upon him, and which have been omitted. I cannot believe such to be a sound construction. Such objections to be sure might be made by him, for whose benefit such omitted obligations ought to have been inserted; but I think it by no means follows, that if the one party could reject it, the other is not bound by it." See also The Governor v. M'Afee, *ib.* 17. Nor is it even the case in the Court of Appeals of South Carolina. In the case of Bates et al. v. The Treasurer, recently decided in that Court, which was upon a sheriff's bond for \$12,000, the statute prescribing but \$7000, Judge O'Neal says, "It is supposed that the bond if not taken in exact conformity to the act, is void. But the act itself makes no such provision, and unless it does, the objection

\*is unavailing. For to render a bond

taken under a statute void, it must be so according to the express enactment, or must be intended to operate as a fraud by color of the law on the obligors, or must be intended as an evasion of the statute."

Then, as a rule for the ascertainment of the legislative will, resting upon the authority of courts, it fails of support, the highest courts, and those of greatest authority being opposed to it. Besides, no rule can be either a good or a safe one that has not for its object the advancement of justice; or is not calculated in its operation to produce that effect; and the object of this rule, if to be inferred from its tendency, is rather to defeat than to advance justice. Upon a careful examination of the subject, and a review of the authorities, the court feels disposed to adopt the following principles or rules.

1st. Where the statute prescribing a bond declares all bonds not taken pursuant to it void, the statute must be strictly pursued, as bonds which do not conform to it, are void by express enactment.

2d. Where the statute contains no such provision, the conditions of bonds taken under it which are contrary to the statute are alone void; as also are onerous conditions beyond the statute.

3d. The obligor can in no case be permitted to take advantage of the omission of conditions, where the omission is beneficial to himself.

4th. Where the conditions omitted are onerous to the obligor, they shall not be permitted to charge him; but if a statute prescribing the conditions of a bond to be given by an officer, agent, trustee or other person, enumerate particular duties, and also contain general words which include his whole duty, an obligor in a bond taken under such statute, is not discharged from his general obligation by an omission of such particular enumeration.

That part of the condition prescribed which is omitted in the bond under consideration, is comparatively unimportant. The administrator has bound himself to "make a true and perfect inventory of all and singular the goods, chattels, and credits of the deceased, which have or shall come to his hands or possession, or into the hands of any other person or persons for him," and the same "well and truly to administer according to law, and to make a just and true account of his actings and doings thereon when required, &c.

The omission is simply as to the inventory. He does not undertake to inventory the goods, chattels or credits of the deceased, which shall come to his 'knowledge.' But with that exception, the whole duties of an administrator have been undertaken; and it may be a question whether his undertaking to administer the estate of the intestate "which have or shall come to his hands or possession, or the  
27 hands \*or possession of any other person or persons for him" does not even embrace this exception. Whether it does or

not, however, the omission does not render the bond void.

Let the nonsuit be set aside, and the cause reinstated.

### The State v. Leah Simons.

In Richmond Superior Court, June Term, 1831.

**Criminal Cases—Jury Judges of Law and Fact—When New Trial Granted Though No Fraud Imputed.**—Though juries be constituted judges both of law and fact in criminal cases, and courts should be cautious about interfering with their verdicts in such cases, yet if juries mistake law and fact, or draw improper legal conclusions from given facts, to prevent injustice, and allow them an opportunity to correct errors, the court will sometimes grant a new trial even when there has been no corrupt or improper conduct on the part of the jurv.

The defendant being found guilty, moves for a new trial on several grounds. The first is that the cow, the subject of the alleged larceny, was claimed by her, as her own property, which claim repels the idea of felonious intention, necessary to make the taking a larceny.

This is the only ground on which the motion can rest; and as it is the province of the jury to decide upon the intention, it is exceedingly questionable whether the court should interfere with their verdict, in a case where there has been no improper conduct by the jury, and where there was some testimony from which a felonious intention might have been inferred.

The mind of the court has inclined strongly against the motion; and in now yielding to it, greatly apprehends that it allows too much latitude to the discretion and power of the court, in granting new trials, and makes a dangerous precedent. But there are peculiar circumstances in the case which seem not only to authorize, but to require the exercise of this power, which is given for the advancement of justice. The subject of the alleged larceny is a part of a considerable property to which the defendant and the prosecutor assert adverse claims. Each has endeavoured to obtain and keep possession of it, and the prosecutor has thus far prevailed. In their various contests, much very angry and bitter feeling has no doubt been excited, and each is still struggling for the property. Under these circumstances, and in this state of feeling the defendant may have gone, and possibly did go very unwarrantable lengths to get possession of the cow; yet if she acted from a belief that the cow was hers, and took her bona fide under such claim, however she may have trespassed upon the rights of the prosecutor, there could have been no felonious intention. And under a claim asserted thus privately and publicly, even here in this court, proof must be very clear that the taking was mala fide and in fraud of the rights of the prosecutor to



warrant a conviction; and here the proof was not very strong.

(a) It is said juries are the judges, in criminal cases both of \*law and fact, and that courts should be cautious of interfering with their verdicts. This is true, but as juries may mistake both law and fact, and may sometimes draw improper legal conclusions from given facts, it is the business of courts to prevent injustice being thereby done, and to allow them an opportunity of correcting any error into which they may have fallen, by granting a new trial. And as the court believes that in this case, thus doubtful as it considers it, a new trial is much the safer course, and one that justice prescribes.

It is ordered that the verdict be set aside, and a new trial awarded.

### The State v. Charles F. Sherbourne.

In Richmond Superior Court, June Term, 1831.

**New Trial—Gross Misconduct of Jury.**—If a jury be guilty of gross misconduct, the court will not hesitate to grant a new trial.

In this case the jury were selected and charged with the cause on Saturday evening, but the court not being able to finish the trial, it was suspended until Monday morning, and the jury left in their room under charge of a bailiff. During the recess of the court the bailiff, regardless of his duty, not only permitted the jury to separate, but allowed several individuals to enter the room and have free intercourse with them. For this cause the defendant moves for a new trial, and it must be allowed.

(b) The misconduct of the jury was very gross; and upon the present motion the court will not stop to inquire into the motives of the jury; or the intentions of those who commingled with them, or whether a word passed between the jury and others in reference to the cause in hand. The trial by jury must be preserved stainless and pure, and the precedent which a judgment on this verdict would furnish would be most dangerous.

Let the verdict be set aside, and a new trial granted.

### Beers, Boothe and St. John v. Thomas Crowell.

In Richmond Superior Court, June Term, 1831.

**Statute of Frauds—Goods, Wares and Merchandize—Treasury Checks.**—Treasury checks are neither goods, wares nor merchandize, within the meaning of the 17th sec. of the Statute of Frauds: And a motion to set aside a verdict and order a new trial on the ground that such checks were within the statute, was refused.

The action is to recover damages for the breach of a contract, by which the defend-

ant agreed to transfer to the plaintiff, \*within a limited time two United States Treasury checks on the Bank of the United States payable at Charleston, and to receive therefor notes of the Banks of the United States, and current notes of the Bank of Georgia in the proportion agreed on, and in amount equal to the checks.

The contract was fully proved as was the offer of the plaintiffs to comply with their part of it, and the refusal of the defendant; and the evidence showed considerable trouble and loss to have been incurred by the plaintiffs in their efforts to perform the contract, while it presented no circumstance of excuse for the defendant, who rested his defence entirely on the statute of Frauds, by the 17th section of which he contended that the contract was void.

Upon this single point the case turns; and the plaintiffs deny the contract to be within the statute. 1st. Because treasury checks are neither goods, wares nor merchandize within the meaning of the statute, and 2d. Because the contract is one of exchange and not of sale.

No case is shown, and it is believed none exists, in which bills of exchange, promissory notes or Bank checks have been adjudged either goods wares or merchandize within the meaning of the statute. In the case of *Colt v. Netterville*, 2 P. Wms. 307, the Lord Chancellor King refused to determine upon demurrer, whether shares in a joint stock company were comprehended under the words 'goods, wares and merchandize,' the judges of England having been divided, six and six upon this question. *Pickering v. Appleby*, Com. Rep. 354. And in a note to *Weightman v. Caldwell*, 4 Wheaton 89, in which the authorities upon the 17th sec. of the statute of frauds are collected, it is said this point appears never to have been settled: though there are some cases in Equity in which the court expressed an opinion that a sale of stocks was within the statute. *Prec. Chan.* 533.

If then there be a doubt whether stocks, forming so large and valuable a part of the personal property of the country as they do, and subject as they are to such frequent contracts and transfers, be within the statute, there can be, it should seem, little doubt but that bills, notes and checks which are mere securities, evidences of debt and choses in action are not included. They are certainly neither wares nor merchandize, and if included at all, it must be under the word 'goods' a term of very general signification, but which must be limited according to the use made of it and the subject to which it is applied. In the civil law it is a term that embraces all things over which a man may exercise private dominion, divided into goods movable and immovable. This cannot be the sense attached to the word in the statute, for other sections of it treat of immovables, this alone of movables. Nor can it be designed to include every class of movables, for

(a) Prin. Dig. 372.

(b) Prin. Dig. 588.

wares and merchandize are expressly mentioned, which \*latter embrace every thing usually rendered in commerce: besides, it seems limited to such things as are transferable by simple delivery. It is then a fair construction of the statute to limit the meaning of the word 'goods' to such personal property, other than wares and merchandize as are usually transferred by sale and delivery; and whatever else may be included, not to extend it to a chose in action, a right of authority to demand or receive money, a security or the evidence of debt.

It being the opinion of the court that the subject of this contract is not within the statute, it becomes unnecessary to consider the other point. But if there be any doubt upon the points of law raised in the case, the facts of it are so strong against the defendant, the court would not disturb the verdict. The motion is refused.

### Walter Dubois v. The City Council of Augusta.

In Richmond Superior Court, June Term, 1831.

**City Council—Right to Pass Laws for Welfare of City—Restriction.**—The city council of Augusta have the power to establish and enforce such by-laws, rules and ordinances respecting the harbor and wharves and every regulation that shall appear to them requisite for the security, welfare and convenience of the city; provided, they be not repugnant to the Constitution and laws of the land.

The plaintiff, who is captain of the steamboat John David Mongin, trading between Charleston and Augusta, having been fined by the city council for a violation of the forty fourth section of their general ordinance, by bringing his boat, which had come from Charleston then infected with smallpox, directly to the wharf at Augusta, without conforming to the regulations of the ordinance, complains of error in their proceedings, and assigns for error, 1st. That there was no order of the council requiring boats to submit to quarantine, and it was not shown that the disease in question was generally prevalent in Charleston. 2d. That the testimony received by the council was as to the bringing a diseased person to the city; an act not prohibited by the section, for the violation of which, plaintiff was tried. 3d. That the offence of which plaintiff was guilty, if guilty at all, was against the laws of the state, and therefore the city council had no jurisdiction of the matter, which was insisted on at the trial, but overruled by the council.

The section of the general ordinance in question directs that "Boats of all kinds which shall contain any damaged corn or putrid substance of any kind, or which shall come from any place infected with malignant or contagious disease, shall anchor in the middle of the River opposite to the lower platform below the bridge, and

there remain, with all the crew and passengers on board, until examined by the Hospital Physician, or such other physician as the council may appoint for that purpose."

31 \*The first ground of error seems to have been assumed from a misapprehension of the ordinance itself, which is of uniform and permanent operation, liable certainly to be modified, suspended or revoked, but until so suspended, modified or revoked, obligatory upon all persons bringing boats to the city without further notice than was given by its original promulgation.

Nor is the provision of the ordinance that the malignant or contagious disease sought to be guarded against should be "generally prevalent" at the place from which the boat may come. If a place be 'infected' with such disease, all boats coming from it are subject to the regulations of the ordinance, and of it, captains of boats are bound to take notice. The evidence before the council proved the existence of smallpox in Charleston at the departure of the John David Mongin, and of a case occurring on board the boat during her passage. Whether the case were known to the plaintiff to be smallpox, or believed by him to be measles, does not vary the question. Smallpox existed in Charleston whence the boat came, and a case even of measles occurring on board should have awakened the attention of the captain, and required from him a most careful and exact conformity to the quarantine regulations of the city, on his arrival. The safety of a whole community is not to be hazarded upon the speculations of any captain of a boat, upon the particular nature of a disease.

The 2d ground of error is so connected with, and involved in the 3d, that they cannot well be separated; for if the case were within the jurisdiction of the city council, evidence of smallpox on board the boat, was proper to prove the place from which she came infected with that disease, and that the diseased person came from Charleston. The return to the certiorari shows that the plaintiff was not tried or fined for bringing the patient into the city, but for bringing his boat from a place infected with a malignant or contagious disease directly to the wharf without conforming to the regulations of the ordinance. We will then examine whether the subject matter of this section be within the jurisdiction of the city council, or whether the violated regulations were such as the city council might legally make.

The charter of 1798 vests the council with full power to establish by-laws, rules and ordinances respecting the 'Harbor' and 'Wharves,' and "every other by-law or regulation that shall appear to them requisite and necessary for the security, welfare and convenience of the said city." Unless then there be something in the Constitution or laws of the state to render this grant of power void, there can be no doubt of the jurisdiction of the council over this matter,



or of the legality of the regulation; for it is not only included in the general grant, but is to be found among the subjects specially enumerated. \*The rule for ascertaining the extent of the council's jurisdiction which was adopted in the case of *O'Donnel v. The City Council* is believed to be the true one. That rule restrains the council to such matters, whether specially enumerated or included under general grant, as are indifferent in themselves, that is, such matters as are free from constitutional inhibition, and have not been the subject of general legislation: Or as it is expressed in the charter, are not 'repugnant to the Constitution or laws of the land.'

It is said the very matter of this section of the ordinance, has been the subject of legislation, and that the act for which the plaintiff was tried by the council, is prohibited by the 16th sec., 9th division of the penal code of 1817. If this were so, then according to the rule laid down, the section of the ordinance in question would be void, and every act of the council under it illegal: But upon an examination of the law and the ordinance, it will be seen that the acts prohibited by each are distinct. The law prohibits "any person coming into this state by land or water, from any place infected with a contagious disease, and a violation of quarantine regulations." The ordinance prescribing the duty of captains of boats in the state, coming from any place infected with contagious disease, whether that place be within or without the state; is altogether of municipal regulation, and prohibits the bringing their boats to the city, until they shall have first anchored at the place indicated, and been there examined by the Hospital Physician. That portion of the penal code cited, being the only law with which the ordinance seems to conflict, and the court being of opinion that between them there is no repugnancy whatever, sustains the legality of the ordinance, and of the proceedings of the city council in this case, under it.

It is ordered that the certiorari be dismissed, and that the plaintiff pay costs.

### The Inferior Court of Richmond County for *Christian Breithaupt v. John G. Barr* and Others.

In Richmond Superior Court, June Term, 1831.

**Action on Constable's Bond—Failure to Return Proceedings on Attachment—Liability—Instructions—Case at Bar.**—In an action on a constable's bond, the breach assigned was failure to advertise his levy and return his proceedings on an attachment, according to law, by which means the attachment was dismissed; the court charged the jury, if they believed the plaintiff failed in his attachment on account of the neglect of the constable, they ought to find against the constable; but if they believed that plaintiff voluntarily dismissed his attachment on account of the supposed irregu-

larity, that such dismissal effectually discharged defendant and his securities. The jury found for the constable, and the court refused to grant a new trial.

**Attachments—Effect Where Defendant Appears and Puts in Bail.**—If defendant in attachment appear and put in special bail, he dissolves the attachment, relieves his goods from its lien and it becomes thenceforth a proceeding in personam.

**Same—Effect Where Defendant Gives Bond to Appear.\***

—Attachment may also be dissolved by defendants giving bond with good security to appear, abide by, and perform the order or judgment of the court; and after attachment is dissolved, the proceeding need not be advertised.

This is an action of debt on a constable's bond, and the breach assigned is "that the said John G. Barr the constable having been required to levy an attachment against one Ramsay L. Mason, at the suit of Christian Breithaupt, did levy on five horses of the defendant Mason, but failed to advertise his levy and make return of his proceedings on said writ therewith to the court, according to its exigency." It

33 appeared in \*evidence that the attachment of *Breithaupt v. Mason* was levied by Barr on five horses which were replevied by Mason's giving bond, with what was then considered good security, to appear at the court to which the attachment was returnable "then and there to stand to and abide by such proceedings as the said court will require of said defendant." That the attachment with this bond were returned by Barr to court, but that he failed to endorse the levy on the attachment or to show by his return that it had been advertised at the court-house-door; and indeed there was proof that no advertisement was made, Barr having about that time left the county. It further appeared, that at the term to which the attachment was returnable, it was dismissed because Barr had "failed to enter his levy on said attachment or to make return of his proceedings, and had also failed to advertise the same according to law," and it was ordered that the plaintiff in attachment be "left to his remedy at law against the said constable and his securities." It was further ordered that the bond of the defendant in attachment which had been returned to court, "be likewise delivered to the plaintiff with liberty to sue thereon, should he think proper to do so." There was other testimony in relation to the value of the horses, but what has been

**\*Attachments—Bond for Appearance—Effect.**—In *Cole v. Reilly*, 28 Ga. 435, it is said, that the next argument was, that in *Breithaupt v. Barr*, *Dud.* 35, it was determined that a bond of this sort is satisfied by mere appearance of the defendant in attachment. But the point in that case was, whether the taking of such a bond dissolved the attachment, so as to relieve the officer from the duty of advertising the attachment. There was no question in the cause as to the import of the condition of the bond. And, of course, any general words that may have been used by the court are to be restricted to the facts of the case.

stated is all the evidence materially affecting the questions to be here considered.

The jury rendered a verdict for defendants, and the plaintiff moves for a new trial on several grounds. 1st, That the verdict is against evidence. 2d, That it is against law. 3d, That it is against equity and justice. 4th, For misdirection of the court upon matters of law. It is upon this last ground that the motion mainly rests; for if the instruction of the court were correct, the verdict was neither contrary to evidence, law, nor justice.

This supposed misdirection of the court was as to the effect of the order of the Superior Court dismissing the attachment. The instruction to the jury was, that if they found, on the part of Barr, the constable, any failure of duty, either in not levying the attachment, or in not advertising, or in not returning, by which the plaintiff lost the benefit of his attachment, the plaintiff was entitled to a recovery for the amount of damage he may thereby have actually sustained. But if they found that the plaintiff had himself voluntarily abandoned his attachment and caused it to be dismissed on his own motion, by which he had sustained damage, it was of his own seeking, and must be borne by himself. That the dismissal of the attachment at once released the bond of the defendant in attachment, the condition of which was "to stand to and abide by such proceedings as the court might require." And that as soon as the order to dismiss was entered, the defendant became as irresponsible both to the plaintiff and the constable, as if no attachment had ever been levied,

34 though by his bond \*he was bound to appear and abide the judgment of the court. That this bond was taken in pursuance of law, and the plaintiff should have proceeded against the defendant, until his remedy under the attachment had failed him; until which failure, and that too by the default or neglect of the constable, he could not complain of injury from him. In a word, it they found the dismissal to have been at the instance of the plaintiff, upon a supposed irregularity without any effort to prosecute his remedy against the defendant in attachment on the bond, and not at the instance of the defendant or from a legal necessity arising out of the irregularity of the constable's proceedings, the plaintiff ought not to recover.

This direction was given to the jury by the court upon the construction it gave that part of the attachment law of 1799, applicable to the facts of this case, and though it was in the hurry of a trial, the construction given is approved upon deliberate consideration.

Plaintiff's counsel contended that the attachment, good of itself, was rendered null and void by the omission or neglect of the constable to advertise his levy, and to endorse the same on the attachment returned to court; that the omission or neglect was a breach of the bond which gave the plaintiff a right of action that he had not for-

feited by any thing he had since done. If it were really true that the omission to endorse the levy, and to advertise rendered the attachment null and void, the plaintiff's right to a recovery would be unquestionable. But the attachment, when dismissed, was not adjudged void, nor is it the opinion of the court that it was so. The act provides that attachments shall be attested by the issuing magistrate, and be advertised at the court-house-door of the county, by the officer serving it, thirty days before the sitting of the court; and if an attachment shall issue within thirty days or the next court, such attachment shall be made returnable to the court next after the expiration of the said thirty days and not otherwise. "And all other attachments issued and returned in any other manner than is herein before directed shall be, and the same are declared to be null and void."

The legislature has thus prescribed in strict form the manner of issuing and returning attachments, and the duty as well of the issuing magistrate, as of the levying officer; and if it had stopped here, the position assumed by plaintiff's counsel would be incontrovertible. But there is a subsequent provision in the same section, which controls this case. Many guards have been thrown around the interests of defendants to protect them from the abuse of this extraordinary remedy, among which is the thirty days' advertisement of the issuing and levy of the attachment, to notify him of its existence, that he may appear and defend the suit if he will. The provision of the act last referred to secures to defendants the right of appearance and of substituting a personal security in

35 \*place of the goods attached. It is in these words "all goods, &c. subject to such attachments shall be releivable by appearance and putting in special bail, or by the defendants' giving bond with good and sufficient security to the sheriff, or other officer serving the same, which bond he is hereby empowered to take, compelling the defendants to appear at the court to which such attachment shall be returnable, and to abide by, and perform the order and judgment of such court."

If a defendant under this provision appear and put in special bail, he dissolves the attachment and relieves his goods from its lien, and the cause is thenceforward literally in personam, the defendant having submitted to the jurisdiction of the court and given bail to the action. But an appearance and putting in of special bail is not the only means by which an attachment may be dissolved. The same thing may be effected by a bond with good security to appear and abide by and perform the order and judgment of the court. It is in effect however the same thing, the only difference being in the time when the act is done; the first being at the return of the attachment, the latter intermediate the levy and return. The latter is the case we are considering and seems the stronger of the two. Here, the attachment was dissolved



perhaps as soon as levied, for it bears date only two days before the bond of the defendant, and both five months before the return; and it may be well asked, what necessity for advertising the levy upon property which the constable had been compelled to surrender to the defendant, or to advertise an attachment which was dissolved by the act of the only person to be notified by such advertisement. That such effect was contemplated and intended by an appearance and putting in special bail, and by giving bond to appear and abide by and perform the judgment and order of the court, is inferred not alone from the nature of the act authorised to be done, and from the nature of the thing itself, but is strongly inferable from other provisions of the same act. There is nothing said about subsequent proceedings in cases where special bail or bond to appear have been given; but the 3d sec. of the act provides that "If any attachment shall be returned executed, and the property attached shall not be replevied as aforesaid, the subsequent proceedings thereon shall be the same as an original process against the body of the defendant where there is a default of appearance." Why this distinction in the two cases, and why has the legislature been careful to prescribe the manner of proceeding in attachments which progress *ex parte*, while it is silent in cases where there has been either an appearance or bond to appear? It cannot be supposed a '*casus omisus*,' as the eye of the legislature seems to have been directed immediately to that subject, and especially as the very act authorized to be done by the defendant gives to the plaintiff process against the body of the defendant, and \*converts the attachment into an ordinary bail case, the proceeding in which was already prescribed.

The course for the plaintiff to have pursued was plain. The attachment was not null and void, but was dissolved, as to its lien on the horses attached, and converted into an action against the person simply of the defendant, who had given bond to appear and abide by and perform the judgment of the court. This action might have been and should have been prosecuted by the plaintiff as his proper and legal remedy; and for aught that appears from the order which dismissed the attachment, a recovery would have been had, for it appears that both the court and counsel for the plaintiff considered the bond of the defendant and his securities legal and obligatory upon them. If then the plaintiff thought proper to abandon his remedy and dismiss the case, it was his voluntary act from which he could not derive a right of action against the constable, and make him responsible for damages upon what might possibly, but probably would not have been the judgment of the court had he proceeded.

But it is said there is no evidence that the plaintiff did dismiss his own case; and it is true there is no direct evidence of that fact, but the record of this court put in evi-

dence by the plaintiff himself, contains enough to authorise the jury to find the fact. That record is the order to dismiss the attachment, and is in these words. "Ordered that the attachment be, for these causes" (the failure of the constable to enter his levy and to advertise) "dismissed and the plaintiff left to his remedy at law against the said constable and his securities. It is further ordered that the bond taken by the said Barr, from the defendant Ramsay L. Mason, Edward Bird and Fields Kennedy, conditioned for the appearance of the said Ramsay L. Mason at the present term of this court and to stand to and abide the order of this court, be likewise delivered to the plaintiff, with liberty to sue thereon should he think proper to do so." Now it does not appear upon whose motion this order was entered, though it must have been entered on the motion of some one, for the court unmoved would not have entered such an order. If it had been simply an order to dismiss, the presumption would be that it was on motion of the defendant, as he would be the party benefited; but this presumption is repelled by the special care which seems to be taken of the plaintiff's interests. It is not probable that the defendant, whose sole object we may suppose to have been to extricate himself from the suit, would be so careful of the plaintiff's interests as to provide in the order that he might be left to his remedy at law against the constable and his securities; and still less probable that he would have an order passed that his own bond and that of his friends should be delivered to the plaintiff for suit. There can be but little doubt that the plaintiff himself moved \*the order, and as little doubt as to its legal effect upon his rights.

The dismissal of the cause as effectually discharged the defendant and his securities, as the dismissal of any bail case will discharge the defendant and his bail. His remedy then was gone the moment the order was entered, till which time he had a right to declare against the defendant, and for any thing which appears might have prosecuted his suit successfully. That he should have so declared and had the judgment of the court against his remedy and that too in consequence of the default of the constable, before he can recover from him or his securities, we have seen. But so far from the judgment of the court being against the plaintiffs' remedy, it seems rather to have been in its favor, as the defendant's bond is ordered to be delivered over to him for suit. Upon every ground, it is the opinion of the court, the verdict is proper and ought not to be disturbed.

The motion is refused.

The State Ex Relatione John Forsyth v. The Justices of the Inferior Court of Richmond County.

In Richmond Superior Court, June Term, 1831.

Mandamus—For What Used.—The mandamus is an

established remedy to oblige Inferior Courts and magistrates to do that justice which without such writ, they are in duty and by virtue of their offices bound to do.

**Same—What Necessary to Sustain Application for.—**

To sustain an application for mandamus, it is not only necessary that the relator should have a legal right to the thing commanded; but he must also be without a legal remedy.

**Inferior Court—Not a Corporation.\*—**The Inferior Court is not a corporation, and cannot be sued as such.

The object of this mandamus is to compel the Justices of the Inferior Court to order payment to the Relator of a sum of money awarded to him for his damage sustained by the opening of a public road through his enclosed grounds in the vicinity of Augusta. It appears from the return of the justices to an alternative mandamus, that on the 25th June, 1821, upon the petition of certain citizens, an order of the Inferior Court was passed appointing commissioners to examine and report whether a public road to run from the southern extremity of Marbury street to its intersection with the Savannah road ought to be opened, and where, so as most to suit public convenience; that on the 16th July, 1821, the commissioners made their report, recommending that the road be opened, and prescribing its route, which lay through the lands of the Relator; upon which report an order was passed for opening the road "provided the same is done at the proper cost and charges of said applicants;" that on the 22d December, 1823, an order was made directing a jury to be drawn to assess the damage sustained by the Relator and others in consequence of the opening of the road, which was accordingly done, but the jury not being able to agree were discharged; that on the 2d

38 of May, 1825, on the petition \*of the Relator and Gilbert Longstreet, the sheriff was ordered to summon a second jury to assess the damage sustained by them in opening said road, which order was obeyed, but that jury also being unable to agree were discharged, that the same order was renewed 23d June, 1828, to which no return appears to have been made; that on the 6th April, 1829, the sheriff was directed to summon three commissioners named in the order to assess the damage and to make report to the court at its next term; and finally, that on the 28th September, 1829, the commissioners having reported that the damages amount to four hundred and twenty five dollars, it was ordered that the clerk

call upon the persons on whose application the road was opened for the amount of the damages, and that the same when collected be immediately paid over to the Relator. This last order has never been carried into effect, and the Justices refuse either to enforce it, or to order the amount of damages so assessed to be paid according to law, and assign as their reasons,

1st. That they are protected from liability to pay any thing, by the proviso in the order for opening the road, "that it should be at the costs of the applicants," one of whom was believed to be Gilbert Longstreet, the occupant of the land, and agent of the Relator.

2d. That the act of 18th December, 1818, which alters the general road law so far as concerns Richmond County, and vests in the Inferior Court full and discretionary powers in that regard, does not authorize or require the court to pay damages out of the county funds.

3d. That if the Relator permitted the road to be opened under this conditional order, without being first secured in the damages, it was his own folly, and the Inferior Court should not answer for it.

4th. That the damages were assessed by three freeholders, and not by a jury of twelve men as the law directs, whose award is therefore illegal, and not binding on them, and that the proceedings of the commissioners were irregular in this, that the Inferior Court had no notice of the time of their meeting.

Upon examining these reasons, none is found to be satisfactory. The Inferior Court, when it passed the order to open the road, exercised a power vested in it by law, imposed an obligation on all persons concerned to yield obedience to its authority, and itself incurred the legal responsibility annexed to the act, from which it could not protect itself by the proviso in its order. The court no doubt proceeded under the act of the 4th December, 1799, on the subject of roads and bridges, as is inferred from the subsequent steps taken to assess the damages by a jury. That act is one "to empower the Inferior Courts of the several counties in this State, to order the laying out of public roads, &c. The 2d sec.

39 of it \*makes provision for assessing damages where roads are ordered to be opened through inclosed grounds, by the inquest of a jury, and declares that "it shall be the duty of such court to order the amount of damages so assessed to be paid out of the next county tax, or out of any monies belonging to the county fund." Here then we see not only the power of the court to open the road, but its duty towards those who may be injured by its order; and the fund from which damages arising from such injury are to be paid.

The act of 18th December, 1818, does not touch this subject, being designed only to change the manner of working upon roads in this county, and to substitute a limited tax in place of the labor formerly required of all who were liable to road duty. When

\*Inferior Courts—Right to Bring Suit against as a Corporation.—In *Justices v. Haygood*, 15 Ga. 318, it is said: "And finally, we add, that courts, generally, if not invariably, in our own state, have entertained the opinion that suit could not be brought against the inferior court, without statutory provision to this effect; (some counties having, as to their courts, obtained such statutory sanction.) and the convention of judges have decided, that 'the inferior court is not a corporation, and cannot be sued as such.' *The State ex rel. John Forsyth v. Justices of Inf. Court Richmond County*, (Dud. R. 39.)"



therefore the Inferior Court passed its order of the 16th July, 1821, the Relator was bound to submit to it, no matter how much aggrieved; and so far from being justly chargeable with folly for non-resistance, would have been highly criminal, had he opposed resistance to the constituted authorities of the country; and the act of submission cannot be construed into an abandonment of the remedy expressly given him by the very law which subjected his private property to be taken for public uses, which remedy is a just compensation "to be paid out of the next county tax, or out of any monies belonging to the county funds." Nor can the Inferior Court impair the right of the injured party to have compensation from the fund which the law prescribes, by attempting itself to provide a different one.

As to the manner in which the damages have been assessed, the objection is more plausible than real. It is true the act of 4th December 1799 directs the summoning of a jury for that purpose, and this is the regular means provided by law. But who seeks advantage of this supposed irregularity or illegality in the proceedings of the court? The court itself; and that too nearly two years after the award, made by commissioners of its own appointment, had been entered upon its records as its judgment, and the clerk ordered to pay the amount out of a particular fund. This proceeding however was not illegal, and the parties were at liberty to waive the irregularity. The only persons interested in this matter were the Inferior Court, who had to pay the damages, and the Relator who was to receive, and it was competent for them to have agreed upon the damages; or to have submitted by consent to the verdict of a jury less than twelve. The course pursued seems to have been without contestation, and to have been adopted in conformity to the provisions of the act of 23d December, 1823, on this subject, which act expressly directs the number three, and with a view of ending this business without further trouble, two or three juries having failed to agree.

It is the opinion of the court then, 40 that the Relator has a \*clear legal right to demand from the Inferior Court the sum awarded him as appears by its own records. But it is not enough that the Relator have a legal right. He must also be without a legal remedy to sustain an application for a mandamus. *The King v. The Archbishop of Canterbury*, 8 East, 214.

The mandamus is a writ of high authority, and is placed by the Constitution of this state in the power of the Judges of the Superior Court alone. It was designed to be used in subsidium justitiæ, to supply any defect of legal remedies, and will never be resorted to, unless without it there must be a failure of justice.

In this case the Relator has had his land applied to public uses, by an order of the Inferior Court, which he could not resist.

The Inferior Court has accepted the award of commissioners appointed by itself, assessing to the Relator four hundred and twenty-five dollars for his damages, and has ordered that sum to be paid out of a fund, upon which, by law, the debt is not chargeable, and which appears to be an unavailable fund; but refuses "to order the amount of damages so assessed to be paid out of the next county tax, or out of any public monies belonging to the county fund," according to the provisions of the law. If then there be no specific legal remedy for the Relator, his case is a strong one to require the extraordinary one of mandamus.

The counsel for the Justices contends, that such legal remedy exists. That it is by action in the Superior Court. And to avoid the absurdity of suing a court—a judicial tribunal, having concurrent jurisdiction with this in most matters, in an action at law, to recover a debt or damages, it is said the Inferior Courts are corporations, and as such may be sued. But no act creating them corporations has been shown. By the act of the 4th December, 1799, the Inferior Courts are made supervisors of roads, and they have powers as such conferred on them, and are made subject to their duties. Yet this will not create them corporations, which could only be done by an express act of the legislature for that purpose. We must then dismiss the notion of the Inferior Courts being corporations. For whether we consider them exercising the high judicial powers given them by the Constitution, or acting as overseers of the poor, supervisors of roads and bridges, or performing any one of the various duties attached to these tribunals, they must still be considered as courts not to be degraded to the level of mere corporations, and subjected to suits. No other remedy is attempted to be shown, or as it is believed can be shown, and the mandamus must supply the defect of justice. It is in fact the appropriate as well as the only remedy. The Superior Courts have the general superintendency of all inferior courts and magistrates, and will oblige them to ex-

ecute that justice which parties are 41 entitled \*to receive from them, and which they are enjoined by law to do, and for this purpose have power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect. "The mandamus is now an established remedy, and every day made use of, to oblige inferior courts and magistrates to do that justice, which without such writ they are in duty and by virtue of their officers obliged to do." *Bac. Abr. Mandamus, A.* What was the Inferior Court or the justices who compose it "in duty and by virtue of their offices obliged to do," on the amount of damages to which the Relator was entitled being ascertained, and what justice were they bound to render? A ready answer is furnished by the 2d sec. of the act before cited. "It shall be the duty of such

court to order the amount of damages so assessed to be paid, &c. This order, as has been seen, they refuse to make, and inasmuch as without a mandamus the party would be remediless, it is a writ he may demand of right. But this is not a new case dependent alone upon principle. Precedent and authority are sufficiently abundant.

A mandamus was granted to compel the mayor and court of aldermen of London to give sentence or judgment in a case very like this in every respect. 3 Bac. Abr. 535. The only difference is, that in the case cited, the mandamus was to compel the court to give sentence or judgment; here it is to compel the court to give an order for payment. But this is a difference in name only. The object of each is the same, namely, to enable the injured party whose private property is taken for public uses, to have the redress provided by law. In the case of Sikes v. Ranson, 6 John. Rep. 279, the Supreme Court of New York on an application for a mandamus say; "We have the general superintendence of all Inferior Courts, and are bound to enforce obedience to the statutes, and to oblige subordinate courts and magistrates to do those legal acts which it is their duty to do." In Adams v. The Supervisors of Columbia, 8 John. Rep. 247, a mandamus was refused, but on grounds which make it an authority very much in point. That was an application to compel the defendants to audit an account of the plaintiff for medicine and attendance as a physician on a pauper. The court refusing a mandamus assign as a reason that "The supervisors of the county are not the board to ascertain whether the services have been actually and faithfully rendered to the pauper. That must be adjusted by the overseers of the poor who are in the first instance responsible to the persons rendering the assistance. The supervisors were only to pay such accounts as the overseers had adjusted and paid in pursuance of the order. As the account in question had never been adjusted, allowed, and paid, by the overseers of Hudson, the supervisors for that reason were not bound to notice it, and on that

42 \*ground alone the court refused to interfere. But we have given our opinion on the merits of the case so that when the account shall have been liquidated and settled by the overseers, and duly exhibited by them to the supervisors of the county, it may be paid without the necessity of an application to this court."

The cases of Wilson v. The Supervisors of Albany, 12 John. Rep. 414, and Hull v. The Supervisors of Oneida, 19 John. Rep. 259, are very similar. In both these cases the mandamus was refused alone because the plaintiffs could not show against the defendants specific legal rights. But in the case of Bright v. The Supervisors of Chenango, 18 John. Rep. 242, a rule was made absolute for a mandamus to compel the defendants to allow the account of the plaintiff as a legal charge against the county. The plaintiff was clerk of the county, and

had purchased books for recording deeds and mortgages, and for the entry of common rules of the Court of Common Pleas; and had as clerk performed for the county various services for which no specific compensation was allowed by law. Here was a legal right, without any specific legal remedy. See also the case of the King v. Sir J. Carter and others, 4 Term Rep. 246, and the King v. Hunt and others, 1 Strange, 42. But it is unnecessary to multiply authorities. The case is sufficiently plain, both upon principle and authority.

Let the peremptory mandamus issue.

### The State v. H. B. Fraser, Jailor of Richmond County.

In Richmond Superior Court, July, 1831.

**Habeas Corpus—Rights of Property Not Liab.**—On a writ of Habeas Corpus, the court will discharge, admit to bail, or remand, according to the circumstances of the case; but it will not try any rights of property. And if the writ be to bring up infants, the court, though bound, ex debito iustitiæ, to free them from all illegal restraint, it is not bound to deliver them over to any body, or to give them any privilege.

The petition sets forth that the "Petitioner is a free woman of color, and has been for a long time past in the jail of Richmond county, under an order of court, which, although intended for her benefit, (which she gratefully acknowledges) deprives her actually of the right of locomotion, to which by the laws of the land, and the rights of her birth, she is entitled." It prays for the writ of habeas corpus "to the end that her case may be investigated, and justice may be done." The jailor having brought up the woman, Winney, returns the following order of the Inferior Court, as the cause of her detention, to wit: "In the matter of the writ of habeas corpus, at the instance of Winney or Jane, and on the return of Dr. William Savage, it appearing to the court, that the said girl, Winney or Jane, is probably a free woman of color, and it appearing also probable that  
43 if left in the custody of Dr. \*William Savage, or any other person, she might be removed from the State. It is therefore ordered that the said Winney or Jane be removed for protection and safe keeping to the common jail, there to remain, until the person who claims property in her, viz. John N. Philpot shall give bond or recognizance to the guardian of said Winney or Jane, in the sum of one thousand dollars, with one or more good and sufficient securities, with the condition that he the said John N. Philpot shall produce the said woman, Winney or Jane, at all times when required by this court, or by the Superior Court, and also that the said Winney or Jane shall be well and humanely treated by the said John N., until the decision of her claims to freedom, by some competent authority."



Upon this return the counsel for Winney offers to prove her freedom, that he may sustain the motion for her discharge not only from present confinement, but from her liability to serve Philpot or any other person as a slave, and reads several letters and affidavits representing her to have been born of free parents in the county of Worcester, Maryland. He contends that under this writ, the court has power to sustain the motion, and insists that according to the principles contained in Magna Charta, as well as by the constitution of this State and of the United States, the court cannot withhold the benefits of the writ of habeas corpus from any free person of whatever color illegally imprisoned; and that upon the return of the writ, it is bound to enquire into the legality of the imprisonment, and discharge if found to be illegal and without proper authority. The counsel for John N. Philpot, resisting the motion, contends that as the return shows a claim of property in Winney, the court must remit her to her legal remedy, and in the mean time leave her at the disposal of her alleged master. A bill of sale of Winney from one Johnson to Philpot is produced.

PER CURIAM. There appears to the court no possible objection to a discharge of Winney from her present confinement, which by the return seems to have been by her own request, or at least for her safety, and to prevent her being eloiigned by John N. Philpot, who claims her as his slave. But the court is prayed to go farther and adjudge her right to liberty, as well as to restore her to the right of locomotion, of which she complains she is deprived. Can this court go farther than simply to discharge the Petitioner? Can it, under this writ, inquire into and adjudge the right to freedom claimed by the petitioner, in opposition to the claim of property in her as a slave by Philpot. These are the questions distinctly presented to the court for its determination, and though grave and important, they seem simple enough to be answered without much hesitation. The writ of habeas corpus is intended for the protection of the personal liberty of free-men, and never was designed or used

44 to try any right \*of property. The Court of King's Bench in the case of Penelope Smith reported in 2 Strange, 982, refused to inquire into and determine the right of guardianship; declaring that the father who had sued out the writ and sought to have possession of his son, had other remedy. He might have trespass quare filium et hæredem suum rapuit, or other action which would bring the right of guardianship in question. All the court would do was to deliver the boy out of the custody of the aunt, and inform him he might go where he pleased. Here the court is called upon to determine not the right of guardianship, but the right to the perpetual and involuntary service of Winney, or whether she be or be not the slave of Philpot? The guardian of Winney has other remedy. He may have his writ under the State ex-

pressly designed to try the right of freedom, and which gives ample relief. If the petitioner were without remedy and could have no other protection against the hand of lawless violence than this writ affords, the court would, without determining any right, make use of the power it possesses of protecting every individual in society of whatever grade, to shield the petitioner until an adequate remedy could be provided. But the legislature has not left a case of this magnitude and importance unprovided for, and forced her judges to the exercise of a doubtful and uncertain power over a matter in which the natural love of liberty inclines with such force against a mere claim of property. Slavery having been introduced into Georgia at an early period of her history, the attention of the people was called to this subject by the necessity of defining the rights and powers of the master, of regulating the conduct of the slave, and of securing the rights of such of the slave race as should become free, with a view to the preservation of order and good government in a community consisting of three distinct classes of people, citizens, free negroes, and slaves, and on the 10th May, 1770, an act was passed for these purposes. By this act a most ample and complete remedy is given to negroes held in slavery who claim to be free; a remedy extending not only to present security against cruel and inhuman treatment, and a fair trial, but to damages for the wrong sustained. When this act was passed, the principles of Magna Charta were as well understood here as they now are, and the writ of habeas corpus was of as much force as it now derives from the Constitution. The right of trial by jury was also well understood, and considered among the most invaluable rights secured by Magna Charta. They were all of too much value to be lost or even impaired, and the people finding among them a class of men held as absolute property, and an intermediate class, neither slaves nor free citizens, were driven to the necessity of enacting new laws in order to preserve these great principles, to adapt them to the actually existing state of society, and to extend them as far as

45 possible. Hence the wisdom and \*propriety of this act, by the provisions of which the liberty and security of negroes claiming to be free, (if indeed free) are guarded on one hand, and the trial by jury of the right of property is secured to the person claiming to be master on the other. Since the enactment of this law, the habeas corpus and the trial by jury have both become constitutional provisions, and the court has no more power to interfere with and deny the latter than it has to suspend or refuse the former. It was stated in argument and much stress was laid upon it, that the habeas corpus is a writ of right to which every freeman deprived of his liberty is entitled, *ex debito justitiæ*. This is very true. Yet on the return of the writ, the court must act according to the circumstances of each particular case. If the im-

prisonment be upon a criminal charge, it will either discharge, admit to bail, or remand, according to the nature of the charge, and the facts disclosed. If the habeas corpus be to bring up infants (and of this nature is the present case) the court is bound *ex debito justitiæ* to set the infants free from all improper restraints; but it is not bound to deliver them over to any body nor to give them any privilege. This is the doctrine held in the case of the King against Delaval and others, 3 Burr. 1434, in which Lord Mansfield recognizes the authority of Smith's case before cited, and it is a doctrine which derives additional strength from the peculiar character of our institutions and of the person to whom it is applied in the case before the court. But it is said, the condition of free persons of color will be wretched indeed, if they are to be left to the mercy of the unprincipled and lawless, and cannot have protection from the courts.

That they will not be protected does not follow from the refusal to try a right of property under habeas corpus. The protection of the law is over all, and the ordinary legal remedy is always within the reach of every one who may need it, and who will use it. In this case it has been more than six months since a guardian was appointed the petitioner, to enable her to prosecute her legal remedy. If she delay or refuse to do so, there can be no just complaint of a want of protection, because the court will not trench upon the constitutional rights of another, to render to her summarily what may be, and perhaps is, justice. All that the court can do is to discharge the petitioner from her present imprisonment, and permit her to return to Dr. William Savage from whose possession she was taken by virtue of the order for her imprisonment, and to leave both Philpot and Winney to their legal remedies.

Let Winney be discharged.

#### 46 The State v. John N. Philpot.

In Richmond Superior Court, July, 1831.

**Habeas Corpus—Who May Petition for Writ.**—In cases of habeas corpus ad subiciendum the person imprisoned or illegally detained may petition for the writ, or any other person may do it for him.

**Same—Petition—Failure to State Name of Person Imprisoned.**—The omission of the name of the person imprisoned, is not an irregularity, if enough appear to indicate the person intended.

**Same—Same—When Affidavit Dispensed with.**—Regularly, the facts stated in the petition for the writ, ought to be supported by affidavit; but still the affidavit is not of the essence of the writ, and in cases of great emergency the writ will be allowed to issue without it—in fact, to enable the party to make it.

**Same—Same—Irregularities—Waiver.**—Irregularities must be taken advantage of, in due time, or the party affected by them, will lose his opportunity of doing it entirely: This rule is, however, con-

finued to mere irregularity: It is different when there is a complete defect in the proceedings.

**Same—Right of Slave to Writ.**—The benefits of the writ belong to all free persons of every country and of every complexion; but not to a slave.

**Writ of Ravishment of Ward—Purpose of.**—The writ of Ravishment of ward, under St. 1790, was given to try the right of freedom against the claim of perpetual service, and nothing more: It will extend to no other case of the detention of free persons of color, however illegal.

**Habeas Corpus—Evasion and Insufficient Return—Contempt.**—An evasion and insufficient return to habeas corpus is a contempt of court, and if obstinately persisted in, the court will punish the offender, by imprisonment until he yields obedience to the writ, or shows that it is impossible to do so.

A motion for Philpot's discharge was made, argued and overruled at a former term upon a state of facts precisely such as now exists. The court is again moved in this matter upon grounds not then assumed, and is prayed to reconsider its decision then pronounced. Advise ment has been had upon every question raised by the counsel for the movant, and the whole case attentively considered, and the decision of the court will now be pronounced upon each distinct ground on which counsel have rested the motion.

It is contended that the writ of habeas corpus for the disobedience of which Philpot has been attached, is illegal and void, and that the writ, and every proceeding under it should be set aside by the court. Two causes have been assigned against the legality of the writ, and these form the first and second grounds in the motion.

The first cause is its irregularity. The first ground in the written motion submitted is "Because the habeas corpus by virtue of which the said John N. Philpot was brought before the court, issued illegally in this, that it issued without an affidavit to support it," though other matters besides the want of an affidavit were insisted on in argument. The particulars are three, in which the irregularity is said to consist. 1st. The petition is not by the guardian of the boy, James. 2d, The boy's name is not mentioned in the writ. 3d, Want of an affidavit. The first of these is no irregularity. It is not necessary there should exist any particular legal relation between the petitioner and person for whose benefit the writ is awarded. The persons imprisoned or illegally detained, may himself petition or complain, or any other person may do it for him. Nor is the omission of the boy's name an irregularity. It can be considered but as a vagueness or uncertainty in the writ, which cannot affect its validity, if enough appear to indicate the person intended. But if it be an irregularity, we shall see whether it have not been waived. An irregularity is the non-conformity to some settled rule of proceeding, by either omitting to do something that is necessary, or doing it at an unseasonable time, or in an improper manner. If the verification of



the facts contained in the petition for habeas corpus be something necessary to the attainment of the writ, then its omission is an irregularity.

The writ before the court is a habeas ad subjiciendum; at common law, and nearly a century ago the Judges of England gave it as their unanimous opinion that such a \*writ ought not to issue of course, but upon probable cause supported by affidavit, which has been the regular practice since. But though the writ ought not to issue regularly without affidavit, is the affidavit therefore an essential part of the writ? The case of the Lady Leigh, cited in 3 Bac. Abr. 5, shows that it is not. In that case no fact was sworn to, but that the Lady Leigh had complained in a letter to her mother, yet the court declared the writ should go to enable her to make oath to the matter complained of, and exhibited articles against her husband; and further, that the Lord Leigh, though a Peer, should be attached if he refused obedience to the writ. However, though the affidavit be not of the essence of the writ, it will never be dispensed with, except in cases of great emergency, and the omission will be adjudged an irregularity. We will consider how far this irregularity affects the present case.

In Tidd's Practice, 435, the rule of law on this subject is stated to be "that whenever proceedings are irregular, the court on motion will set them aside, provided the application for that purpose be made in the first instance; for in all cases of irregularity, the party should apply to the court as early as possible; and if he either proceed himself after discovering the irregularity, or lie by and suffer the other party to proceed, the court will not assist him." The language of the court in the case of Pearson and Rawlings, 1 East, 77, is clear and very strong. "It is the universal practice of the court, that where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it. Justice requires that that rule should be general in its operation, having in view the advancement of right. And however we may be inclined to favor persons in the situation of the defendant, yet we must not go the length of breaking in upon the general practice of the court." The same doctrine is held in the case of D'Argent and Vivant, 1 East, 330. "A defendant may waive irregularity, and is considered as having done so by submitting to the process, instead of taking steps to avail himself of the irregularity, which ought always to be done in the first instance." See also Fox and Money, 1 B. & P. 250, Davis and Owen, ib. 342. This rule is applicable, however, only to cases of mere irregularity. It is different where there is a complete defect in the proceedings. The former may be waived, but not the latter. Goodwin and Parry, 4 T. R. 577; Hussey and Wilson, 5 T. R. 254; Stevenson v. Danvers, 2 B. & P. 110.

The distinction is then plainly this, that where that is wanting, without which the whole proceedings are void, no subsequent steps will cure the defects. It is radical. But if that be wanting which will merely render the proceedings voidable, it may be waived by subsequent steps. The

48 case of the \*Lady Leigh before referred to, proves that the verification of the facts contained in the petition forms no part of the process of habeas corpus; for in her case the writ was ordered to go, as well that she might have an opportunity of swearing to the facts as of exhibiting articles against her husband. The affidavit is not, as in bail cases, a part of the process, but is only a preliminary measure in attainment of the process, which is the writ of habeas corpus itself, and serves no other purpose than to convince the mind of the judge that the writ should issue, and to prevent its being abused and made the instrument of vexation. What particular showing was made to the justice who issued this writ, beyond that contained in the petition, does not appear; no affidavit is annexed. He, however, exercising the power vested in him by law, awarded the writ, and much proceeding has been had upon it, though the petitioner has not yet sworn to the facts in the petition. Let us look to these proceedings or subsequent steps, and see if enough has not been disclosed by Philpot himself to convince the court of the propriety and even necessity of issuing the writ in the first instance, and to amount to a waiver of any irregularity.

The first step taken by Philpot is his appearance in obedience to the writ, and moving to adjourn the return to a future day, to enable him to produce the boy, whom he admitted to be in a certain place, which motion, (the petitioner consenting) is allowed.

The next is filing his return, in which no exception is taken, for want of an affidavit, nor averment made that the boy is a slave, though it is insisted that negroes or persons of color have no right to the writ. Then an argument upon the sufficiency of the return, which was adjudged evasive and insufficient, and an attachment ordered. And lastly, a motion for discharge from the attachment, on two grounds. 1. Because the period of imprisonment being indefinite and unlimited the order was illegal, and secondly, Because the contempt was purged.

It is then disclosed and made as manifest to the court as any affidavit could make it, if Philpot's statements and admission are to be believed, that he had in his custody, power or control, the boy James, averred to be free, and the fact not denied by Philpot, or the boy claimed by him as a slave, or any other cause assigned for detaining him. The facts contained in the admission authorized the writ; the evasive return and subsequent events brought to the notice of the court by Philpot himself render it necessary to demand its strict obedience, and justice forbids that it should fail of its

effect by reason of too nice an adherence to forms. And surely unless the affidavit be of the very substance of the process itself, the subsequent steps taken in 49 this cause have \*waived the irregularity. It is the opinion of the court that it has been waived, and that it is now too late to object to or take any advantage from it.

The 2d ground is, "because it (the writ of habeas corpus) issued illegally in this, that it issued in behalf of a negro admitted to be such in the petition, and also admitted in the petition to be claimed as a slave. By reason of which two grounds aforesaid the whole subsequent proceedings were illegal and void." Before we proceed to consider this second ground, it may be well to notice an error into which the counsel for the movant have fallen, in supposing it to be admitted in the petition, that the boy was claimed as a slave; on the contrary both in the petition and writ he is averred to be a free boy in the possession of Philpot, and in his return Philpot does not claim him as a slave nor aver him to be such otherwise than may be inferred from the legal presumption against the freedom of the negro race. The argument took a wide range, and it was contended that free negroes or persons of color, were not, under the constitution and laws of Georgia, entitled to the benefit of the writ, which was designed alone for free white citizens.

It might perhaps be sufficient upon this point to remark, that with but a single exception known to the court, the decisions and practice throughout the State are now, and have been uniform, to extend to this class of persons the benefit of the writ of habeas corpus. But as their exclusion has been insisted on with much zeal, as well upon constitutional law, as upon expediency and policy, the court will examine the principles which are said not only to authorize, but to require such exclusion.

This writ is called a constitutional writ, and upon the whole constitutional is rested the strong argument for the exclusion.

The constitution it is argued was made by free white citizens and for free white citizens; the writ of habeas corpus is secured by the constitution, and is therefore a remedy exclusively for the benefit of free white citizens. Neither the force of the argument nor correctness of the conclusion is perceived. It is most true, the constitution was made by free white citizens; and it is equally true that the writ of habeas corpus is secured by it, and that constitution and writ were both for their benefit; but it does not necessarily follow that they were for their exclusive benefit. A constitution is but a law declared by the people of a state in the exercise of their inherent and unrestrained sovereignty, and is, like laws enacted in the course of ordinary legislation, binding upon all persons within the limits of the state, (and obedience and protection are correlative terms) though unlike such laws in this, that it not only governs individuals, but also restrains and

controls the different departments of government itself. Both constitution 50 \*and laws are to be so construed as to arrive as nearly as possible at the intention of those who framed them, and neither add to, nor detract from the distinctions, limitations or restraints therein expressed. Bring to the test of these plain obvious principles the proposition contended for, that the writ of habeas corpus was intended for the exclusive benefit of free white citizens, and say if it be true. If true, then it was the intention of the framers of the constitution and of the people of Georgia, who adopted it, to deprive every Frenchman, Englishman, or other foreigner who might come among us, of its benefit until he should have been naturalized. But enlarge the proposition and extend the writ to free white persons, which will embrace aliens if they happen to be white, and this supposed intention of the framers of the constitution would not be much less absurd; for then the benefit of this salutary writ would be made to depend upon the particular complexion of the individual, and not upon his political or social relations, and the red men whom we are subjecting to our laws would be forced to their obedience without enjoying their protection; and would be left to the mercy of every ruffian who might choose to seize upon their persons. But the constitution recognizes no such distinctions. Its words are very plain and general. "The writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require it." Here the writ is spoken of as a remedy well known, and all that the people of Georgia did, by this act of their sovereign power, was to place its future existence in dependence alone upon their sovereign will, except in cases of great emergency. The powers of the writ are neither enlarged nor diminished, nor is any particular class of persons indicated for whose exclusive benefit it is designed. By reference to the constitution of 1789, that under which the convention sat, which framed the present one of 1798, we find that "all persons shall be entitled to the benefit of the writ of habeas corpus" are the general and comprehensive terms by which the remedy is secured. In the constitution of 1777, the first made by the people of Georgia, although the writ itself is not in express terms secured, yet "the principles of the habeas corpus act are made a part of this constitution."

It cannot therefore be doubted, that it not only now is, but ever has been, since Georgia has become a sovereign State, her will and intention to preserve the writ has beneficially and perfectly as it existed, or was known to her while in a state of colonial dependence, or as it existed in the mother country whence it is derived. Do any of the distinctions here sought to be established exist there? None. When the writ is applied for, no inquiry is made as to the complexion of the petitioner, or the place of his permanent allegiance.



51 All, of every condition, \*of every country and of every complexion, are equally entitled to it, the native of South Africa, not less than the Peer of the Realms.

But it is insisted, that the existence of slavery among us, and the provisions of the act of the 10th May, 1770, create the distinction; that slaves are considered in law as things, mere property and not as persons; that they are unknown in England, and therefore the writ could not and cannot extend to them, and that the act of 10th May, 1770, a colonial statute, declares "it shall always be presumed that every negro is a slave, unless the contrary be made to appear," and that the constitution was adopted with a view to the state of things created by the existence of slavery and with reference to the act of 1770, regulating the condition of slaves; that the general presumption being against the liberty of the slave race, those who are free can be in no better condition to demand the writ than the slave; and that the slave being always considered in the legal possession and power of the master, cannot be said to be illegally detained by him, or be entitled to this writ. Let it be remembered, while these positions are examined, with a view to ascertain their bearing on the present question, that it is not whether a slave may have the writ, but whether it may be legally awarded to a free person of color.

It is true, slaves are property, and by the act of 10th May, 1770, are declared to be personal chattels in the hands of their owners, and to be alienable, but it does not thence follow that they are mere things, horses, as was contended in argument. This property or 'personal chattel,' consists in the right of governing the slave, subject to such restraints as the legislature may impose on the master, and of enjoying his perpetual and involuntary service. The law has never yet ceased to consider slaves, though thus subject to the government and service of a master, as human beings, subject to its protection, and bound to obey its requirements. And so careful were the people of Georgia on this subject, that in their Constitution, 4th article, 12th sec., the life and members of slaves are expressly protected in the same manner as the life and members of free white persons are. They are subjected to general laws. See acts of 1811, 1816, and the laws throughout on this subject. They have secured to them a formal trial for all offences, and the right of examining witnesses, and in capital cases, the right of trial by jury. They cannot be tried twice for the same offence. Act of 1803, sec. 4. Their persons are protected from violence and cruelty, none but the master having a right causelessly to strike or whip them, and the master himself being restrained to such moderate chastisement as may be necessary for discipline and the preservation of a just subordination. They have likewise secured to them from the hands of the master all

52 \*care, food, sustenance, and clothing, proper and necessary for them, and

an exemption from excessive labor. Code of 1817, 36 and 37 sec. 11th division.

It is apparent, then, that though slaves have no political rights, nor right of property, they have many personal rights, and are very far from being considered mere things, brutes, and beasts of burden. A right of the benefits of a habeas corpus does not however belong to a slave, as it would be inconsistent with the rights of the master. This writ not having been sued out for a slave, but for a free person of color, it is insisted that they all stand upon the same footing in this regard by virtue of the general presumption against the liberty of the slave race. This is carrying the presumption of law too far. By looking into the act of 1770, it is seen, that free negroes who then were or might thereafter be in the province, as well as such as might thereafter become free, are expressly excepted not only from that part of the act which fixes the condition of the slave race, but also from that which declares the presumption. But suppose there were no such exception, let us look to the act, and see the extent of the legal presumption, and whether it be so general as to place slaves and free persons of color upon the same footing. By doing so we shall find that it is confined to actions or suits between the guardians of negroes and their masters, to try the negroes' right to freedom, and is a rule of evidence applicable to such cases only. Now it would be a very hard and unreasonable construction of a mere rule of evidence, to make it reduce a whole class of free people to a level with slaves, deprive them of the most effectual means of protecting their personal liberty, and subvert a constitutional provision.

There is a very broad and obvious distinction between the rights and condition of slaves and free persons of color. Slaves, as we have seen, are not mere things, and have many personal rights secured to them by law, but are without the right of personal liberty or any political rights whatever. Free persons of color are equally destitute of political rights, are somewhat abridged of personal rights, but enjoy in its fullest extent personal liberty. To protect this latter right wherever enjoyed, to restore it wherever unlawfully deprived, the habeas corpus was designed, and in a state of society just such as now exists among us, was engrafted upon the Constitution. The slave, therefore, without personal liberty, is without the benefit of the writ: the free person of color enjoying personal liberty has the benefit of the habeas corpus secured to him by a constitutional guaranty.

There is another objection to the allowance of this writ to free persons of color, arising out of the act of 1790, on which great stress was laid in argument, which is this, that as the act has given a remedy by writ of ravishment of ward, all other remedies were superseded by it.

53 \*The argument in support of this objection proves rather too much. It

admits the existence of the remedy by habeas corpus before the superseding act. If it existed then, it exists still, except only so far as it has been superseded. The statutory writ was given to try the right to freedom against the claim of perpetual service, and nothing more. It will reach to no other case of the detention of free persons of color, however illegal. What would then be their situation? Those who have the clearest right to freedom would be most exposed to lawless violence, and giving the means of trying their freedom, to those of doubtful right, would be made to take all remedy from those acknowledgedly free, or the habeas corpus must remain to them full and perfect. But if the writ may issue in favor of any one free person of color, in any given case of illegal detention, it may issue for all and in every case; for neither the Constitution nor law has made any exception. What the court might do upon the return of the writ is another question. Should it be obeyed, and the return show a claim of property as a slave in the person for whose benefit it issued, he would no doubt be left to his remedy under the act. On the subject of the act of 1770, there is this farther remark to make, that if there be any thing in it inconsistent with the remedy of habeas corpus, the statute must be considered so far repealed, as well because the Constitution which establishes the habeas corpus is a posterior law, as because it is paramount to every legislative enactment. Much has been said about the expediency and policy of allowing a habeas corpus to this class of persons. These are considerations for another department of government. Here they can have no place, the only question being whether such is the law, not whether it is expedient and politic that it should be so. It should never be forgotten, however, by any, that there can be no true and sound policy which is opposed to strict and impartial justice; and that both individual and general happiness and security are best attained by a prompt and cheerful obedience to just and humane laws.

The 3d, 4th, and 5th grounds of the motion are, that no contempt has in fact been committed by Philpot; that his return is neither evasive nor defective; and that it should be received as conclusive.

If the court have authority to issue the writ, it follows of course, that it has the power to compel obedience to it; and no higher contempt can be conceived, than a refusal to submit to such power, and an obstinate disobedience. That disobedience is contempt, has not been, and cannot be denied, on the contrary is admitted, but at the same time it is contended, that the return of the 2d November, 1829, is an act of submission, which being full and perfect, no disobedience is chargeable upon him. This return has been well considered on a former occasion, and of its evasiveness and insufficiency, \*it was then thought, there could be no serious question. Such is still the opinion of the

court. To have been full, it should have denied the custody, possession, power or control of the boy, not only at the time of the return, but also at the service of the writ. For the court to receive as sufficient, any return short of this, would be to enable all who might choose to evade the writ, easily to do so, by simply transferring the person confined to another between its service and return. The return of Sir Robert Viner, cited 3 Bac. Abr. 14, which was adjudged to be insufficient and equivocal, is very like the present. That was to a pluries writ, there having been no return to the first and second. The return was "that at the receipt of this writ, nor at any time since, has she been in my custody." This was held by the court to be insufficient, because upon return to a pluries writ "he ought to say not only at the time of the receipt of this writ, but of any other," and equivocal because it simply denied the custody of the person alleged to be confined. The only difference between that case and this, is that this is a return to a first, that to a pluries writ. But the same obedience and the same return are required to each, and it is not our practice to issue alias and pluries writs, which leads to unnecessary expense and delay, but to enforce the first. If Philpot's return had shown, that neither at the service of the writ, nor at any time since, had the boy been in his possession, custody, power or control, it would have been full and perfect; but he evades a part, and will not swear that at the service of the writ the boy was not in his power or control. Had Philpot, however, sworn that the boy was not in his possession, power or custody, still, if upon looking into the facts stated in the return, the conscience of the court should not be satisfied that all the material facts were disclosed, it was not bound to discharge him. In looking at his return, the conscience of no man can be satisfied that all the facts are disclosed, but must be convinced that very material facts are suppressed; and this conclusion, to which the return itself would lead, becomes irresistible to the mind of the court, when it recollects the admission of this suppressed and most material fact by Philpot himself since the service of the writ, which fact is, that he had the boy.

A great deal of argument has been offered by counsel for the movant to show that the return should have been received as conclusive. That it is conclusive, the court has always held; and if it have erred at all on this point, the error has been in holding the return too conclusive, not only as against the applicant for the writ of habeas corpus, but also as against Philpot himself. He cannot be permitted even to amend his return when once filed, 3 Bac. Abr. 14, much less to contradict it, or aver any thing inconsistent with, or repugnant to it.

The 6th ground "Because, if any contempt was committed, it was purged by the affidavits of Philpot, Carey, Turley, \*and the certificates filed in the



cause," has been formerly insisted on, and well considered by the court, and its opinion, then expressed, is still entertained. That the return is an evasion of the writ, is a matter about which there can be but little difference of opinion; and that an evasion of the writ is a contempt of court, admits of but as little doubt. As soon therefore as the return of the 2d November was filed, Philpot was in contempt, and liable to be attached. But the court before awarding an attachment, called upon the defendant to show cause why it should not go against him. The cause shown was but an attempt to amend his return, which could not be allowed. Philpot's admissions and conduct on the 17th October, followed by his evasive return, manifested a disposition to trifle with the authority of the court, and placed him in an attitude towards it which rendered some unequivocal act of submission, and earnest and sincere effort to obey its process, necessary to extricate him from the situation in which he had thus voluntarily placed himself.

The rule to show cause was to furnish him an opportunity of making this submission, and showing this effort, or of yielding actual obedience. Not the slightest effort at obedience being shown, and the paper amendatory of the return and contradictory of the previous admission being rejected, an attachment became unavoidable, unless the court would surrender its own authority. At this stage of the proceedings, the case is clear. Philpot is manifestly in contempt, and his punishment is the direct and inevitable consequence of his own conduct. Has his case been changed by any thing which he has since done? He has in fact done nothing, and yet it is said, if he were then in contempt, he is now purged of it. The contempt, it must be recollected, is his evasion of the writ, and disobedience of its requirements. Not an act of his has been shown, nor an effort on his part to obey, although six months elapsed from the return of the writ until the removal of the boy, during all which time he was kept within a few miles of Philpot's residence, in the place where he had himself deposited him and was for sale, which could not but have been known to him, and Philpot, at large, free to exert all his energies.

Great reliance is placed on the affidavits of Carey and Turley. That of Turley shows nothing but that on the 28th May, 1830, he purchased the boy from Carey, and the next day removed him to the western country, where he sold him. Carey's affidavit shows his purchase of the boy from Philpot between the 6th and 13th October, 1829, having contracted for him some days before; that the boy had not been since in the possession, power, or custody of Philpot, and that some time since he had sold him, and does not know where he is.

These affidavits, so far from acquitting Philpot of his contempt, by showing an effort and sincere desire to obey the

effort, and an inability on his part, lead the mind rather to an opposite conclusion. It will not be forgotten that these are voluntary affidavits of persons not subject to the process of the court, or bound to state more than in the opinion of Philpot might suit his purpose, and were prepared under his direction, and to effect his enlargement after he had been attached. Hence only that is stated which may have been supposed sufficient to attain that end; and hence, in Carey's affidavit, the mystery which is left to hang over the condition of the boy, the person to whom he had been sold, the direction in which he had been sent, the circumstances under which he had been purchased by Carey from Philpot, and their knowledge or ignorance, at the time, of the boy's claim to freedom. It is not disclosed that Philpot sold the boy to Carey without a knowledge on the part of either or both of them, that the boy was free, or had any claim to freedom; that Carey gave any consideration for him; that after Philpot's admission of having the boy, and either before or since his return, he ever made any application to Carey for the boy, and that Carey had refused to re-deliver him, or that Philpot had adopted any measures whatever to regain possession of him. Nor indeed was Carey bound to make any such disclosures, his affidavit being purely voluntary, yet the omission to make full and entire disclosures as to the boy, greatly weakens the effect of his testimony in Philpot's behalf; and taken in connexion with all the circumstances of this transaction, excite a suspicion, that, though he may not have been actually a partaker with Philpot, yet that he was not wholly ignorant of his (Philpot's) attempt to evade the writ. But to give the fullest force and effect to the affidavits of Turley, Carey, and of Philpot himself, still, no one single act of obedience to the writ, or the slightest disposition to obey it has been shown, while throughout the whole case there appear to have been continued and obstinate struggles to elude and evade.

The 7th ground is that "the order of imprisonment was illegal in this that it imposed upon Philpot a condition which it was impossible for him to perform, and because the court was not authorized to require the production of the boy, as the condition of his purging his contempt, if any were committed." As has been repeatedly said, the attachment was for an evasion and disobedience of the writ, and the only condition imposed on him was obedience. His imprisonment was not made to depend upon the arbitrary will of the judge, but upon his own will, if that will should lead to an action. That such an order is, not illegal, must be manifest to any one who considers the order and allows to the court the power of enforcing its own process. Such orders are of common occurrence and are absolutely necessary for the attainment of justice. They are issued and enforced against sheriffs, justices of the peace, and constables who collect

money and neglect or refuse to pay it over when ordered to do so; to compel the production of personal chattels under a warrant for restitution, and in a variety of instances of small importance, compared with personal liberty; and it would be a very singular defect of power in the court, not to possess the same means of enforcing the writ of habeas corpus. If the court had a right to issue the writ, it had the right to compel the production of the boy, and to use the only means adequate to the attainment of that end. The indefinite use of the means beyond the attainment of the end, would be illegal and improper: up to that period it is both legal and proper.

The opinions of Senator Clinton as delivered in the case of Yates against the people, 6 John. Rep. 507, were much relied on in argument. How these opinions can be construed into a support of the principles assumed in this 7th ground, the Court has not been able to perceive. The position for which Mr. Clinton contended, and successfully too, was that every commitment to be legal, must be definite and terminable, either by the efflux of time, or on the doing of some act by the prisoner. In speaking of imprisonment made to depend on the doing of some act by the prisoner his words are, "and where an imprisonment is made to terminate on the doing a certain act on the part of the prisoner, every legitimate object will be answered, and his course of future conduct expressly marked out. He will not depend for his liberation upon the varying volition of fluctuating caprice of the judge." The direct application of these opinions to the present case is readily made by every one, but fully to sustain it. That the production of James is impossible, remains yet to be shewn.

The 8th ground is "That the court had no jurisdiction over the said John N. Philpot after the return was filed, and therefore all the subsequent proceedings were null and void."

If the position here assumed be true and this ground is tenable, it follows by necessary consequence, that the filing of any return, of whatever character, to a habeas corpus is equivalent to a discharge of the defendant, and that the court can in no case inquire into its fullness or sufficiency; or if it do inquire and find the return imperfect and evasive, it at the same time makes the humiliating discovery, that the very act of contemning its authority has deprived it, not only of all power to protect the innocent and helpless who seek its shelter, but also of the power of self-protection. The jurisdiction and power of the court cannot, however, be thus easily evaded; for when once it takes cognizance of a cause it will see that full and ample justice be done, nor will it release its hold of the defendant until that end be attained.

The 9th and 10th grounds are the opinions of Judge Crawford and Judge Lamar,

under both of which it is said Philpot should be discharged.

58 \*At the last term, Judge Lamar being present and sitting with the Judge of the middle circuit, a motion for Philpot's discharge was argued; and the court being divided upon what forms the 6th ground of the present motion, the defendant could take nothing by his motion then made; upon which the whole case being referred to Judge Crawford, by consent of parties, that judge concurred with the opinion opposed to the motion; and in pronouncing his decision, after an attentive consideration of the case, and upon a review of all the grounds then assumed, declared that "upon the whole, Philpot ought to remain attached, until he produces the boy James, or shows that it is impossible to produce him." In order to have the benefit of Judge Lamar's opinion, which was favorable to the motion upon the ground stated, and it may be added, upon that ground alone, it is contended that but a single Judge can legally sit in our Superior Courts: and that Judge Lamar having been present, by request, at the argument, and sitting with the presiding judge of the district, the authority of the latter was in that particular case superseded. It is not necessary to go into much argument on this subject. The judges of the Superior Courts, though elected for the service of a particular district, have a general commission for the whole State, and the authority vested in each judge is exactly equal. Any one of them may hold any court in the State; but there is nothing in their commissions, the laws or the constitution to prevent a greater number, or all of them from sitting together, if they should happen to be present. Yet if it were the law that one only may sit, and two should be present, which of them would be in power? The presumption would seem to be in favor of the presiding judge of the district, and if in him, it would be criminal courtesy to abandon a deliberately formed and settled opinion in favor of a visiting brother, in whatever estimation that brother might be held, either for worth and integrity as a man, or learning and ability as a judge. It is held, however, that the power of each judge present was equal, and that the motion was lost by the division of opinion.

The court repeats its regret heretofore expressed, for the situation in which the movant has thus voluntarily placed himself, and the necessity he has imposed upon the court of exerting against him its extraordinary power for the advancement of justice; and after having attentively and advisedly considered every ground submitted, and weighed every argument offered, feels bound to adhere to the decision pronounced by Judge Crawford on the former motion "that Philpot ought to remain attached, until he produced the boy James, or shows that it is impossible to produce him."

The motion is therefore overruled.



## William Taylor v. William Thomas.

In Chatham Superior Court, July Term, 1831.

## Justice Court—Jurisdiction—Demand for Pilotage.—

The 5th sec. of the act of 1799, entitled an act to regulate the pilotage of vessels to and from the several ports of this State, and which vests the commissioners of pilotage with power to decide, adjust and regulate any damage, dispute, complaint or difference, arising against or between master or pilot for pilotage, or any other matter relating to the business of a pilot, does not deprive the Justice's Court of jurisdiction over a demand for pilotage, where the same does not exceed thirty dollars.

The plaintiff below brought his action in a Justice's Court, to recover the outward pilotage of a vessel of which the defendant was consignee. The defendant pleaded to the jurisdiction of the magistrate's court; and alleged, that by the 5th sec. of the act of 1799, entitled an act to regulate the pilotage of vessels to and from the several ports of this State, exclusive jurisdiction over the subject matter of this suit was vested in the commissioners of pilotage. That section prescribes, that "in cases any damage, dispute, complaint, or difference shall happen to arise, or be made against, or between any master or pilot, for or concerning the pilotage of any ship or vessel, or any other matter incident or relative to the business or care of a pilot, in any of the said harbors, all such damages, disputes, complaints or differences, (when the claim does not exceed \$100) are hereby ordered to be heard and determined by the commissioners, or a majority of them, who by their decree, arbitrament or order, shall and may lawfully decide, adjust and regulate every such damage," &c. The plea thus interposed, was overruled by the justice; and an application made by the defendant to this court for the writ of certiorari. The question presented for adjudication, is upon the sufficiency of the plea offered in the court below. To determine this, we are naturally led into an inquiry of the jurisdiction of Justices' Courts in civil cases.

By the judiciary act of 1789, sec. 47, it is provided, for the more speedy recovery of small debts, that the justices of the several counties, or any one or more of them, shall have authority and jurisdiction to hear and determine all suits for any debt or liquidated demand due by judgment, specialty or account for any sums of money not exceeding five pounds sterling, &c. The 5th sec. of the act of 1790, limits the exercise of the powers thus conferred, within their respective Militia Captain's district. By the 44th sec. of the act of 1792, the provisions of the act of 1789, are re-enacted. By the act of 1797, the justices in the respective company districts are clothed with jurisdiction to hear and determine all suits or any debts or liquidated demands, or on account for any sums of money, not exceeding thirty dollars. And by the 5th section of the 3d art. of the Constitution of the

State of Georgia it is declared, that there shall be two justices in each Captain's district, either or both of whom shall have power to try all cases of a civil nature, within their district, where the debt or liquidated demand does not exceed

60 \*thirty dollars, in such manner as the legislature may by law direct. The principal act passed on this subject, since the adoption of the constitution is the act of 1811,—by it, their jurisdiction is recognized for the trial of all suits on any liquidated demand or account, for any sums of money not exceeding thirty dollars.

Thus it is obvious, that anterior to, and at the time of the passage of the act of 1799, for regulating the pilotage of vessels, jurisdiction over the subject-matter of this suit was vested in the Justices' Courts; and the simple question to be determined is, whether that jurisdiction is taken away by the mere affirmative grant of powers to the commissioners of pilotage contained in the said 5th sec. of the act of 1799.

The general rule in England is, that the Court of King's Bench is ousted of jurisdiction by nothing, but the express negative words of a statute; or according to the later cases, necessary implication. This rule is so well established, as to dispense with the necessity of adducing authorities. Considered with reference to the original jurisdiction of the K. B. as distinguished from its superintending control over inferior judicatories by appeal, certiorari, &c. it is not perceived why the rule stated is not equally applicable to all the common laws courts; and indeed, such has been its extension and application; and so it seems to have been understood, as it has been adopted and applied in this country. It is not important now to inquire into the character and course of proceeding of the Justices' Courts, since we are not seeking to establish a jurisdiction for them, as originating in the common law, but are limited to the inquiry whether a jurisdiction expressly derived to them, in common with all other courts, from the constitution and legislative enactments, can be divested by the mere affirmative words of a statute conferring the same jurisdiction upon some other tribunal.

Do the words, used in the said 5th sec. "are hereby ordered to be heard and determined," necessarily imply a negative? It is only as if the legislature had said "shall be heard and determined" and such words, without some non-intromittant clause prohibiting the exercise of jurisdiction by any other tribunal, or the introduction of some word or words which necessarily exclude the other tribunal, as final, original, exclusive or the like, have never been held in England sufficient to oust a previously existing jurisdiction. And by their received acceptance with us, as established by uniform construction and practice, no such efficacy has been given to them here. Upon the establishment of the court of Oyer and Terminer for the city of Savannah, it was invested with cognizance of civil cases within

a limited amount, and criminal jurisdiction of minor offences. Yet it never has been made a question whether this ousted the jurisdiction of the other courts. The

Superior Court continues constantly to try criminal \*cases, over which the city court has jurisdiction; and if a civil jurisdiction, within the limits of the latter, has not been exercised by the former, it is only because of the more speedy justice in the city court. By the 3d art. 2d sec. of the Constitution of the United States, it is provided, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." Upon the principle contended for, in support of this plea, this ought to be construed as giving the courts of the United States exclusive jurisdiction of all cases embraced within it; yet such is not the construction it has received, and a concurrent jurisdiction remains in the courts of common law of the states where the common law is competent to give a remedy. So it has been decided in England, that a statute simply giving remedy at common law for a thing before recoverable in the spiritual court only, does not take away the jurisdiction of the spiritual court. 1 Ld. Raym. 323. And where by charter a jurisdiction was conferred upon the mayor and aldermen of London in Southwark, but which charter contained no non-intromittant clause as to the justices of the county of Surrey, by whom the jurisdiction had been previously exercised, it was held that the justices retained a concurrent jurisdiction with the mayor and aldermen. 4 Term Rep. 451.

By reference to another sec. of the same act, the construction maintained in support of this plea, it is thought, will be found at variance with the legislative intent, as it is there manifested. It will be recollected that the 5th sec. professes to regulate disputes, complaints or differences between master and pilot. Now by the 15th sec. of the same act, it is declared, that the captains of vessels having no owner or consignee in the port, shall be obliged, if requested, by the pilot acting on board, to give security for the faithful payment of the pilotage, before said vessel leaves such port. Obviously contemplating, it would seem, a right in the pilot against the owner or consignee, not embraced by the words of the 5th sec. within the new jurisdiction, and liable to be enforced elsewhere. It is not however necessary to rest the decision of this plea here. The Constitution declares, that the judicial powers of this State shall be vested in a Superior, Inferior, and Justices' Courts, and in such other courts as the legislature shall from time to time ordain and establish. The Justices' Court is here recognized by the Constitution; and in another sec. of the same article, its power and jurisdiction, as we have seen, are limited and defined. It is left to the legislature to point out the cause of its proceeding, but its jurisdiction can neither be increased nor diminished, without an alteration of the Constitution itself. It is a

right which the Justices' Court derives from the Constitution to try all cases of a civil nature within the limits therein prescribed, and this right cannot be impaired, but by the means pointed out in the \*Constitution. Such is not the character of the act of '99, nor does it profess to effect an alteration of the Constitution. Whatever may have been the intention of the legislature, in the grant of powers conferred by the 5th sec., or whatever interpretation it might be susceptible of, according to the rules of construction, it cannot be permitted to divest a jurisdiction, derived from the supreme law of the land.

For these reasons, the plea is overruled, and the judgment below affirmed.

### Bank of South Carolina v. Michael Brown.

In Chatham Superior Court, July, 1831.

**Evidence—Witnesses—Refreshing Memory—Memoranda.**—It is competent for a witness to refresh his memory, by resorting to a memorandum which he had made of a fact, and if he can then speak to the fact from his own recollection, it will be good evidence, but if after seeing the memorandum he cannot recollect the fact, the original memorandum itself must be produced.

**Same—Original Paper in Possession of Adverse Party**—Notice.—Notice must be given to produce an original paper proved to be in the possession of the adversary before secondary evidence can be received of its contents.

**Same—Same—Same—Exception.**—The principal exception to this rule is, when from the nature of the proceedings, the defendant must know that the plaintiff intends to charge him with the pos-

**\*Evidence—Witnesses—Refreshing Memory—Memorandum.**—That a witness may refer to a written instrument, memorandum, or to an entry in his books, to refresh or assist his memory is a well established rule of evidence. *Williams v. Kelsey*, 6 Ga. 365; *Bank v. Brown*, Dud. 62; *Finch v. Barclay*, 87 Ga. 393. 13 S. E. Rep. 566; *Hinton v. State*, 68 Ga. 322; *Schall v. Eisner*, 58 Ga. 190; *Akins v. Georgia R. & B. Co.*, 111 Ga. 815, 35 S. E. Rep. 671; *Schmidt v. Wambacker*, 62 Ga. 321; *McLendon v. Frost*, 57 Ga. 448; *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. Rep. 18; *Orr v. Warehouse & Com. Co.*, 97 Ga. 241, 22 S. E. Rep. 937.

But if after seeing the memorandum he cannot recollect the fact, the original memorandum itself must be produced. *Bank of South Carolina v. Brown*, Dud. 62.

And a witness may refresh his memory by examining a book kept by another, the entries on which were made from memoranda furnished by the witness himself, and who had verified the correctness of these entries by comparing the same with his original memoranda. It is, in effect, the same as if the book had been kept by the witness himself. *Orr v. Warehouse & Com. Co.*, 97 Ga. 241, 22 S. E. Rep. 937.

Also where a witness under cross-examination, had acted, not upon reading a letter, but upon hearing it read, it was enough to allow him to refer



session of the instrument: as in an action of trover for a bond.

**Same—Document—Whole Must Be Read.**—The whole of a document or writing offered must be read, if required, otherwise there can be no certainty as to the sense and meaning of the entire document.

**Same—Secondary Evidence—Rules Regulating.**—When secondary evidence is let in, it is subject to the same rules which regulate the admission of primary evidence.

**Same—Defective—Inadmissible.**—The impossibility of furnishing better evidence will not authorize the admission of that which is intrinsically defective and dangerous.

**Same—Witnesses—Conclusions Drawn by—Inadmissible.**—It is not the conclusion at which a witness may arrive which constitutes evidence in a cause, he must state facts, and let the jury draw their own conclusions.

This case is presented upon an application for a new trial, on the part of the plaintiff. The action was brought upon two promissory notes against the defendant, who was alleged to be a partner of the house of William Overstreet and Co., in Charleston, by whom the notes were made. To establish the copartnership, the testimony of Robert Campbell, taken by commission, was offered by the plaintiff. Mr. Campbell, in his answer to the second direct interrogatory, says, "he received a letter from Adger and Black, of Charleston, dated 29th March, 1826, containing the following. 'When you write us again, please say who is concerned in business with William Overstreet and Co. here; he says Michael Brown of Savannah is his partner.' To which I find, that on the 3d April, 1826, I replied, that I had that day inquired of Michael Brown himself, and he informed me he was a partner." The witness then further proceeds in his answer to state, "of this conversation or inquiry and answer, I have no recollection; though I have no doubt that Michael Brown told me

he was a partner in the firm of William Overstreet and Co., of Charleston." This testimony was objected to on the part of the defendant, on the ground that the witness spoke entirely from a memorandum, and was unable to recall the fact to his mind after seeing the memorandum. The court refused to allow the evidence to be read to the jury; stating the law to be, that it was competent for a witness to refresh his memory, by resorting to a memorandum, which he had made of a fact, and that if then he could speak to the fact from his own recollection, it would be good evidence; but that, if after having seen the memorandum he could not recollect the fact, the original memorandum itself must be produced. The rejection of this testimony presents the first ground upon which the

present motion is based. I have  
63 looked \*into the authorities upon this subject, and see no reason to change the opinion expressed upon the trial of the cause. The general rule is believed to be correctly stated in 1 Stark. 128. "If a witness has made a memorandum of facts, he may refresh his memory by referring to it; and if by that means he obtains a recollection of the facts themselves, as distinct from the memorandum, his statement is evidence; but if he has no knowledge or recollection of the fact, except that he perused it in a book or paper, the original book or paper must be produced, and he cannot give evidence of the facts. The authorities cited by Starkie are *Doe v. Perkins* et al., 3 Term Rep. 749 and 754, and the case of *Tanner v. Taylor*, a MS. note of which was read by Mr. J. Buller, in the case of *Doe v. Perkins*, and it is thought that they sustain the rule as here laid down. In the case of *Tanner v. Taylor*, which was an action for goods sold and delivered, Mr. Baron Legge said, if the witness would swear positively to the delivery from recollection, and the paper was only to refresh

to the letter, to refresh his memory as to what he had heard read, without permitting him to read aloud to the jury and without permitting cross-examining counsel to read from the letter in the hearing of the jury. *Travelers Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. Rep. 18.

But where the plaintiff, while a witness on the stand testified generally that he remembered certain facts stated by him, and that he used certain books and memoranda to refresh his memory (the *memoranda*, but not the books, being then before him) his evidence as to the numbers and destinations of certain cars, and the dates of their shipment, was inadmissible, it further appearing from his testimony that he could state none of these particulars without referring to the books, or to the *memoranda* he had taken therefrom, and that the entries in the books were sometimes written by himself and sometimes written by another in his employ, it being also apparent that at the time of testifying the witness was unable to state which entries were made by himself and which by the other. *Hematite Min. Co. v. East Tenn., etc., Ry. Co.*, 92 Ga. 268, 18 S. E. Rep. 24.

A witness may refer to the books he has kept, as a

memorandum to refresh his memory, and may swear to the correctness of the accounts as taken from the books, his memory being so refreshed, but neither the books nor an extract from them are admissible as evidence for the jury. *Schall v. Eisner*, 58 Ga. 190.

But when accounts are in evidence, and they are pertinent otherwise than as mere *memoranda* used by the witnesses to refresh their memory, it is not error to refuse to rule them out except as such *memoranda*. They should stay in, if at all, for all purposes which they may legally subserve. *McLendon v. Frost*, 57 Ga. 448.

And for the purpose of proving notice of dishonor to the indorsers, the certificate of a notary public, made at the time of protesting the note for non-payment, and annexed to the protest itself, may be given in evidence in connection with the testimony of the notary to the effect that the certificate is genuine, and that, though he has no recollection of the facts stated therein, or any of them, he is satisfied of their truth, because he would not have certified them had he not been convinced of their truth at the time. *Allen v. Georgia National Bank*, 60 Ga. 347.

his memory, he might make use of it. But if he could not from recollection swear to the delivery any further than as finding them entered in his book, then the original book should have been produced. In the case of Doe v. Perkins, the only question was, at what time of the year the annual holdings of several tenants expired. The witness Aldridge had noted down in a book the declarations of the different tenants respecting the times when they severally became tenants. Upon his examination he stated that he had no memory of his own of those specific facts, but that the evidence he was giving was founded altogether upon the extracts he had made from the book. This evidence was objected to, because, as the witness had no recollection of the facts, the original book ought to be produced. The evidence was admitted, and upon motion for new trial, Ld. Kenyon, Ch. J., said, that the rule appeared to have been clearly settled, and that every day's practice agreed with it. And that comparing this case with the general rule, the court were clearly of opinion that Aldridge ought not to have been permitted to speak to facts from the extracts which he made use of at the trial. In Phil. on Ev. 209, it is laid down as the rule, that if the witness cannot, from recollection, speak to the fact any further than as finding it stated in a written entry, his testimony will amount to nothing. The same authorities are relied on by Philips, which have been cited by Starkie, and the rule therefore should receive a like interpretation; and they are perfectly consistent as far as the rule goes, as stated by Philips. They both concur in rejecting the testimony of the witness, as to the facts stated in the memorandum. No case is recollected, and none has been produced upon the argument here, in which a witness, who had lost all recollection of the fact to which he testifies, and could not recall it to

his mind, has been permitted to give it  
 64 \*in evidence as the contents of a memorandum made by him, without producing the original in court. It may be, that from the necessity of the case, a general necessity, resulting from the impossibility of furnishing better evidence, where the witness had forgotten the fact which he had recorded, the original memorandum, properly proved by the witness, ought to be received as evidence of its contents; but the reason, which requires its production, is commensurate with the rule which requires the best evidence the case is susceptible of. It is important that rules of evidence when clearly settled should be adhered to. In nothing are established principles more necessary than in the regulation of judicial proofs. The admission of this testimony in the present case would have been contrary to the rule which had been stated, and it is therefore considered that it was properly rejected.

The 2d, 3d, 4th and 5th grounds upon which this motion is based, will be disposed of together. The 2d and 3d are founded upon the refusal by the court to

allow so much of the answer of Drake Mills (a witness for plaintiff) to the 6th direct interrogatory to be read in evidence to the jury, as went to give in part the contents of a letter written by the defendant, addressed to William Overstreet and Co. dated 3d April, 1826. The 4th and 5th grounds are founded upon the refusal by the court to allow so much of the testimony of Edwin B. Overstreet, as went to give in part the contents of the same letter of 3d April, 1826, to be read in evidence to the jury. The witness, Edwin B. Overstreet, stated in his examination that when the trunk, containing the papers of William Overstreet and Co. was brought to Savannah, Georgia, and opened, Michael Brown was present, and took therefrom as witness believes, all the papers bearing his signature, including the letter alluded to, which he subsequently destroyed, as witness is informed and believes. In this letter Michael Brown writes thus—the witness then proceeds to give an extract from the letter. To so much of the testimony of both Mills and Overstreet as went to give the contents of this letter, the defendant's counsel objected upon two grounds. 1st, That the letter having been traced to the possession of the defendant, by the testimony of Overstreet, it was incumbent on the plaintiff to give him notice to produce the original before a copy could be offered in evidence. 2d, That a part only of the contents could not be given in evidence, but that a copy of the whole letter must be offered. Upon these grounds the court rejected the evidence as inadmissible.

No rule of evidence is perhaps better settled and more uniformly acted on in practice, than that, which requires notice to produce an original paper proved to be in the possession of the adversary, before secondary evidence can be received of its contents. The rule is founded in reason; its purpose is to guard the party in  
 65 whose possession the \*original is; to prevent his being taken by surprise, in cases where it is uncertain whether such evidence will be used by the adverse party. There are exceptions to the rule, the principal one of which is, where from the very nature of the proceedings the defendant must be informed, that the plaintiff intends to charge him with the possession of the instrument as in the example in the books of an action of trover for a bond. In such cases the reason of the rule ceases, et cessante ratione cessat et ipsa lex. It is, moreover, a primary rule that the best evidence must be produced. Secondary evidence of the contents of a written instrument is admitted, because the party offering it cannot produce the original, it being either lost or destroyed, or in the possession or power of the adversary. But until notice is given him to produce the original in his possession, non constat but that better evidence may be had, than the secondary evidence offered. 2 Mer. 464. The testimony of Edwin B. Overstreet establishes



the fact, that the original letter, an extract from which was attempted to be used in this case, had come to the possession of the defendant in the action. This proof was sufficient to require notice; and the only question is, whether the evidence in relation to the destruction of the letter, was enough to dispense with the obligations thus imposed. The belief or persuasion of a witness, cannot be received as evidence, unless it rests upon a sufficient legal foundation, as upon facts within the actual knowledge of the witness—these facts may be inquired into, and a court and jury enabled to weigh the testimony of the witness by the facts upon which his belief is founded—so that it is at last the facts, and not the opinion, which constitutes the evidence. A belief resting, as the witness informs us in this case it does, upon mere information; a belief that a fact is true, because the witness has heard it said to be true, is evidence which cannot be permitted to have the effect desired for it in this case. The testimony of Edwin B. Overstreet as contained in a subsequent answer, in which he speaks of the destruction, in his presence, of certain letters by the defendant, has reference to other letters, and cannot be made to apply to the letter of 3d April, 1826. Upon this ground it is thought the evidence was properly rejected.

On the other ground, too, it is an established rule, that the whole of a document or writing offered in evidence must be read, if required; otherwise there could be no certainty as to the sense and meaning of the entire document. The dangerous tendency of permitting an extract from a letter to be read in evidence, is at once obvious—by suppressing a part, the meaning of the writer may be entirely perverted. When secondary evidence is let in, it is subject to the same rules which regulate the admission of primary evidence. The evidence as

to the contents of written instruments, when the \*original cannot be produced, must be of a nature which the law would receive in other instances. 1 Camp. 193. And as, if the original were offered in evidence, it would be the right of the defendant to have the whole letter read, so this right equally exists, when a copy is offered, and excludes the idea of receiving a mere extract. There is nothing in this case upon which to relax the general principle—it does not even appear by the evidence, that the extract was the only part of the letter referring to the subject matter. Nor will the impossibility of furnishing better evidence, authorize the admission of that which is intrinsically defective and dangerous. It has been well observed, that the reception of evidence from necessity, must be founded on a general necessity, or probability of the failure of all other and superior evidence arising out of the nature of the case. 1 Stark. 356, note o. No such general necessity is perceived here. In a case in which the only evidence of the contents of a letter was a copy in the plaintiff's letter book in his own hand-writing, and

which was urged from the necessity of the case, as being the only copy which had been preserved, *Ld. Ellenborough* rejected the evidence. *Fisher v. Samuda* and *Another*, 1 Camp. 190.

The 6th and last ground upon which this motion is made, cannot avail the plaintiff: *Ed. B. Overstreet* in his answer to the 4th direct interrogatory says, that he could not undertake to say what the specific contents of these letters were, (alluding to two letters which the witness had previously designated,) but their general purport was to charge him (*Mr. Brown*) as a partner of the firm of *William Overstreet & Co.* of *Charleston*. This evidence the court rejected. It is too loose and unsatisfactory. It is not the conclusion at which a witness may arrive, that is to constitute evidence in a cause. It is facts to which he is required to testify, that from these facts the jury may draw their own conclusions. What the witness may conceive to be the substance and effect of letters is no evidence, since it is the jury alone who are to judge from the contents of the letter what is its effect. It cannot require argument to satisfy the mind that such evidence was properly excluded.

This cause was tried before an impartial and most enlightened special jury, and upon the evidence which was before them, I see no reason to be dissatisfied with their finding. The motion for new trial is therefore denied.

### Central Bank v. H. Kendrick and His Securities.

In Houston Superior Court.

**Rent of Bridge—Statute Requiring Bond to Be Taken—Effect Where Promissory Note Was Taken.**—Where the statute required bond with security to be taken for the rent of a public bridge, and a promissory note was taken—suit was instituted upon the note, and the maker pleaded that the note was void, because the statute which required a bond had not been complied with: The plea was overruled.—A motion was then made for a new trial on the ground that the court erred in overruling the plea, which motion was refused.

**Statutes—Substantial Compliance with—Effect.**—Where there has been a substantial compliance with the law, the want of a rigid conformity with the mere letter of a statute requiring a bond to be taken, is not a fatal objection to the bond:

**Same—Effect Where Statute Says Bond Void If Not Complied with.\***—But if the statute prescribes the form and condition of the bond, and declares all bonds taken in any other form void, the bond prescribed should be strictly pursued.

**\*Statutes—Effect Where Statute Says Bond Void If Not Taken Pursuant to.**—When the statute prescribing a bond declares all bonds not taken pursuant to it void, the statute must be strictly pursued, as bonds which do not conform to it are void by express enactment. *Justices v. Wynn*, *Dud.* 22.

The facts in this case are as follows:—By the third section \*of the act of 1824, (pamphlet, page 90,) on the subject of the Macon Bridge, certain commissioners thereof were authorized to rent the same annually at public outcry to the highest bidder, taking bond and security, for the faithful payment to the State, of the sum for which the bridge should rent. The bridge (which was the property of the State), was rented accordingly. In the year——Harvey Kendrick became the highest bidder, and the commissioners took his promissory note with security for the amount of the rent. By virtue of the act of 1828, incorporating the Central Bank, all debts due the State were vested in said Bank, and under the authority of said act the note above mentioned was transferred to said Bank. An action was instituted upon the note by the Bank, and the defendants pleaded that the note was void, not having been taken in conformity with the statute which requires a bond. The plea was overruled by the court, and a verdict rendered for the plaintiffs. Whereupon a motion for a new trial was made, upon the ground of error in the court, in overruling the plea. A rule nisi was granted, and the question to be determined is, shall the plea prevail? My opinion is, that it ought not to be sustained. The taking of a promissory note, although not in conformity with the mere letter, was certainly not violative of the spirit and object of the law. It is hardly necessary to remark that the bond intended by the statute was of course to be a mere money bond, viz. a written engagement under the hands and seals of the obligor, and his securities, binding themselves to pay a certain sum of money at a certain time. Now as to the end in view, and the obligations incurred, there is no difference between such a bond and a promissory note, executed by the same parties, and for the same sum, and payable at the same time.

The difference is only in the form of the undertaking; the substance is the same in each case. A promissory note is not exempt from the operation of the statute of limitations for so long a period as a bond—but in that respect, (if the maxim "*nullum tempus occurrit regi*") would not apply in a case of this kind) the taking of a note instead of a bond was beneficial to the defendants, and furnishes no ground of legitimate objection on their part. For every purpose contemplated by the legislature, the taking of a promissory note was a substantial, though not a literal compliance with the statute. For that part of the statute which designates a bond as the security to be taken, I regard as directory to the commissioners, but not as absolutely prohibitory of every other form of security. On the part of the defendants an attempt has been made to analogize the present case to cases which have arisen under the statute 23 Hen. 6, c. 9, in relation to bail bonds. As to bail bonds it is true the courts have frequently adjudicated,

that any variance from the form and condition required \*by statute is fatal; and for the obvious reason that the statute is not only imperative as to the form and condition of the security, but expressly enacts that every security other than that prescribed by the statute shall be void. 10 Co. 101; 7 T. Rep. 109; 1 T. Rep. 418; 4 East, 568; 1 Archbold's Practice, 74. Besides, the principal object of the statute was to prevent the extortion, and oppressive exactions to which defendants were often subjected by sheriffs, *colore officii*, previous to the statute. There is no analogy then between the st. 23 H. 6, and the act of 1824 under which the commissioners acted. They are equally dissimilar in their objects and terms. One was enacted to correct abuses, and prescribes the form and requisites of a bail security, at the same time declaring every obligation different therefrom to be void. The object of the other was, to invest certain commissioners with authority to rent a certain portion of the public property. It directs them to take bond and security from the lessee for the payment of the rent, but does not inhibit them from taking any other equivalent security; nor does it declare that any security other than a bond, shall be void. There are essential points of difference between the two statutes. The statute of New York, on the subject of bail bonds, was copied from the English statute. Hence, the remarks made concerning the latter, will apply with equal force to the former, and to the cases which have occurred under it, some of which have been cited on the part of the defendants. 8 John. Rep. 76; 7 Ib. 157; 19 Ib. 223.

That there is a well founded distinction between an imperative requisition of a statute, and a clause merely directory to an officer, is illustrated even in the case of a bail bond. Thus a sheriff may take a bond with one security only, notwithstanding the statute mentions securities in the plural number. 2 Saunders, 61 c.; 1 Archb. Prac. 75. Again: the st. 12 Geo. 1, c. 29, enacts that the sheriff shall take bail for the sum endorsed on the writ and no more, yet if the bond be taken for more, it will not avoid it if no intention to oppress the defendant appear. 2 Wils. 60; 1 Burr. 331; 1 Archb. Prac. 74. The same distinction is supported in the case of *Speake et al. v. U. States*, 9 Cranch, 28, in which the court held "that a bond taken by virtue of the first section of the embargo law of January, 1808, was not void, although taken after the vessel had sailed, by consent of parties, the statute as to the time of taking the bond was merely directory to the collector." On the subject of statutory bonds generally, I am aware that there are dicta, and some decisions, which go the extent, that the insertion of conditions not authorized by law, renders such bonds void in toto. 3 Wash. C. C. Rep. 10. This point however does not occur in the present case. If it did, it might be well worthy of consideration, whether it \*would not



better comport with reason and justice that the unauthorized conditions only, should be held void. (a) 1 Gallis. 86. But without engaging in that inquiry now, I will remark that the present case, does not fall within the reason of those authorities, in which such bonds are held to be void, as no onerous or unauthorized conditions have been exacted from the defendants. The obligation incurred by them under their contract, is only co-extensive with that which the legislature intended to impose. The departure from the statute, consists in the form, not in the substance of the contract. Where there has been a substantial compliance with the law, the want of a rigid conformity with the mere letter of a statute requiring a bond to be taken is not a fatal objection to the bond. In the case of the U. States v. Morgan et al., 3 Wash. C. C. Rep. 10, the court held, that although the second section of the embargo law of December, 1807, directs the bond which is therein required, to be given to the collector, yet it is valid if taken to the United States, (see also U. States v. Smith et al., 2 Hall's American Law Journal, 458.)

The case of Cole et al. v. Gower and Peggot, 6 East, 110, has been cited on the part of the defendant. In that case, certain parish officers had taken from the putative father of a bastard child, a promissory note for an absolute sum, whereas by the st. 6 Geo. 2, c. 31, they were only authorized to take security from him to indemnify the parish. Upon a suit brought upon the note, the defendants pleaded a tender of a sum less than the note called for, as the amount of the charge actually sustained by the parish. The court held that the parish officers were not authorized to take a note for an absolute sum, and that the plaintiffs could not recover beyond the amount tendered. At the first blush this case seems to be somewhat in point, but it is really not so. The taking of a note for an absolute sum, was not only contrary to the letter, but to the whole spirit of the law. By the statute, the liability of the putative father was limited to the mere indemnity of the parish; but by taking a note for an absolute sum, the statutory measure of his liability was wholly disregarded, and an arbitrary one substituted. On the one hand if the amount of the note exceeded the actual charge incurred by the parish, then more was exacted from the defendant than the law required; on the other hand, if the amount of the note was less than the actual charge, then the parish was not indemnified, and the object of the law was defeated. The proceeding too as was justly observed by the court, was contrary to public policy. Grose, J., said "that the parish officers could not convert a power given to them for the mere purpose of indemnity, into a matter of bargain and speculation upon the life and death of the child,

70 thereby making it the interest of \*the parish to get rid of the child as soon as possible." To show the want of analogy between this case in East, and the present, it is only necessary to observe, that the commissioners of the Macon Bridge, in taking a note, did not vary in the least degree the legal measure of the defendant's liability, and that the transaction was in no wise inconsistent with public policy.

Authorities relating to mercantile and commercial agencies have been adduced to show that an agent acting under a particular, and not a general authority, cannot bind his principal beyond the extent of the authority granted. Paley on Agency, 139; 2 John. Rep. 48; 3 T. R. 757. The doctrine is admitted, but the present case does not fall within its limits. If the defendants were principals, seeking to avoid some act of their agent, upon the ground that he had transcended his power, then the authorities cited would not be inapplicable. The commissioners however by taking a promissory note, did not subject the State, whose agents they were, to any unauthorized liability. If this were a case of private commercial agency, another principle no less true than that which has been already stated would apply. It is this: although an agent cannot bind his principal by an act exceeding the agent's authority, the want of authority may be supplied by a subsequent express or implied ratification of the act by the principal, "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*" 1 Bos. & Pul. 316; 13 John. 367; 2 John. Cas. 424. 1 Livermore on Agency, 44. In this instance, the note taken by the commissioners was accepted by the State through its proper public functionary, and under the authority of an act of the legislature, it has been transferred and delivered to the plaintiffs as an evidence of debt due to the State. Similar acts of adoption in the case of a private mercantile agency would cure any defect of authority on the part of the agent. I do not conceive it to be necessary to insist upon the application of this principle to the present case, but advert to it to show that the defendants can derive no aid from the law of commercial agencies. As a general proposition it is no denied that a special or a particular authority must be strictly pursued. But in the several cases cited on the part of the defendants, wherein the principle has been practically applied, it will be found that the rights, duties, obligations, or liabilities, which were attempted to be created by an undue execution of a limited authority, were in some degree variant from those for the creation of which the power was given. Hence the decision, that such an execution of a limited power is not valid. But from the manner in which the commissioners of the Macon Bridge executed the authority delegated to them, no such variance results. Under the promissory note which they accepted, the right which thereby accrued to

(a) See ante, p. 22.

the State, and the obligation and liability incurred \*by the makers were exactly commensurate with those which it was the object of the statute to create; to wit, a right on the part of the State to receive, and a corresponding obligation on the part of the lessee of the bridge and his securities, to pay, a certain sum of money at a specified period.

Reference has been made by the defendant's counsel to a class of cases which have arisen under special statutory powers affecting the property and vested rights of individuals without their assent. In all such cases it is admitted that a strict pursuance of the authority delegated is indispensable. 1 Burr. 377; Cowp. 26; 7 T. R. 363; 3 John. Cas. 107. Thus it has been frequently determined that a collector of taxes or other officer empowered in particular cases to sell land for taxes, must strictly pursue the statutory directions in every matter which the law required to precede the exercise of the power delegated to him: and that no title is conveyed by a sale when any pre-requisite act has been omitted. 4 Wheat. 77; 6 Ib. 119; 4 Cranch. 402; 9 Ib. 64. It is an obvious dictate of justice, that no man shall be deprived of his property, against his will, except under the circumstances defined, and in the manner prescribed by law. But these decisions do not reach the case under consideration. The authority of the commissioners of the Macon Bridge was not a power affecting compulsorily the private interests of individuals. The defendants were voluntary parties to the instrument now sought to be invalidated.

The doctrine of powers by which estates are limited and settled, has been referred to by counsel. 1 T. R. 707; Willes, 169. That doctrine however has but little application to a case like the present. In the case of Taylor v. Horde, et al., 1 Burr. 120, Lord Mansfield doubtless laid down the correct rule in relation to the construction of such powers. "The intent of the parties who gave the power, ought to govern every construction. He to whom it is given has a right to enjoy the full exercise of it: they over whose estate it is given have a right to say it shall not be exceeded; the condition shall not be evaded; it shall be strictly pursued in form and substance." The reason that such powers are to be strictly pursued, is that the rights of remainder-men or parties having reversionary interests in the estate, are connected with, and affected by the execution of such powers, a reason wholly foreign to the case before the court.

Finally, the note was given for a valuable consideration,—it was voluntarily executed by the defendants,—it created no right in the State, and imposed no obligation upon the defendants beyond the purview of the statute; but the right in the one hand, and the correlative obligation on the other are the same as would have arisen under the security mentioned in the

statute. I hold, therefore, that the commissioners substantially \*executed their power, and that the note is not void.\*

Rule nisi for a new trial discharged, and execution ordered to proceed.

### Jane Irwin v. John Morell.

In Chatham Superior Court, July, 1831.

**Adverse Possession—Effect as to Infants.**—The only possession and enjoyment, which can divest a legal right to property, must be adverse to, and inconsistent with the title. And even an adverse possession held during the minority of the true owner cannot operate against his right.

**Mortgage of Another's Property—When Owner Estopped to Claim Title—When Infancy No Excuse.**—When a person, knowing that he has title to property, stands by and suffers another to mortgage or sell it, without asserting his title, or making it known to the mortgagee or purchaser, he cannot afterwards set up his claim. And in such a case even infancy will be no protection, provided the minor had arrived at those years of discretion when a fraudulent intent could be reasonably ascribed to him.

**Executions—Levy upon Wrong Person's Property—Failure of Such Person to Object at Time—Statute.**—

If A. be present when an execution is levied on his property as the property of B., and does not object to the levy, or claim title in himself, a presumption arises that he has none; but then if A. should afterwards interpose his claim according to our statute, and should produce clear and satisfactory evidence of his title, he will recover the property.

**Same—Same—Failure to Interpose Objection under Statute—Objection at Sale.**—And if he should not interpose his claim, under the statute but on the day of sale should publicly forbid the sale, and assert his title in the hearing of the by-standers, he might afterwards institute an action against the purchaser who could not defend himself against a clear title by proving that the plaintiff at the time of the levy made no objection.

**Same—Same—Failure to Object under Statute or at Sale—Rights of Purchaser.**—But if claimant fail to assert his right both at the time of levy and sale, having an opportunity of doing so, it will be regarded as a fraud on the purchaser, or such gross laches as will bar any future claim.

**New Trials—Verdicts—Contrary to Evidence—When Granted.**†—When a verdict has no foundation in

\*NOTE.—This case was submitted to the convention of Judges in November, 1830, by JUDGE STRONG. The decision which he made in the case was confirmed by a majority of the Judges then present. JUDGE LAMAR reduced his opinion to writing, of which the above is a copy, and it was entered on the minutes of the court, with the final order in the case. It may therefore be considered as having the sanction of a majority of the convention.—Note in Original Edition.

†New Trials—Verdict Contrary to Evidence—When Granted.—To weigh the evidence is peculiarly the province of the jury; and where there has been testimony on both sides, and no misconduct imputable to them, their verdict should never be disturbed



the evidence, a new trial will be granted; but when there has been evidence on both sides as it is the peculiar office of the jury to determine the relative weight of conflicting evidence, the court although it may differ with the jury on the point of preponderance, will not disturb the verdict.

**Same—Same—Same.**—It seems however, that when the verdict is glaringly against the weight of evidence, and must inevitably work injustice, a new trial may be granted.

**Same—Discovery of New Evidence—Cumulative—Effect.**—A new trial will not be granted upon the discovery of new testimony which is merely cumulative.—Though this rule has not been held inflexible, the courts will observe great caution in relaxing it.

**Same—Same—Same—Same.**—The court reluctantly granted a new trial upon the ground of newly discovered testimony, which was not merely cumulative, in connexion with certain auxiliary circumstances attendant upon the case, if not having been satisfactorily shown that due diligence was used to obtain it sooner.

**Same—Discretion of Court.**—The granting of a new trial or refusing it, must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case.

This was an action of trover for — negroes. The case was tried the first time at — Term, 182—, when a verdict was rendered for the plaintiff. The defendant appealed from the verdict, and the case was again tried at — Term, 183—. On the

because the court might happen to think the weight of evidence was the other way. *Glover v. Woolsey*, Dud. 86, citing *Irwin v. Morell*, Dud. 78. To the same effect, the principal case is cited in *Wilson v. Wright*, Dud. 103. See also, *Knight v. Mantz*, Adm'r, Ga. Dec. Pt. I. 22, and *foot-note*; *Bagshaw v. Dorsett*, Ga. Dec. Pt. II. 42, and *foot-note*; *Fell v. Abbot*, R. M. Charl. 452.

**Same—Discovery of New Evidence—Effect.**—Newly-discovered evidence is ground for granting new trials; but it must be such as is so material that it would be likely to change the verdict, that is such as to show that justice had not been done; and it must also be such that the movant could not have obtained by diligent inquiry. *Glover v. Woolsey*, Dud. 86, citing the principal case.

But newly-discovered evidence which is merely cumulative is not ground for granting a new trial. *Irwin v. Morell*, Dud. 72; *Giles v. State*, 6 Ga. 276; *Coleman v. State*, 28 Ga. 78; *Hoye v. State*, 39 Ga. 718; *Lynes v. Reid*, 40 Ga. 237; *Perry v. Houseley*, 40 Ga. 657; *Orand v. Walker*, 41 Ga. 657; *Wood v. Ross*, 43 Ga. 596; *Moore v. Ewings*, 44 Ga. 354; *Malone v. State*, 49 Ga. 211; *Niles v. State*, 55 Ga. 557; *O'Shields v. State*, 55 Ga. 697; *Meeks v. State*, 57 Ga. 329; *Wilkinson v. Smith*, 57 Ga. 609; *Smith v. State*, 59 Ga. 514; *Griffin v. Cleghorn*, 63 Ga. 384; *Hill v. State*, 64 Ga. 453; *Hutchins v. State*, 70 Ga. 727; *Smith v. State*, 72 Ga. 114; *County of Macon v. Chapman*, 74 Ga. 107; *Hunt v. Dunn*, 74 Ga. 120; *Hart v. Jackson*, 77 Ga. 493, 3 S. E. Rep. 1; *Artemus v. State*, 79 Ga. 514, 4 S. E. Rep. 385; *Brinson v. Faircloth*, 82 Ga. 185, 7 S. E. Rep. 923; *Verdery v. Savannah*, etc., R. Co., 82 Ga. 675, 9 S. E. Rep. 1133; *Baker v. Moor*, 84 Ga. 186, 10 S. E. Rep. 737; *McCurdy v. Terry*, 33 Ga. 49; *Crawford v. Gauden*, 33 Ga. 173; *Blalock v. Denham*, 85 Ga. 646, 11 S. E. Rep. 1038.

part of the plaintiff one witness testified that Alexander Irwin, an uncle of the plaintiff, about the time the line was run between the State of Georgia and the Indians, under the treaty of Shoulderborne, gave to the plaintiff a negro girl, three or four years old, whose name was Hannah;—that said Alexander Irwin brought the negro girl to the house of the late General Jared Irwin, who was the father of the plaintiff, and called for the plaintiff, who met him in the yard. He then put the hand of the girl into that of the plaintiff, and told her that he gave her that negro girl. Another witness also testified that she did not see Alexander Irwin make the gift; but soon after he had brought the girl to the plantation of Jared Irwin, she heard him (Alexander Irwin) say that he had given the negro girl Hannah to the plaintiff. These two and other witnesses testified that said negro girl was always recognized in the family of Jared Irwin, as the property of Jane Irwin the plaintiff. Jane Irwin at the time of the gift, was a little girl, about the age of the girl Hannah. This negro Hannah and her children were the subjects of the suit. The identity of the negroes, and the conversion by the defendant were sufficiently established.

On the part of the defendant it was proved, that the negro had remained in the possession of Jared Irwin to the time of his death,—that he exercised acts of ownership over them—that in the year 1815, he mortgaged them and other negroes to James Dickson and Co.—that after the death of Jared Irwin they still remained upon his estate 73 and with his negroes, "until they were sold in the year 1823 at sheriffs' sale, to satisfy the debt due to James Dickson and Co. The person who was sheriff at the time of said sale testified, that when he made the levy, he found the negroes in the possession of the family of Jared Irwin deceased, and on his plantation—did not take them away at the time of the levy—believed the plaintiff was present when the levy was made; did not know positively, but was under the impression that the plaintiff knew the nature of the process under which the levy was made; no person forbade him to take the girl Hannah; the negroes were sent to the court house on the day of sale by the family. One of the plaintiff's witnesses who had acted as overseer for Jared Irwin in 1807, and had continued in his service for three years, stated in his cross examination, that the negro Hannah was considered as the property of Jared Irwin, except by the family who called her Jane's property. The same witness gave an affirmative answer to the question "whether from what he saw while acting as overseer, he did not believe the said slave was the property of the estate of Jared Irwin?" There was no direct evidence that the plaintiff was cognizant of the mortgage at the time of its execution; and one witness who was examined as to that point on the part of the defendant, stated it to be his opinion that the mortgage

was unknown to the family and neighbors of the mortgagor in the year 1817; that the situation of the plaintiff was such at that time, that he (the witness) could say that she knew nothing at all of the private transactions of her father and mother; and that she usually spent much of her time from home. To the question put on the part of the defendant "whether the negroes were not considered in the family as the property of Jane Irwin," the witness answered that he did not think so; and stated that John Irwin the son of Jared Irwin after the death of his father, applied to the witness to borrow a sum of money in order to keep back, (to redeem,) the negroes belonging to his sister Jane Irwin. No evidence was adduced that the plaintiff was present at the sale. The jury returned a verdict for the defendant, whereupon the counsel for the plaintiff moved for a new trial upon the following grounds.

First. Because the verdict was contrary to law and evidence.

Secondly. Because since the trial the plaintiff has discovered a new and material evidence. This ground was verified by the usual affidavit of the party. The following extracts from the affidavits of Simon Whitaker and Charles Williamson will show the nature of the newly discovered evidence. "Simon Whitaker being duly sworn, deposeseth and saith that he was in Saundersville, Washington County, on the first Tuesday in January, 1823, at the time that General Irwin's negroes were sold, and saw

Miss Jane Irwin there, who claimed  
74 \*a part of said negroes; that he heard her say to her brother General John Irwin that she forbid the sale of them, and that she never would consent to the sale of them—that he saw the negroes encamped with a waggon on the commons of said town; and there they remained until they went back to General Irwin's plantation; that he saw the sheriff within sale hours, standing at the court house door crying the said negroes all at once, and knocked them off to the agent of James Dickson and Co. while they were at the camp on the commons with the waggon—that he enquired of General John Irwin, what he meant by such a course of conduct—that he remarked the house of James Dickson and Co. had been kind and indulgent to him—that he wanted the case settled—that he thought was the best he could do—that he had made a private sale—and that he wanted to perfect titles—that he (deponent) told him that his sister Jane would never consent to it. He (General Irwin) then remarked that he intended to try and satisfy her by letting her have some other property, that would suit her as well."

"Charles Williamson being duly sworn, maketh oath and saith, that to the best of his recollection, in the year 1823 or 1824, this deponent lived in Saundersville in Washington County, and that on a sheriff's sale day in one of those years above mentioned, some of the negroes belonging to the estate of Jared Irwin, deceased, were

exposed to public (sale) under the foreclosure of a mortgage and there were included in said mortgage a certain woman named Hannah and her increase; and Miss Jane Irwin the daughter of said deceased, claim said negroes, and on the day and at the hour of sale, called on this deponent to go with her to the court house where the negroes were exposed to public out-cry, and did then and there forbid the sale of said negroes, saying the negroes, to wit, Hannah and her children, were the property of her the said Jane Irwin."

By the Convention. The jury in rendering a verdict for the defendant, must have been governed by a conviction of the truth of some one at least of the following propositions. First, that the plaintiff had no title originally to the girl Hannah: or secondly, that she had parted with her title by some contract, or agreement with Jared Irwin her father; or thirdly, that she had been divested of all property in the negroes in question, by Jared Irwin's uninterrupted possession, and control of them for so long a period; or fourthly, that he had knowledge of, and assented to the mortgage in favor of James Dickson and Co. or fraudulently concealed her title from the mortgagees; or fifthly, that she was apprized of, and acquiesced in the levy; or lastly, that she had knowledge of the intended sale and acquiesced therein; or fraudulently concealed her title from the purchaser. It is not to be presumed that the verdict of

the jury is referrible in any degree  
75 \*to the first of these positions. For the fact of a verbal, but explicit gift, made to the plaintiff by her uncle and perfected by actual delivery, was established by the uncontradicted testimony of a witness, who was present at the transaction; and also by proof of the acknowledgment of the donor, made a short time afterwards, that he had given the girl Hannah to his niece. Without this positive proof of the existence and origin of the plaintiff's title, perhaps even the uniform recognition of it, by the family of Jared Irwin, whilst the property remained in his possession, would have lost much of its force; but taken in connexion with the direct evidence, the recognition becomes effective, and both united place it beyond controversy that the plaintiff once had a valid title to the girl Hannah, and that the jury could not have acted on a contrary supposition.

The second ground though not so wholly untenable as the first, does not afford a satisfactory foundation for the verdict. There was no evidence adduced of an actual transfer of the property by the plaintiff to her father; and that such alienation did occur is not a matter of necessary or just inference, even from Jared Irwin's long continued possession of the negroes, or from his exercise of a general authority over them. From the tender age of the plaintiff at the time of the gift, the possession and management of the girl Hannah necessarily devolved upon General Irwin; and that he should keep the negro and her offspring



upon his plantation and exercise a general authority over them, during the whole time that his daughter remained under his paternal care as a member of his family, was entirely consistent with the ordinary course of human conduct under such circumstances, and furnishes no reasonable ground for the hypothesis of an actual transfer of the property to him; particularly when that hypothesis is at variance with the uniform admission of the plaintiff's title by the family of General Irwin, during the time that he had possession of the property. It may be thought however, that the presumption of a transfer is authorized by the fact of his having mortgaged the property. But unless she had knowledge of the mortgage, no such presumption can arise. Her antecedent title (with which his possession was not incompatible) having been established, no inference to the prejudice of her right can be legitimately drawn from any act of his, of which she was not cognizant. It was not proved that she was apprised of the mortgage at the time of its execution. The only witness who testified concerning this point, said he did not believe the existence of the mortgage was known to the neighbors and family of the mortgagor in the year 1817, and that from the situation of the plaintiff who spent much of her time from home, it was probable that she at that time knew nothing of the private transactions of her father.

76 \*But the jury, without adopting the presumption of a transfer by contract, may have based their verdict upon the third proposition. They may have supposed that the uninterrupted possession and control of the property by Jared Irwin for so long a period, together with his assumption of ownership in, mortgaging the negroes to James Dickson and Co. had the effect by operation of law to divest the plaintiff of her right of property. But the only possession or enjoyment which can divest a legal title, must be adverse to, and inconsistent with the title. And even an adverse possession held during the minority of the true owner, cannot operate against his right. The mere possession then of Jared Irwin, during the minority of his daughter, even granting it to have been adverse, creates no bar to her claim. But the possession of General Irwin, was certainly not adverse in its inception. It originated in necessity and duty; and may we not find a sufficient motive and reason for its continuance in his paternal character, and in the situation of the plaintiff as a young female, residing under her father's roof, and incapable of superintending and managing the property herself? The only act of General Irwin which was necessarily adverse to his daughter's right, was the mortgage of the property to James Dickson and Co. But that act alone, considered merely as his act, and unsupported by any thing done on her part, could not affect her title. It could operate against her, only through the medium of her own conduct.

We have now arrived at the fourth proposition—to wit, that she had knowledge of, and assented to the mortgage, or fraudulently concealed her title from the mortgagees. Whether this ground is supported by the evidence, we have already briefly considered, and it is not necessary to resume the inquiry. The legal principle upon which it rests, is doubtless a sound one. Where a person having title to property of which he is apprised, stands by and suffers another to mortgage or sell the property, without asserting his title, or making it known to the mortgagee or purchaser, he cannot afterwards set up his claim. 1 Fonb. 163. And in such case, even infancy would be no protection, provided the minor had arrived at those years of discretion when a fraudulent intent could be reasonably imputed to him. 1 Fonb. 164; *Clare v. Earl of Bedford*, cited 9 Mod. 33.

The fifth and sixth propositions remain to be considered. Whatever influence the circumstances which we have already reviewed, may have had in producing the verdict, it is highly probable that the evidence in relation to the plaintiff's presence and silence at the time of the levy, together with the fact that there was no proof that she objected to the sale, or disclosed her title, had a controlling effect upon the minds of the jury. And it was certainly entitled to grave consideration.

If A. be present when an execution is 77 levied on his property \*as the property of B. and does not object to the levy, or claim title in himself, a presumption arises that he has no title. But it is not an absolute and uncontrollable presumption, which, like the "*Præsumptiones juris et de jure*" of the civil law, admits of no contradiction. For notwithstanding his silence, if A. should afterwards come forward, and in conformity with our statutory provisions, interpose his claim, and should produce upon the trial, clear and satisfactory evidence of title in himself, which he would be permitted to do, he would of course obtain a verdict in his favor. And even if he should not interpose his claim under the statute, but on the day of sale should publicly forbid the sale, and assert his title in the hearing of the by-standers, he might afterwards institute an action against the purchaser, who could not defend himself against a clear title, by proving that the plaintiff at the time of the levy made no objection. In a doubtful case, however, such implied acquiescence in the levy, if not satisfactorily explained, would be sufficient to turn the scale against the claimant. In the present case, the only evidence applicable to this point is contained in the written examination of the officer who made the levy; and perhaps it is worthy of remark that he does not speak in positive and unqualified terms as to her presence at the levy, but simply states that he believes she was present. He also gives it as his mere impression that she knew the nature of the process under which he was acting. He does not say explicitly that

she did not object to the levy, or that she did not assert a title to the property now claimed; but as he does state that no person forbade him to take the girl Hannah, the reasonable inference is that no claim was announced. It must be recollected however that other negroes were levied on at the same time, and that none of them were then taken away by the sheriff. We are left to mere conjecture, as to the manner in which the levy was effected. It does not appear whether the negroes were assembled in the presence of the family, so that the attention of the plaintiff must have been necessarily directed to the fact that Hannah and her children were included in the number; or whether some other method was not adopted which might have left the plaintiff uninformed as to that fact. It was the province of the jury, however, to weigh the evidence, and if they were satisfied that the plaintiff was present when the levy was made, and knew the nature and effect of the proceeding, and was apprised of the fact that Hannah and her children were included in the levy, and yet did not assert her title, it cannot be said that there was no evidence to support their conclusion. If it be conceded that the plaintiff had knowledge of the levy, it was certainly her duty either to avail herself of the statutory remedy, or on the day of sale to give such notice of her title, and of her intention to

insist upon it, as would have placed  
78 bidders upon their guard. In \*all such cases, an omission to do either, when the party has the means and opportunity of doing one or the other, must be regarded as a fraud upon purchasers; or as such gross laches as will effectually bar any future claim by the party. Although it now appears by the affidavits of Whitaker and Williamson, that the plaintiff was present at the time and place of sale, and so far from assenting to it, actually forbade it, and announced her claim, yet no such evidence was adduced on the trial. In the absence of such proof therefore there was nothing to counteract the presumption against the title of the plaintiff which may have arisen in the minds of the jury from her silence at the time of the levy; and indeed that presumption could not but derive additional strength from her failure to produce the evidence now disclosed. Under this aspect of the case, it cannot be affirmed that the verdict is against evidence. When a verdict has no foundation in the evidence, a new trial will be granted; but when there has been evidence on both sides, as it is the peculiar office of the jury to determine the relative weight of conflicting evidence, the court, although it may differ with the jury on the point of preponderance, will not disturb the verdict. "Ad quæstiones facti non respondent iudices; ad quæstiones legis non respondent iuratores." 2 Strange, 1142; 3 Wils. 45; 1 Bl. Rep. 1; 3 John. Rep. 269; 9 John. 310; 2 Const. Rep. 452; 4 M. & S. 192. It seems, however, that where the verdict is glaringly against the weight of evidence, and must inevitably

work injustice, a new trial may be granted. 5 Mass. 353; Berks v. Mason, Say. 264; Norris v. Freeman, 3 Wils. 39; 1 Caines' Rep. 162; 1 Const. Rep. 165; 2 Ib. 337. But excluding from our consideration the new matter disclosed in the affidavits of Whitaker and Williamson, and looking at the case only as it was presented to the jury, we cannot say that the verdict was contrary to evidence, or that it was manifestly against the weight of evidence, and clearly unjust. Hence, if there was no other ground for a new trial than the alleged opposition of the verdict to the evidence, the application could not be sustained.

It is the opinion, however, of a majority of the convention, that a new trial ought to be granted upon the ground of the newly discovered evidence, taken in connexion with certain auxiliary circumstances attendant upon the case. The materiality of evidence, particularly of that contained in the affidavit of Williamson is obvious and striking. From the affidavit of Whitaker, we learn that the negroes were not actually present at the Court-house when they were sold, but that they were all cried at once, and knocked off en masse to the highest bidder, whilst they remained encamped upon the commons of the town. In disposing of the present motion, however, it is not necessary to determine whether this alleged irregularity in the sale can affect the question of right between

79 \*the parties. From the same affidavit it appears, that John Irwin who was the legal representative of Jared Irwin deceased, and who had an active agency in causing the negroes to be sold, was notified by the plaintiff on the day of sale, that she would never consent to a sale of those, which she claimed as her own; and it seems that in reply to the remonstrance of Whitaker, he admitted the plaintiff's title at the very moment that he was engaged in promoting a measure so injurious to her interest. Much of the force of this testimony must of course depend upon the notoriety of the plaintiff's declaration to her brother;—of Whitaker's remonstrance in her behalf,—and of John Irwin's recognition of her title. If they occurred under such circumstances of publicity as to affect the vendee with notice previous to the consummation of the purchase, it is hardly necessary to remark, that in a future trial, the testimony of Whitaker will have an important bearing upon the case. The testimony of Williamson is too explicit; and its pertinency and force too manifest to require comment. But it has been suggested that the evidence supplied by these affidavits is only cumulative, and therefore not a good ground for a new trial. We admit the general rule to be, that the discovery of evidence merely cumulative in its nature does not in itself constitute a sufficient reason for granting a new trial. 8 John. 65; 15 John. 210. Though it would seem, from an observation of Livingston, J., in the case of Steinbach v. The Columbian In. Co., 2 Caines' Rep. 133, that the rule is not per-



fectly inflexible. "Cases may occur (said he) in which if great doubt exist as to the first decision, it may be proper on the discovery of further witnesses, even to the same fact, to open the case for a second discussion." We would be loth, however, in any case to relax the general rule, the object and tendency of which are to establish a reasonable limit to litigation. In the present case, we think, a new trial may be granted without relaxing this salutary rule. The new evidence consists of facts bearing upon a point in the case, to which no evidence whatever was adduced on the part of the plaintiff. It cannot therefore be said to be merely cumulative, for that term in its judicial sense implies the previous introduction of some testimony to the same point by the same party. But the fact is,—whether the plaintiff did or did not give notice of her title on the day of sale was a question, in reference to which, notwithstanding its importance, no testimony was introduced on either side. If the evidence now produced upon this point had been submitted to the jury, it would have given a different aspect to the case. The verdict could not then have rested upon the presumptive foundation of an acquiescence in the sale, or of a virtual fraud upon purchasers; and if that ground had been removed, it is not improbable that the verdict would have been different. As

the evidence therefore is material, as  
80 it is \*not merely cumulative, and as  
its direct tendency would be to destroy those presumptions, upon which the verdict was probably based, there could be no difficulty in granting a new trial, if the plaintiff had shown that the evidence now produced could not have been had on the trial by the exercise of ordinary diligence. This has not been satisfactorily shown, and in our solicitude not to intrude upon the rule which exacts proper diligence from parties, we have doubted, whether for this deficiency, a new trial ought not to be refused. In general the objection would be insuperable, but in the present instance we are inclined to think that it is outweighed by the strong considerations in favor of a new trial, which are to be found in the general character of the case. In the language of Mr. Justice Denison, (1 Burr. 397,) "the granting a new trial or refusing it must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice." The circumstances then from the united force of which we feel ourselves bound to grant a new trial may be gathered from the following condensed recapitulation.

The original title of the plaintiff was established by clear and direct proof. Against it, presumptions alone were relied on. Some of those presumptions may have been deduced from facts which were not necessarily inconsistent with her title. The possession of Jared Irwin in its commencement was perfectly consistent with

the plaintiff's right. An adequate reason for its continuance existed in the relation of parent and child without resorting to the idea of alienation by the plaintiff, or of an adverse title in Jared Irwin. The girl Hannah was invariably acknowledged to be the property of the plaintiff by the family of Jared Irwin. There was no evidence that the plaintiff assented to, or was even apprised of the mortgage at the time of its execution. Her title was admitted by John Irwin the legal representative of Jared Irwin deceased, soon after the death of the latter, (Ware's testimony.) The evidence in relation to the levy and the plaintiff's conduct on that occasion is so indefinite, as to leave it uncertain whether she was then apprized of the fact that Hannah and her children were included in the levy. The property in dispute is of considerable value. There have been two opposite verdicts. The last verdict was probably founded in a great measure upon a presumed acquiescence in the sale by the plaintiff, or upon the idea of a fraudulent concealment of the title from the purchaser. The plaintiff has it now in her power to show that such presumption had no foundation in fact, and that at the time and place of sale she gave public notice of her claim.

In addition to all which, the recognition of her title by John Irwin the legal representative of Jared Irwin deceased, when the negroes were sold, may become  
81 very material if it be \*shown that it occurred in the hearing of the purchaser before the sale was perfected. Without such subsidiary proof we do not pronounce upon its admissibility or effect.

The evidence in the cause having been procured by interrogatories, exists in writing. No injury to the defendant therefore can be apprehended from the possible death of witnesses.

The opportunity which the granting of a new trial will give to the plaintiff for submitting new evidence in support of her action will be equally available to the defendant for strengthening his defence; the result of which will be, that upon a reconsideration of the case, the jury would be furnished with all the light necessary to a correct decision.

Rule made absolute.

Solomon and Moses Allen v. Freeman W. Lacy and David Clarke.

In Richmond Superior Court, July, 1832.

Witnesses — Agents — Competency — Release. — An agent had lost the money of his principal at faro, and action for money had and received was brought against the winners by the principal, and it was held that the agent was not a competent witness until released. And to enable the court to decide on the competency of the agent, the release need only be officially attested by notaries; it is not necessary they should prove it as witnesses.

The action was brought to recover money had and received by defendant for plaintiffs' use. A verdict has been rendered in favor of the plaintiffs, upon the testimony of Alexander Main; and a new trial was moved for on the following grounds:

1. The verdict was contrary to law.
2. It was contrary to evidence.
3. Because the court erred in admitting the release to Main upon the evidence offered. Its execution not being sufficiently proved.
4. Because the power of attorney to Main was admitted without sufficient proof of its execution.

The last ground fails in point of fact, as full legal proof of the execution of the power of attorney was made by a competent witness, who testified both to the handwriting of the constituents and of the subscribing witness, and that the latter was before the jurisdiction of the court.

But not only this ground, but also the 1st and 2d are expressly abandoned as untenable by one of defendants' counsel, and not argued by the other. It is the third ground alone, therefore, which claims the attention of the court.

The witness Main examined by commission, was the agent of the plaintiffs, and was responsible to them for the very money sued for, which had been fraudulently won from him \*by the defendants at faro, and was therefore incompetent as a witness for them, unless released. A full release was given before the witness was sworn, and the only question for the court to decide, was, as to the sufficiency of the proof of its execution. It was executed in New York and attested by Notaries Public who duly certified the execution, under their hands and official seals. It was transmitted to New Orleans to be delivered to Main; and the commissioners with whom it was deposited, and by whom it was returned to court, certify that it was delivered to Main, and accepted by him before he was examined.

Defendants' counsel object that Main should not be considered released, until the notaries who attested the release should have proven it as witnesses.

This is a strictness not required by law, and with which truth and justice may well dispense.

The release comes into court together with the deposition of Main. It is returned by the commissioners of this court, entrusted with the power of examining the witness, and who, though they are without authority to decide upon the competency of the witness, may and are bound to certify the facts upon which that question is to be decided by the court, as far as those facts occur at the examination; and the court must receive their return as true. They certify that before, Main was sworn they handed him the release from Solomon and Moses Allen, and that he read and acknowledged it. Main himself then swore in answer to a question propounded by the defendants, that he had no interest in the

subject matter of the suit. His interest must have been divested by the release, and he surely knew that it was executed by S. and M. Allen. Here then is satisfactory proof of a delivery of this paper as a release and of its acceptance as such, and from that time its execution was complete, and it took effect. That it was signed and sealed is proven by the certificate of the notaries, and by subsequent recognition in authorizing a delivery, and in accepting the benefit resulting from it, which latter (setting the notarial certificate out of the question) would be sufficient for the present purpose. If this release had been offered to establish any right arising under it, as between the parties, or those claiming under them, the proof of its execution which was before the court might have been deemed insufficient; but proof less strict will be received where the testimony is by preliminary, and to enable the court to decide upon the competency of testimony offered to the jury.

In the case of Wallace v. Megar tried in this court, the bare certificate of a Notary Public of New Jersey, to the oath of the plaintiff, that an original deed had been lost, was received as sufficient to let in the secondary proof. This is a much stronger case. We have here not only the certificates of \*the Notaries Public but all the other facts and circumstances adverted to, fully satisfying the mind of the court of release and competency of the witness. The motion is refused.

W. T. Gould, for plaintiffs.

J. P. King, for defendants.

#### Marine and Fire Insurance Bank of the State of Georgia v. William Megar, Administrator of David Clarke.

In Richmond Superior Court, July, 1892.

**Suit for Money Won at Cards—Proof That Defendant Actually Received It—Necessity for.**—In an action against an administrator for money had and received by his intestate, (which money was won at cards) it was held necessary to prove that the intestate actually received the money in question; and the proof that he was in partnership with others who gambled, won, and received it, was held insufficient.

**Partnership in Crime—Validity.**—The courts will not recognize a copartnership in crime.

This is an action of assumpsit for money had and received by defendant to plaintiffs' use. The facts in proof upon the trial were, that in the months of January and February, eighteen hundred and —, Henry Young and William Baldwin kept in Augusta, a gaming room and faro table, at which they played; that Alexander Main, who was the plaintiffs' agent, lost at that table more than a thousand dollars of their money which was won and received by Young and Baldwin; that Clarke the intestate, was interested in the bank, though



he was not present, and did not partake in the games at which plaintiff's money was won; and the three, Young, Baldwin and Clarke, were partners in the room and table. There was no other evidence that Clarke ever received any of the plaintiffs' money, than the presumption arising out of the partnership, and his interest in the Bank.

A verdict was rendered for the defendant, and the plaintiffs move for a new trial on the ground,

1. That the verdict was against law and evidence in as much as it was distinctly put in proof, that the defendants intestate was interested as a partner in the game at which the plaintiffs' money was won and unlawfully received.

2. That the court erred in charging the jury that the proof above referred to, would not entitle the plaintiffs to a verdict; but that it was necessary to prove that the intestate actually received the money in question.

**PER CURIAM.** The whole case depends upon the last ground; for if the court erred in its instruction to the jury, a new trial should be granted, as the verdict was no doubt the result of that instruction. But if the instruction were correct, the testimony would well warrant the verdict, and it should stand.

Assumpsit for money had and received is an equitable action, adopted to enforce an implied promise to pay money which cannot of right and in good conscience be withheld; and before the action can be maintained, it is necessary for  
84 \*the plaintiff to show by sufficient proof that the money demanded is his, and that it was actually received by the defendant.

The principles upon which this case turns, are those recognized in *Clarke v. Shee and Johnson*, Cow. 197, 1 Selw. 80, that where one person fraudulently and in bad faith, receives the property or money of another, he shall not be permitted to retain it. About the authority of this case or the soundness of its principles there can be no doubt; and the only question is whether the facts of the present case, bring it within those principles. By the code of 1817, gaming was prohibited under severe penalties. Money won and received at faro was therefore received mala fide, and the plaintiffs in this case being free from fault, may recover back their money obtained fraudulently, and in violation of law, from their agents. They must however prove by sufficient evidence, that the money lost and won was actually theirs; and that the defendant received it.

The first part of the proof, that is, the property in the money and its identity was made by a competent witness, the agent himself, who had been released. But there was no proof that the defendant ever received it. On the contrary it was proven to have been received by Young and Baldwin his alleged copartners. This gave rise to the question whether Clarke could be made to repay money received by others,

his alleged copartners in an illegal transaction. Upon this point the jury were instructed that he could not. For though the court may not always require positive proof of the receipt of money in this action; yet if reliance be had upon presumptions, they must be such as are in accordance with, and not violative of law. An implied contract cannot be established by proof of a crime. The court still adheres to that opinion which rests upon the legal maxim, *ex maleficio non oritur contractus*. No contract is valid, the consideration of which is crime; nor can a copartnership in crime or for its commission, exist. Those who form such connexion are accomplices, not partners. Had Clarke been present partaking in the game, and had he received any of the money won, that might have laid the foundation for the presumption, but in the absence of that proof the presumption cannot arise, as there is nothing to support it, but the supposed copartnership, which could neither confer on one a right to demand, nor on the other an obligation to pay. And in the absence of all proof neither the court nor the jury could sustain the cause by a presumption that Young and Baldwin had done that which they were not bound to do by any rule of law.

The court, believing the verdict to be correct according to the evidence and the law of the case, and that the jury were properly instructed, refuses the motion.

W. T. Gould, for plaintiffs.

J. P. King, for defendant.

## 85 \*Eli Glover v. A. and J. M. Woolsey & Co.

In Richmond Superior Court, July, 1832.

**Juries—Challenges—Waiver—Effect Where Juror Acts from Improper Motives.**—The fact that one of the jury who tried a cause on appeal, was security on the appeal, though good cause of challenge is not of itself a sufficient ground of new trial: But if it were shown that the juror acted under the influence of improper motives and principles, a new trial would be granted.

**Same—Same—Same.**—Neglect to challenge a juror before he is sworn, is a waiver of objection to him.

**Same—Same—Effect Where a Failure to Challenge is Due to Gross Negligence.**—When there was good cause of challenge, unknown to the party at the time a new trial may be granted: But the party will not be permitted to take advantage of an ignorance which is the result of gross neglect.

**\*Juries—Challenges—Waiver.**—It is well settled, both by the authorities of the courts of Great Britain and of this state, that it is too late, after a jury has been sworn, to challenge any of its members *proper defectum*, or to move to set aside the verdict on that account. *Costly v. State*, 19 Ga. 628, citing *Glover v. Woolsey*, Dud. 85. To the same effect, the principal case is cited in *Keener v. State*, 18 Ga. 215.

The principal case is also cited in *Wilson v. Wright*, Dud. 103.

**Evidence—Newly Discovered—When New Trial Will Be Granted.**†—Newly-discovered evidence is a ground for new trial, but it must be such as is so material that it would be likely to change the verdict, or such as to show that justice has not been done, and it must also be such as the movant could not have obtained by diligent inquiry.

In this action the plaintiff claims from the defendants damage for the loss of one hundred and sixty four bales of cotton, consigned by plaintiff to them as factors and commission merchants of New York, and burnt in Brooklyn where it was stored in consequence of quarantine regulations of the port of New York. There are several counts in the declaration, though but two grounds on which the plaintiff insists upon his right to recover. The first is, defendants' carelessness and negligence in storing the cotton in wooden buildings, insecure, and subject to extra-hazardous risks. The second is, their breach of positive orders to insure or store in a fire-proof warehouse.

This is an important case; but its importance is principally owing to the amount in controversy. The legal principles involved are plain and well settled. The chief difficulty has always been found in the facts; and so great has that difficulty been, that two successive juries were not able to agree upon them. A verdict having been ultimately rendered for the plaintiff, the defendants now move for a new trial on the following grounds.

1st, Because the verdict of the jury is against the law of the case.

2d, Because it is against the weight of evidence.

3d, Because it is against the equity and justice of the case.

4th, Because one of the jury that tried the cause was the security for the plaintiff upon the appeal by him.

5th, Because new and material evidence has been discovered in favor of the defendants.

**PER CURIAM.** Whether the verdict be or be not "against the law of the case" must necessarily depend very much upon the facts of the case. The law of the case is this, that a factor is bound to take reasonable care of goods committed to his charge, that is, such care as a man of ordinary prudence would take of his own goods; and to store

in wooden buildings subject to extra-hazardous risks, if storage in fire-proof houses exempt from such risks could be obtained is not reasonable care; though what is reasonable care is more properly a mixed question, and for the jury. The law further is, that a factor is bound to obey all orders and instructions from his principal which concern the goods, are legal, and are within the compass of his agency, and of this character are orders to insure. That if any damage happen to the goods, or the principal sustain any loss, by reason either of the factor's carelessness, 86 \*negligence, or disobedience of orders, he must answer to the principal for such loss or damage. It was for the jury alone to determine whether the facts in evidence would bring this case within these principles, and if they found for the plaintiff, to assess his damages. They have done so. But it is said.

2dly, That the verdict is against the weight of evidence.

To weigh evidence is peculiarly the province of the jury; and where there has been testimony on both sides, and no misconduct imputable to them, their verdict should never be disturbed, because the court might happen to think the weight of evidence was the other way; (a) more especially should it not be done in this case where there was much testimony on both sides, the principles of law plain, and the case depended almost entirely upon its facts; and in which the truth was only ascertained by the preponderance of testimony.

The most serious difficulty and perhaps the only one in the case arises out of the fact stated in the fourth ground—"That one of the jury who tried the cause was security for the plaintiff on the appeal." That this was good cause for challenge of the juror will be disputed by no one. Whether it be good cause for a new trial is not so clear. After hearing argument and considering the question deliberately, the conclusion to which the mind of the court has come, is, that that fact of itself is not sufficient cause for granting a new trial. The strong argument, and that which at first inclined the court to allow the motion, is, that the security upon appeal becomes, under our law, a party to the suit. If that were true, the court would not hesitate; but upon consideration it is believed a proper construction of the act of 1826, (which is the law relied on) will not sustain the position assumed, that the security becomes a party. That is an "act to define the liability of securities on appeal, &c." In the 2d sec. it is enacted "that in all cases of appeal, where security hath been given and hereafter given, and hereafter to be tried, it shall be lawful for the plaintiff or his attorney to enter up judgment against the principal and the security jointly or severally, &c." It is evident both from the title and the enacting clause, that it was the design of the legislature to prescribe the mode of proceeding against securities on

†**Evidence—Newly Discovered—When New Trial Granted.**—See foot-note to *Irwin v. Morell*, Dud. 72; *Allen v. Lacy*, Dud. 81.

**Witnesses—Agents—Competency.**—It is settled that agents, carriers, factors, brokers, and other servants of this description, in consideration of public convenience and necessity of trade and commerce and to prevent a failure of justice, constitute a class of special exceptions to the general rule, that a witness, interested in the subject of the suit, or in the record, is not competent to testify on the side of his interest. *Collins v. Lester*, 16 Ga. 145.

But where an agent had lost the money of his principal at faro, and an action was brought against the winners for the money, the agent was not a competent witness until released. *Allen v. Lacy*, Dud. 81.

(a) See ante, page 78.



appeal, and to make certain and uniform the remedy against them which before the act was uncertain, and variant in the different districts. Before this act it was the practice in some parts of the State to proceed against securities on appeal by scire facias and in others to pursue the mode here prescribed. But no where was it ever supposed that when a man entered into a recognizance or bond for the eventual condemnation money, he made himself a party to the suit. If he were a party he would be subject to all the liabilities of a party. He

87 might be required upon notice to produce books and papers; it \*would be sufficient to serve copies of interrogatories on him; he might be required to respond to any notice in the progress of the cause—might make defence and plead, and do any other act which a party might do; for it would be unjust to make him a party, subject to a party's liability, and deny him his privileges. These are the necessary consequences of the security becoming a party; and surely such could never have been the intention of the legislature. And who has ever supposed, that the death of the actual defendant, notwithstanding this act, did not abate the suit altogether, or arrest its progress until parties could be made, according to the provisions of the judicial act of 1799; or that the suit might proceed against the security as survivor. And yet the act of 1826 authorizes a joint or several judgment. Though even if the act could receive the construction insisted on by the counsel for the defendants, still this case would not be within its provisions; for none but the security for a defendant could be such party, as none but a plaintiff or his attorney could sign such a judgment. Securities for plaintiffs could only be brought within the provisions of the act, by a liberal construction of it, and surely such an act as this would be, according to the construction contended for, should never be extended beyond its letter.

But though he be not a party to the suit, the security is not without interests in its event, as he is certainly answerable in some form of proceeding for the eventual condemnation money. How far this interest, which would have been good cause of challenge before the juror was sworn, is good cause for new trial, the court will proceed to consider. It may be laid down as a well settled rule, that an omission to challenge a juror before trial is a waiver of the objection to him. For it would be most unreasonable to allow a party the benefit of the verdict if favorable to him, and the benefit of a new trial on account of the objection, if the verdict should be adverse. It was so decided in *Cotton v. Daintry*, 1 Vent. 30, cited in 5 Bac. 245, in which case the cause of challenge was for favor. Also in *Loveday's case*, cited in 5 Bac. 245, where the cause of challenge was for bias or prejudice. So also in *Jaffries et al. v. Randall*, 14 Mass. Rep. 206, where there was a statutory disqualification on account of interest in the question and prejudice,

the court say "the objection to this juror is made by the statute a good cause of challenge, but we think it comes too late after verdict." And proceed to add, "If in this case we had evidence that the juror acted under the influence of improper motives or principles, we should set aside the verdict; or had the defendants made the requisite inquiry on the voir dire and failed of discovering the fact which would have disqualified the juror it would have been within the equity of the statute to grant them belief at this stage, but having omitted to avail themselves of their 88 rights, \*when the jury was impaneled, the motion cannot now obtain."

In South Carolina there have been many decisions upon this question in accordance with the cases already cited. The *State v. Quard*, 2 Bay, 150, where the cause was alienage of the juror. *Ib.* 153. The *State v. O'Driscoll* in which two of the jury had been of the grand inquest that found the bills true. 2 Nott and M'Cord, 261. The *State v. John Fisher*, where the disqualification was the non-payment of taxes. In the case of *Mina Queen and Child v. Hopburn*, 7 Cranch, 297, where the exception taken was to the disqualification of the juror, he not being an inhabitant of the county, the Supreme Court says "Whatever might have been the weight of this exception if taken in time, the court cannot sustain it now. The exception ought to have been made before the juror was sworn." The cases of *Parker v. Thornton*, 1 Strange, 640, and *Wood v. Stoddart*, 2 John. Rep. 194, relied on by defendants' counsel, are not opposed to these decisions. In the first case, the new trial must have been granted either on account of the misconduct of the returning officer, or the juror himself. There is in *Strange* a very imperfect report of this case, but the facts as stated in *Lord Raymond*, are that the juror returned on the panel by the name of Hooper, was challenged, and the challenge allowed, and that afterwards he was offered as a talisman by the name of Hook, and sworn. In the case reported in *Johnson*, the whole jury was challenged on account of interest, but having notwithstanding been sworn, a new trial was granted, on account of the error of the court. Nor are the cases cited, in which new trials were granted because some of the jury had declared that a particular party should not have a verdict, adverse to the rule; the misconduct of the jury being the real cause. So also were the cases where the jurors on their voir dire swore they were not interested, when in fact they were. And besides, here the party moving had used the proper means to ascertain the juror's interest before they were sworn, but without success. The case of *Knight v. The Inhabitants of Freeport*, 13 Mass. Rep. 218, was a case in which plaintiff's son-in-law had tampered with the jury, and is inapplicable to the present question. The cases cited for the defendants, which bear most strongly upon the question under consideration, are those in which there was

good cause of challenge to the jurors but unknown to the party at the time. Such is the case of *Hyon v. Ballard*, 7 Mod. 54. In these cases, new trials were granted, and with good reason. The law requires, that jurors should be omni exceptione majores, and will not suffer a party's rights to be concluded by the verdict of an incompetent jury, put upon him without his knowledge of such incompetency; nor will it impute ignorance of a fact as a fault, unless that ignorance be the result of gross neglect and inattention, \*or the fact be one which he must reasonably be presumed to know. A. M. Woolsey, one of the defendants, has sworn that he was ignorant of the fact that Jacob Dill, one of the jury who tried the cause, was security upon the appeal, until after the verdict was rendered. That is no doubt true, but it is an ignorance that cannot avail him in this motion. The entry of an appeal was an important step in the progress of the cause. It was a public act, recorded on the minutes of the court, of which the adverse party was bound to take notice; and giving security was a necessary part of that act to make it regular and valid. Not to know that security was given, and of course who that security was, is culpable laches and inattention on the part of the defendants, against the effects of which the court cannot relieve. And that laches is the more remarkable, as there were between the entry of the appeal and the final trial, two mis-trials, which must have rendered an inspection of the records frequently necessary; and the entry of the appeal and name of the security are indorsed upon the declaration immediately after the first verdict. Whether the security upon the appeal become a party to the suit, as contended for under the act of 1826, or remain a mere security against whom a certain and summary remedy is given, the notoriety of the appeal is the same: and it would hardly be urged that a party could be allowed to plead ignorance of an adverse party for any purpose whatever.

But what is the disqualifying interest in this case? The appeal was by the plaintiff, who must have paid all costs up to that stage of the case, which form much the most considerable portion of them; and it is only for the subsequently accruing costs, that he is bound. The interest is indeed minute, and it is from the smallness of the interest we may account for the indifference of the defendants to this part of the case. Yet small as is the interest and secondary as is the liability of the security, they would have formed good cause of challenge; and even now the defendants might have relief by a new trial if there were any evidence that the juror acted under the influence of improper motives and principles. It may be added, that this individual, though not expressly accepted as a good juror, by defendants, was so accepted in effect, when that question was brought directly before them in selecting the jury. Upon the best consideration the court has been able to give

the question, it is against the motion on this ground.

Newly discovered evidence is a ground for granting new trials; 12 Mod. 584; but it must be such as is so material that it would be likely to change the verdict, that is, such as to show that justice has not been done; and it must also be such that the movant could not have obtained by diligent inquiry. (a) *Salk*. 273, 647, 653; 3 Mor. 90 *Ess*. 85; 6 Mod. \*22 & 222. The court will not disturb a verdict, to give an opportunity of letting in light testimony, which may not be likely to change the verdict, especially where witnesses have been examined to the same point; nor where there is the least question of its materiality or relevancy; or the least negligence of the party. The after-discovered testimony which is made the subject of the fifth ground in this motion is that of Dr. Johnson, who will prove, as is made known to the court, that in a conversation with the plaintiff respecting this suit, he mentioned "that he had always considered his prospect of success very doubtful, and that he had always been prepared for the worst; that he had, from the time a judgment was obtained against him, kept a fund in reserve to meet it, and by speculations on which fund, (viz.) in shaving paper, he had made as much as would remunerate him in case of failure in the suit; that this suit might in all probability be of service to him even if he should lose it, as it was the cause of his keeping a fund on hand that he thought he had used to greater advantage, than he otherwise should or might have done." Now it is not to be supposed that any diligence on the part of defendants could have brought them acquainted with the various conversations which plaintiff may have had on this subject with different individuals, or acquainted with this particular conversation. Such a discovery must be the result of mere accident. But to what does this conversation amount, and what are plaintiff's admissions? They are, at most, that he considered the result of the suit doubtful; that his apprehensions had been increased by his failure on the first trial; and that having set apart a fund to meet the most unfavorable event, and used that fund judiciously, he might not ultimately be a loser. Slight as this testimony is, it would not, perhaps, have been rejected as wholly immaterial and irrelevant, had it been offered at the trial, but it is not good cause for granting a new trial. If the admissions had gone to the extent that he had no cause of action; or if it might have been strongly inferred that he felt a consciousness of pressing an unfounded claim, the defendants might, perhaps, by a new trial, have had the benefit of such admissions. Such, however, is not their character, they being nothing more than the declaration of a prudent foresight, and the success of measures suggested by the proverbial uncertainty of law-suits.

(a) See ante, page 80.



Upon the subject of the justice and equity of this case, the court has but little to remark. There has been an entire loss of property to a large amount, and justice and equity require that the loss should fall upon the owner, the plaintiff, unless it were the result of the defendants' negligence, or disobedience of orders, which justice and equity are in exact conformity with law. The jury were alone competent to determine the facts which must fix the loss upon one party or the other. \*This they have done under the instruction of the court upon the matters of law, to which instruction no exception is taken. And after a most careful examination of the whole case, it is the opinion of the court that their verdict should stand.

The motion is therefore overruled.

R. H. and J. W. Wilde, and A. B. Longstreet, for plaintiff.

T. Flournoy and R. R. Reid, for defendants.

### Banks and Baird v. Cater and Davies.

In Richmond Superior Court, July, 1832.

**Pleading—General Indebitatus Assumpsit—Express Contract.**—An express contract of sale cannot be recovered, under a general indebitatus assumpsit count; it must be specially declared upon:

**Sale of Goods on Ninety Days' Credit—When Suit Can Be Brought.**—And where there was a sale of 1500 bushels of salt to be paid for at 90 days, it was held that action could not be brought on the contract until the expiration of the time.

This action is brought to recover the price of fifteen hundred bushels of salt, alleged to have been sold by the plaintiffs to the defendants. In the declaration there are two counts, but so slightly variant, that they are in fact no more than the indebitatus assumpsit count for goods sold and delivered. There is not any date to the bill of particulars annexed, but the time of sale is stated in the declaration to have been on the first day of December, 1829. The process and service, both bear date on the 8th of the same month.

It was in proof at the trial, that a short time before that laid in the declaration, a contract was entered into between the parties for the sale, at fifty seven cents per bushel, of a quantity of salt then in a particular store, to which each party had occasional access; that the sale was on a credit of ninety days, and the price to be paid (as one of the witnesses testified) by a note or bill; that at the time of the contract there was neither a delivery of the salt, a memorandum made in writing, nor an earnest paid, but that shortly after the contract, a clerk of the defendants demanded and received from the plaintiffs' agent, the key of the store-house as the defendants' right, the purchase having entitled them to the sole access to, and control over, the salt; that soon afterwards the house was burnt, and the salt destroyed; that there was in it at

the time of sale, from twelve to fifteen hundred bushels of salt, worth from fifty five to sixty cents per bushel; and that between the time of the contract and loss of the salt by fire, the plaintiffs commenced to measure the salt but desisted at the request of one of the defendants, for that he was too busy to attend to it that day.

A recovery was resisted, because, according to the testimony, the plaintiffs had no right of action at the time of action brought, the ninety days credit not having expired; and that if indeed the time had expired, the plaintiffs could not by \*law recover upon the present declaration, there being in proof an express contract of sale. And, because the contract itself is void by force of the 17th sec. of the statute of frauds.

A verdict having been rendered for the plaintiffs, the court is now moved for a new trial, for that the verdict is against law and evidence.

It is not necessary to consider here the questions which arose upon the statute of frauds. This motion must be decided for the defendants upon the other points. The evidence of the contract was not by any means clear and full, but there was enough in proof to show that it was special both as to the price to be paid, and as to the time and manner of payment. Upon these points the cases of *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 Bos. and Pul. 582; *Haskins and another v. Duperay*, 9 East, 498, are clear, and must be decisive of this question. For whether or not the proof of the special contract be such as to preclude a right to recover on the implied promise, the credit upon the sale was extended for ninety days, before which time the plaintiffs, by their contract, having no right to demand payment, could have no right of action to compel payment. Had the action been special for breach of contract in not delivering the bill or note, the question would have been very different, and the plaintiffs might have recovered. But upon this declaration and with the proof which was made, the court erred in not instructing the jury in favor of the defendants.

The verdict is therefore set aside and a new trial granted.

Crawford and Cumming, for plaintiffs.

A. B. Longstreet, for defendants.

### Gazaway B. Lamar v. Joseph P. Mahony.

In Richmond Superior Court, July, 1832.

**Domicil—What Constitutes—Question of Fact.\***—To constitute a legal residence there must be the concurrence of an actual residence, and an intention to remain, which is matter of fact for a jury to decide, not alone from express words, (which might not at all times be proper testimony) but from attendant circumstances showing an *animus manendi*.

This case was tried upon a plea to the jurisdiction of the court, the defendant al-

\*See *Halkins v. Arnold*, 46 Ga. 657.

leging his residence to have been in Columbia County at the service of the writ. The verdict is against the plea, upon which the defendant moves for a new trial on the following grounds.

1. The verdict of the jury is contrary to evidence, because the proof was, that Joseph P. Mahony was not resident of Richmond, but of Columbia county, at the time of the service of the writ.

2. Because the verdict is against law, since a man may reside in any county of the State with an intention to remove further; and then he is liable to be sued  
93 in the county of \*his residence and  
not in that from which he originally removed, and where his residence no longer is.

3. Because the verdict is against justice, law, evidence, and the constitution of the State.

PER CURIAM. In deciding this motion it is not necessary to consider these grounds severally, as it depends chiefly upon the first; being a question of residence. The proof showed, that some few months before action brought the defendant who for many years had been a resident of Augusta ceased to rent a house there, with the intention of removing to some of the Western Counties of the State, and that he did actually remove as far as the county of Columbia, where, in consequence of the indisposition of his wife, and the necessity of attending to some unfinished business in Augusta, he remained at the house of his mother-in-law until the writ was served; that he soon after abandoned his intention of settling in any of the Western Counties, and again returned, with his family to Augusta, where he still lives. It was clear, that, at the service of the writ, the defendant had no fixed residence in the county of Richmond. And it is admitted that his journey was not pursued, and that he never reached his intended place of residence. The only question is, whether, by his stay in Columbia, he acquired a legal residence there. And this depends altogether upon the intention of the defendant at the time of going into that county, or while there, to remain permanently; and not upon his manner of living, as an independent housekeeper or a mere boarder, nor upon the length of time he was there. To constitute a legal residence, there must be the concurrence of an actual residence, and an intention to remain. Every man is free to choose his place of residence, and if such choice be made, a day or an hour in that place will give the right of residence there. Whether such choice have or have not been made, is a question of fact for the jury, to be determined, not alone from express words of election (which might not at all times be proper testimony) but from attendant circumstances showing an animus manendi. The jury which tried this cause were particularly instructed by the court, that if they found the defendant to have gone from Richmond to Columbia with the intention of remaining there, his plea must prevail.

But if, on the contrary, he had no such intention, that he had actually chosen a different place for his residence, and that he was in Columbia but temporarily until the health of his family or other circumstances might enable him to prosecute the intention with which he left Richmond, his plea must fail; for the animus which is essential to constitute legal residence would be wanting, and the defendant would be considered in itinere, a mere sojourner there; and that whether his original design were subsequently prosecuted or abandoned by him, could in no other way affect the  
94 case than \*as a circumstance from which intention might be inferred.

The jury have found against the plea: and as the court after having heard argument and considered of this case, believes they were properly instructed, their verdict will not be disturbed. If the defendant had no residence in Columbia, none of his Constitutional rights have been violated, and justice requires he should pay a debt against which he has no defence whatever.

The motion is refused, and execution ordered to issue.

J. P. King for plaintiff.

R. R. Reid for defendant.

Alexander Mackay et alii, Complainants, v.  
J. Moore, Ex'r of J. Willson et alii,  
Def'ts.

### *In Equity.*

In Richmond Superior Court, July, 1832.

**Wills—Construction—Conditional Bequest.**—The words, "In the event of its becoming necessary," in a will, are the same in effect with the words "if it becomes necessary—provided it should become—if it should happen to become," which clearly indicate a conditional bequest and not a limitation.

**Same—Same—Condition Precedent—Impossible of Performance—Effect.**—If the condition precedent becomes impossible even by the act of God the estate would never arise.

**Same—Same—Powers—Right of Donee to Vary.\*—A** testator may limit the extent of power conferred by him, and prescribe the particular manner of executing it, and the agent is as little able to vary the manner, as to transcend the limit, for in either case he would be found usurping, instead of executing authority.

By this bill the complainants, who are the residuary legatees of John Willson, pray for an account and settlement of the estate, and that the executors may be decreed to pay over to them the residuum;

**\*Wills—Construction—Powers.**—The donee of a power cannot confer that power upon any one else in derogation of the will, for in the construction of powers the intention of the donor of the power always governs. *Mackay v. Moore*, Dud. 94; *Berrien v. Thomas*, 65 Ga. 61; *City Council v. Radcliffe*, 66 Ga. 474; *DeVaughn v. McLeroy*, 82 Ga. 697, 10 S. E. Rep. 211.



which is not resisted by the executors, except as to the sum of four thousand dollars, for the payment of which sum they ask the direction and judgment of the court, the present right to the possession thereof being disputed by the testamentary guardians of Betsy Keating and her children. Whatever difficulty there is in the case, arises under this clause of the will. "I will and desire that in case Betsy Keating and her children should continue to reside in the City of Augusta after my decease, or should wish to settle themselves in some other part of the State, then and in that event, I will, order, and direct, that my two nephews John and Alexander Mackay aforesaid, shall furnish them with a house for their residence, free of rent so long as they reside therein, and also furnish them with suitable household and kitchen furniture, and an adequate number of male and female servants to wait on them. And in the event of its becoming necessary (and which necessity to be judged of by a majority of my executors and John and Alexander Mackay, and the testamentary guardians hereinafter appointed) to remove the said Betsy Keating and her children aforesaid, then I will, order, and direct my executors to pay over to the said testamentary guardians, hereafter appointed, for and on account of the said Betsy Keating and her children, aforesaid, over and above the legacy hereby, and before bequeathed to them, the sum of four thousand dollars to be raised out of the residuum of my estate, &c." It appears manifest from the whole will,

95 \*that Betsy Keating and her children were the peculiar objects of the testator's bounty. The provision made for them in another part of the will is ample, and the greatest solicitude is shown that it should not be disturbed, but take effect according to his will. That bequest is neither conditional nor contingent, and seems to have been considered by the testator sufficient for their comfortable support and maintenance under ordinary circumstances, when furnished with a house and servants as directed by the first part of this clause; with which direction John and Alexander Mackay have fully complied, as appears by the exhibits. But the testator, apprehending that some necessity might arise which could not then be foreseen, seems to have extended his care for these persons so as to meet a possible but unforeseen event. His intention should not be defeated if it were possible that it could ever be carried into effect: But that has now become impossible, by the death of a majority of the executors, and John and Alexander Mackay, and the testamentary guardians.

This is clearly a conditional bequest, and is not a limitation. No intermediate disposition is made of this legacy. No interest in it is vested in any one; nor can any interest vest, until the happening of the contemplated event, except such interest as the executor acquires by virtue of his office; and the bequest is given upon a con-

dition precedent which, by the act of God, has become impossible. For though a necessity may arise for removing Betsy Keating and her children, and a very strong necessity too; yet no such necessity as the testator contemplated, can ever possibly arise, those who were, by him, made alone capable of determining upon it, having ceased to live. The power of judging when necessity should arise, is a mere naked power, unaccompanied by any trust. It cannot be delegated, being a personal trust and confidence; and can only be executed in the manner prescribed by the testator; that is, by a majority, &c. That this is a conditional bequest, and not a limitation, is apparent from the words used, "in the event of its becoming necessary," which are no way different in effect or meaning from these, "if it become;" "provided it should become;" "if it happen to become;" words clearly conditional and not of limitation. 1 Bac. Abr. 403, H. That no estate was intended to vest in the devisees until the event should happen, or the condition be performed will appear, it is thought, to any one who looks at the clause under consideration. "In the event, &c. then I will, order and direct my executors to pay over, &c." The gift is made to depend on the happening of the event. If this never happen, the gift can never take effect. In the case of *Popham v. Bampfild et al.*, 1 Ver. 83, it is said that "precedent conditions must be literally performed, and this court will never vest an estate, where, by reason of a condition precedent, it will not vest in law." \*And in the case of

*Cary v. Bertie and Wife, et al.*, 2 Ver. 340, the Chancellor and two Chief Justices all declare, that "if the condition (precedent) becomes impossible, even by the act of God, the estate would never arise." That the event in this case can never happen, and that the condition has become impossible, is a necessary legal consequence from the admitted fact, that a majority of those to whom alone was referred the power of judging of the necessity upon which the four thousand dollars were to be paid, are dead. If the testator had omitted the words contained in the parenthesis, the case would have been a very different one from what it is. The power of judging when the necessity arose, might then have been considered as being connected with the trust in the executors, to pay over when it should arise; the condition to be still possible; the power capable of being executed, and such as could be enforced by this court, according to the authority of the case of *Brown v. Higgs*, 8 Ves. jr. 574. But it is evident from what is contained in the parenthesis that it was not the testator's intention that this power should be in his executors; and he has, as plainly as words could do it, separated the power from the trust: for while the trust remains in the executors alone, he has given the power to them together with John and Alexander Mackay, and the testamentary guardians, hereinafter to be appointed, and made the

concurrence of a majority of them alone competent to execute it. Here then is a power, the result of a special trust and confidence reposed in particular individuals, which is incapable of being transferred to another, Cole and Wade, 16 Ves. 43, and which, had it been joint, would have been determined by the death of any one of them. Same case, also Peyton and Bury, 2 P. Wms. 626. Had the power been confided generally to these persons, the death of either of them would, according to these authorities, have determined it. But the case would have been much stronger, had the testator expressly made the concurrence of all necessary. Here he has expressly made the concurrence of a majority necessary, which majority is dead. The effect is the same. And it is upon the general principle, that the testator or constituent may not only limit the extent of power conferred by him, but also prescribe the particular manner of executing it; and that the agent is as little able to vary the manner, as to transcend the limits; for in either case he would be found usurping instead of executing authority.

The intentions of a testator, and not the reasons which governed him, are alone regularly inquirable into; but the peculiar circumstances of this case are such as in a good measure to obtrude upon the consideration of the court the reasons which were likely to have operated upon the mind of this testator. Two of his residuary legatees, the two testamentary guardians of Betsy Keating and her children and  
97 \*the executors, are appointed. It is the interest of the first two that the event should not happen at all, and this interest would be likely to influence their judgment against the existence of the necessity. It would be the interest of the guardians representing their wards, to obtain possession of the fund at once; but the interest of the executors is balanced between them. In all the testator had confidence, and he was willing to put this sum at the disposal of a majority of them, being equally unwilling on the one hand to suffer the death of one, or two, or even three of them, or the obstinacy or selfishness of the residuary legatees, to obstruct his kind intentions, and on the other to delay the rights of his residuary legatees, and to burden his executors for an unreasonable length of time with this unadministered fund.

The court does not advert to this reason as any way controlling the power, but as an aid in explaining the intention of the testator, who must have had in view the interests of the residuary legatees as well as those of Betsy Keating and her children: and this reason is thus used more especially because the intention so explained is in accordance with, and not opposed to, a settled rule of law.

Upon a careful consideration of this case, it is the opinion of the court that the complainants are entitled to recover the whole residuum, including the four thousand dol-

lars reserved to meet the conditional bequest to Betsy Keating and her children, and it will decree accordingly.

I. P. King, Solicitor pro complainants.  
R. H. and J. W. Wilde, for defendants.

Elizabeth Pennington v. Thomas Watson and Isaac Brant.

In Richmond Superior Court, July, 1832.

Note for Collection—Evidences of Debt Put in Attorney's Hands by Maker as Collateral Security—Effect.

—A. indorsee of a note given by B. placed the same in the hands of her attorney for collection: B. went at once to the attorney and placed in his hands a number of notes and other evidences of debt, of a larger amount on third persons as collateral security for the payment of his own note: In the receipt which the attorney gave B. for those evidences of debt he agrees as soon as he has collected enough of them to pay B.'s note to deliver it over to him, together with whatever balance there might be over. The court held that the evidences of debt were not taken as satisfaction of B.'s note, nor did the language of the receipt amount to an agreement not to sue B. till the securities mentioned in the receipt could be collected.

This was an action of assumpsit in which judgment was confessed, subject to the opinion of the court as to the plaintiff's right of action upon the following statement of facts and the annexed receipt.

"There was no agreement to wait till the demands mentioned in the receipt could be collected, unless the receipt import such agreement. All the claims mentioned in said receipt were collected (except the attorney's receipt) and credited upon the note sued on; and before the commencement of this suit, the defendant Watson was informed, by plaintiff's attorney, that he was unable to collect said demands (attorney's receipt) and that he did not believe they could be collected, and offered to return the attorney's receipt: where-  
98 upon \*the defendant Watson promised to be in Augusta in a few days, and that he would pay the amount due on the note. The notes mentioned in the 2d and 3d lines of the receipt are still in suit in Columbia and these cases undetermined." Signed by counsel.

"Augusta, May 8th, 1829. Received of Thomas Watson, Petit & Burnside's receipt for two notes against the estate of Henry W. Cobb, which are now in suit in Columbia Superior Court, one for one hundred and thirty dollars and twenty-five cents, besides interest, and the other for two hundred dollars besides interest, and on which notes there is a credit of ten dollars and eighteen cents.—Also four notes dated 18th March, 1828, and payable one day after date to Thomas Watson or bearer, three for thirty dollars each, and one for four dollars and ninety four cents,—all which I am



to hold as collateral security for the payment of a note given by said Thomas Watson on the 17th March, 1829, payable one day after date to Isaac Brant or order for five hundred and seventy four 12-100 dollars. As soon as I collect the first mentioned notes or a sufficiency thereof to pay the last-mentioned note (which has been indorsed and delivered to Elizabeth Pennington) I agree to deliver to the said Thomas Watson the said last-mentioned note and to pay him any balance that may be due to him." Signed, "A. J. Miller, attorney for E. Pennington."

This case is submitted without argument, and is indeed very plain. It is not easy to perceive on what ground the defendant can reasonably expect the judgment of the court in his favor. The defence rests exclusively upon the above receipt. This could bar the plaintiff's right to recover her debt but in two ways. 1st, That the notes and evidences of debt deposited with plaintiff's attorney, had been received in satisfaction of plaintiff's demand, or there had been such neglect and laches of the plaintiff in regard to them as would in law amount to a satisfaction. 2dly, By an agreement not to sue until the securities mentioned in the receipt could be collected. No laches whatever is imputed to the plaintiff or her attorney; and so far from the notes and attorney's receipts mentioned, having been deposited in satisfaction of, they are expressly declared to be as collateral security for, defendants' note; and a stipulation is entered into as to the manner of applying their proceeds when collected, which has been fully complied with, as far as collections have been made, and an inability is shown to make further collections.

It is only the last clause in the receipt of plaintiff's attorney that can in any way import an undertaking to abstain from suing upon the defendants' note until the securities can be collected; and the words used will by no means imply such an agreement. But the facts stated, and the defendants' promise to pay, with a knowledge of these facts show \*what he understood by the undertaking in the receipt, and are conclusive of the case. Let judgment be entered for the plaintiff.

A. J. Miller, for plaintiff.

A. B. Longstreet, for defendant.

**Thomas Colvard, Complainant, v. Benjamin S. Coxe, Administrator of Robert Crawford, Defendant.**

In Columbia Superior Court, July, 1832.

**Equitable Interest—Right of Sheriff to Sue.\*—An eq-**

\*Legacies—When Liable for Debts of Legatee.—A legacy is not subject to be seized and sold for the debts of the legatee, until the executor has assented to, or, at least, until all claims upon it of higher rank than the claim of the legatee, have ceased to exist. *Suggs v. Sapp*, 20 Ga. 101, citing *Colvard v. Coxe*, *Dud.* 99; *Blake v. Irwin*, 3 Kelly 345, 366; *Bell v. Bell*, 1 Kelly 637.

uitable interest is not subject to seizure and sale by a sheriff.

**Sheriffs—What May Sell on Execution.**—A Sheriff can sell nothing but goods and chattels, lands and tenements: a right to receive a distributive share of an estate, is neither.

The object of this bill is to compel an account of the intestate's estate, and the payment to complainant of the distributive share to which Joel Crawford, one of the sons of the intestate was entitled, and which the complainant now claims as a purchaser as sheriff's sale. To this bill the defendant demurs, and insists as a ground of demurrer, that an equitable interest is not subject to seizure and sale by a sheriff, and that complainant can take nothing by his deed.

That a mere equitable interest is not subject to execution, is well settled; and it cannot be here necessary for the court to enter upon an argument to show why it should be so. That it is settled, must be sufficient with the court, until it can be made to appear that the decision is erroneous. But it would be most dangerous to suffer distributive shares to be sold under execution, as well on account of the confusion which would arise in settling estates, and the difficulty and uncertainty of obtaining sufficient discharges and indemnities by executors and administrators, as on account of the unavoidable sacrifice of the interest of distributees in the sale of a mere claim, which from its very nature is utterly inappreciable.

There is, too, a technical difficulty that cannot be obviated. The sheriff has no authority to sell, but what he derives from the writ. And that gives him the power to sell nothing but the defendant's goods and chattels, lands and tenements: A right to receive a distributive share can neither be considered the goods or chattels, lands or tenements of the distributee. Of whatever the estate may consist, it is the estate of the testator or intestate in the hands of the executor or administrator until distribution.

The authorities are numerous and clear. *Scott v. Scholey and Another*, 8 East, 467; *Metcalf and Another v. Scholey and Another*, 5 B. & P. 461; *Lyster v. Dolland*, 1 Ves. jr. 431; *Wilkes and Fontaine v. Ferris, Sheriff*, 5 John. Rep. 335; *Hendricks v. Robinson, Franklin and Others*, 100 2 John. \*Ch. Rep. 283. In this case the Chancellor says "I do not know of any case in which a court of equity has considered an execution at law as binding an equitable right. The idea is altogether inadmissible."

The demurrer is allowed.

Ball, for complainant.  
Miller, for defendant.

**James Fellows v. Guimarin and Brelet.**

In Richmond Superior Court, July, 1832.

**Statute of Limitations—Exception in Favor of Merchant's Accounts.**—The exception in favor of mer-

chants' accounts in the 5th section of the statute of limitations of 1767, is not repealed by the act of limitation of 1809.

**Partnership—Dissolution—Promise by One Member to Pay Debt Not Barred—Effect.**—After dissolution of copartnership, and until the statute shall have attached to the demand, each partner has the power to bind his copartner by promises which shall avoid the statute.

**Same—Same—Same—Sufficiency.**—The promise to be sufficient must be express or there must be an acknowledgment so direct and explicit as to be equivalent to a promise.

In the declaration there are counts for goods sold and delivered, the common money counts, and an insimul computasent; to which the defendant, Guimarin (Brelet not having been arrested) pleaded non assumpsit, the statute of limitations, an award and a release.

At the trial the plaintiff fully proved, by his clerks, the account annexed to his declaration. The defence rested principally upon the statute of limitations. There was an attempt to prove an award, but it failed for want of proof of a submission. A release too was offered, but it was the release of Brelet to Guimarin from all liability to pay the copartnership debts, and no evidence whatever that the plaintiff ever assented to it, or even knew of it.

The last item in plaintiff's account was dated more than four years before the action brought; but the account is such as concerns "the trade of merchandize between merchant and merchant," the plaintiff being a dealer in jewelry and plated wares in New York, and the defendant engaged in the same business at Augusta. As the court was of the opinion that the exception in favor of merchants' accounts, contained in the 5th section of the act of limitation of 1767, had been repealed by the act of 1809, the plaintiff was compelled to reply a subsequent promise. He also proved mutual dealings between the parties within the four years, and in regard to some of the very articles charged in the plaintiff's account.

A verdict having been returned in favor of the plaintiff, and the court being now of opinion that the exception in the 5th section of the act of 1767, is of force, it becomes altogether unnecessary to consider the other questions raised, which are,

1. How far it is in the power of one partner, after the dissolution of the copartnership, to bind his copartner, by promises

**\*Partnership—Dissolution—Promise by One Member to Pay Debt Not Barred—Effect.**—The admission of a debt by one partner after dissolution, but before the statute has interposed its bar, will be binding upon the other partners so far as to constitute a new point from which the statute shall commence running. *Brewster v. Hardeman*, Dud. 138.

In *Walker v. Mercer*, 41 Ga. 45, the principal case is cited to the point that, where there is an open account the statute of limitations commences to run from the last item of such account.

which avoid the statute of limitations?(1)

101 \*2. What promise will be sufficient for that purpose?(2)

It may be stated, however, that upon the first question it is held by a majority of the judges, that after dissolution of copartnership, and until the statute shall have attached to the demand, each partner has the power to bind his copartner by promises which shall avoid the statute.

And upon the second question, that the promise to be sufficient must be express; or there must be an acknowledgment so direct and explicit, as to be equivalent to a promise.

The error into which the court fell respecting the exception in favor of merchants' accounts in the act of 1767, was occasioned by the generality of the words used in the first section of the act of 1809, and the repealing clause in the 2d section. The words in the 1st section are "that all actions founded upon open accounts shall be commenced within four years from the time such account accrued, and not after." And the 2d section repeals all laws militating against that law. Here is no exception. All actions upon open accounts shall be commenced within four years, and not after. But the true intention of the legislature is to be ascertained, from a consideration of this law in connexion with others upon the same subject, and from the object to be attained by this particular act, as disclosed in the preamble. And so important a part as the exception in favor of merchants' accounts, the usefulness of which is attested by ages of experience, should not be stricken from the statute, unless it be clearly the intention of the legislature that it should be.

The act of 1767 continued in force until 1805, when it was repealed. But the next year it was revived with some slight alterations; the principal of which are contained in the proviso of the 2d section, which is in these words, "That all notes and instruments of writing not under seal bearing date after the passage of this act, shall be of the same dignity with specialties, and subject to the same limitations heretofore in force in the case of specialties, anything in the 5th and 9th sections of the said act to the contrary notwithstanding."

There is something vague and uncertain in this proviso, which seems to relate only to contracts in writing. Yet though "notes and instruments in writing not under seal," alone are mentioned as having been placed upon the same footing with specialties, a reference to the 5th sec. of the act of 1767, together with the use of the word "specialties" and other indefinite expressions, rendered the explanatory act of 1809, necessary not only to fix precisely the limitation of actions upon sealed and unsealed instruments, but also upon open accounts.

(1) See post, cases of *Brewster v. Hardeman* and others.

(2) See preceding note.



That act is entitled an act to amend the act of 1806. And as concerns bonds and notes, it certainly is such; but as to open accounts, it is only declaratory of what the law was. No new principle is introduced; and the time prescribed is the same which in the 5th sec. of the act of 1767, limits similar demands. As to open accounts then, the act of 1809, is but affirmative of that of 1776, and it would be a most absurd construction, to make an affirmative act, by general words, repeal an important part of the act affirmed. There are two grounds upon which the defendant moves for a new trial.

1. Because the plaintiff's claim is actually barred by the statute of limitations, and no verdict can or should have been rendered upon it.

2. Because the verdict is against evidence and law.

As the court is of opinion that the statute of limitations never attached to the plaintiff's demand; and as the jury have passed upon the evidence in support of the account, competent in law and by them considered sufficient to sustain it, the motion is overruled on both grounds, and a new trial refused.

W. T. Gould, for plaintiff.

R. R. Reid, for defendants.

### Benajah S. Wilson et al. v. William Wright.

In Columbia Superior Court, July, 1832.

**Juries—Verdict—Setting Aside.**—It must be an extraordinary case, in which a court would undertake to say, that a jury acting within their appropriate sphere and eliciting truth from conflicting testimony had determined improperly.

**Gift of Slave to Infant Children—Right of Father to Sell.**—When negroes have been given to a man's children who are under age, the father cannot sell them, or if he do, the sale is void, and they may be recovered from the purchaser.

In this case there is a verdict for the plaintiffs, and the defendant moves for a new trial on three grounds, which are,

First. Because the verdict is against evidence, and the weight of evidence.

Secondly. Because it is against law. And

Thirdly. Because it is against the justice and equity of the case.

The action is to recover damages for an alleged wrongful conversion by the defendant to his own use of a slave, named Albert or Gilbert, claimed to be the property of the plaintiffs. It support of their action, they gave in evidence a deed of gift, dated the 6th of June, 1812, from their uncle Benajah Smith, for a female slave named Harriet and her two children Henry and Albert. It was proven that Benajah Smith, purchased Harriet some years be-

fore, and when she was just grown, (being then but about fourteen or fifteen years old) from one Abner Wellborn, for the use of the family of Littlebury Wilson, who was the plaintiff's father, and that she immediately went into their possession, and served them in the capacity of a house-servant; that the plaintiffs were, at the date of the deed, young children, and their father continued to exercise acts of ownership and control over Harriet and her children, until he sold Albert to Johnson Wellborn in eighteen hundred and nineteen, and that when this sale was made, the plaintiffs were yet tender infants under the care and management of their father. The conversion was fully proven, as were also the value and annual hire of Albert. Though other witnesses were sworn, this proof was principally made by Mrs. Eliza Wilson, the plaintiff's mother.

For the defendant it was proven by the widow of Johnson Wellborn, that the girl Harriet was held by Littlebury Wilson as his own property; that he exercised all acts of ownership over her and her children which masters usually do, and that he publicly offered Albert for sale before he sold him to Johnson Wellborn, to whom he sold him for a valuable consideration. There was no evidence of either actual or constructive notice to Johnson Wellborn of the deed from Benajah Smith to the plaintiffs. But in addition to the proof that Harriet was publicly purchased for the family of Littlebury Wilson by Benajah Smith, there was proof that at the time Wilson was a very improvident man, and continued so until his death; that before his sale of Albert to Johnson Wellborn, he had offered him for sale to different individuals in that neighborhood, but could not then sell him, because his title to the boy was not believed to be good; and that Johnson Wellborn bought him for a small consideration. Such being the nature of the proofs, it is clear, the verdict was not against evidence, for the deed from Smith, and Mrs. Wilson's testimony showed title in the plaintiffs, and the other necessary proof was fully made. It is true, there was an attempt to impeach Mrs. Wilson's credit, but it was supported not only by witnesses called for that purpose, but by the jury who alone were competent to pass upon it. According to the testimony of Mrs. Wellborn, Littlebury Wilson held Harriet and her children as his own property, but this being directly opposed to the deed and to the testimony of Mrs. Wilson, it was for the jury alone to determine between them, and to declare on which side the scale preponderated. They have done so: and it must indeed be a very extraordinary case in which the court would undertake to say that a jury, acting within their appropriate sphere, and eliciting truth from conflicting testimony, had determined improperly.\* In this case especially, the court will not so

\*See foot-note to Irwin v. Morell, Dud. 72, citing the principal case.

\*See ante, p. 78, 86.

interfere with the verdict of the jury, because the only title shown in Wilson, was one of possession, and that possession not at all inconsistent with plaintiff's title.

But on the second ground, it is contended for the defendant, that though the equitable interest in Harriet and her children may have been in the plaintiffs, yet that 104 Littlebury \*Wilson who held as trustee might convey them to an innocent purchaser for a valuable consideration, whose title should prevail against the claim of the plaintiffs. Before the reasoning or authority in support of this ground can be made to apply to the present case, it must be shown that the legal title was in Littlebury Wilson. But as no such proof was offered, it is unnecessary for the court to say what effect it might have had upon the rights of the parties if it had been made. The plaintiffs do not here rely upon an equitable, but upon a legal title. It is upon such title alone that they can recover. If the deed from Smith to them be valid it conveys such title, and cannot at the same time convey a legal title to them and to Littlebury Wilson, the supposed trustee, nor could he, if the title were not in him, by any unauthorized act, destroy or defeat the title of his infant children. The validity of the deed was attacked on the ground of the purchase of Harriet being a covinous transaction to defraud the creditors of Littlebury Wilson, and that she was in fact purchased with the money or property of L. Wilson. Upon this fact the jury must have passed, for they were expressly instructed by the court that if it were true, the plaintiffs could not recover. But the recollection of the court is that there was no distinct proof to support this part of the defence, while the proof on the part of plaintiffs was positive that she was paid for by Smith with his own cotton. No rule of law being violated by the verdict, the second ground is overruled.

As to the third ground, the court does not perceive how the justice and equity of the case can be at all separated from the legal title to the boy Albert. That title the jury have found to be in the plaintiffs, and it would seem rather unjust and inequitable to disturb it, and to defeat the kind and benevolent intentions of the donor towards the children of an unfortunate sister, in favor of purchasers who derive their only title through the improvident father whose conduct rendered the gift necessary; and which title has its origin in a wrong done to his infant children. Their rights must be carefully guarded. Let the purchaser take care. A new trial is refused, and it is ordered that the execution be issued.

Black, for plaintiff.

Flournoy, for defendant.

105 \*Samuel Hale v. Ira Burton.

In Richmond Superior Court, July, 1832.

**Distress Warrants—Rights of Parties.**—All the rights belonging to parties in cases of claim, at least

such as regard the mode of trial, belong to parties to distress-warrants, for rent, as soon as replevy is made; and among these rights is that of appeal to a special jury.

**Record—Imperfect—Effect.**—A garbled or imperfect record will not be received in evidence by the courts.

**Distress for Rent—Who Entitled to Remedy.**—Distress for rent is a remedy which none but a landlord can have, and as soon as the relation of landlord and tenant ceases, the remedy ceases with it.

**Distress Warrant—On What Levied.**—A distress warrant may be levied on the tenant's property, wherever it can be found in the county and the authority to levy is not confined to the demised premises.

**Statute Giving Summary Remedy—Construction.\***—Acts giving summary remedy out of the ordinary course of proceeding must be construed strictly, and confined to cases clearly contemplated by them.

This is a proceeding under the rent law of 1811. It was originally returned to the Inferior Court, there tried and a verdict rendered for the plaintiff, from which the defendant appealed to this court. At the trial the plaintiff moved to dismiss the appeal, upon the ground that the case was not such a one, as, according to law, was the subject of appeal. The motion was overruled and a verdict rendered for the defendant, under the instruction of the court, that the distress for rent is a remedy which none but a landlord can have; and that as soon as the relation of landlord and tenant ceases, the remedy ceases with it. A new trial is now moved for by the plaintiff on the following grounds.

1. The court erred in not dismissing the appeal.

2. The court erred in repelling the evidence of the proceedings under the former distress warrant between the parties.

3. The court erred as to the lien and time of issuing distress warrants.

4. The court erred in allowing the defendant to the advantage of any irregularity in the distress warrant after having plead issuably in terms of the law in such cases made and provided.

**PER CURIAM.** The first section of the act of 1811, on the subject of rent, requires the levying officer, if the goods distrained be replevied, to return his proceedings "to the court having cognizance of the same, and that the same shall be determined by a jury as practised in other cases of claim." It is plain that the summary remedy by distress was not intended to reach cases of contested claims for rent, nor to deprive tenant of his constitutional right of trial by jury; for, whenever he will swear that the whole or any part of the sum dis-

**\*Statutes—In Derogation of Common Law—Construction.**—Statutes in derogation of the common law and of common right must be construed strictly and extended no farther than their words plainly import. *Fox v. Rucker*, 30 Ga. 527, citing *Hale v. Burton*, *Dud.* 105; *Carr v. Georgia R. & B. Co.*, 1 Kelly 533; *Young v. McKenzie*, 3 Kelly 38; *Mayor v. Hartridge*, 8 Ga. 23.



trained for is not due, the matter shall be tried "by a jury as practised in other cases of claim." All the rights which belong to parties in 'cases of claim,' do then belong to parties to distress warrants, as soon as replevy is made; at least such as regard the mode of trial. Among these rights, a very important one is that of a trial before a special jury, upon appeal. And the court sees no reason, even if the words of the act were less explicit, why a tenant, who might become defendant in a distress warrant, should be denied a right enjoyed by almost every other party in our courts.

The rejection of the record, which is complained of as an error in the court, was on account of its imperfection. It 106 was "but a garbled and imperfect record, and could not have been received without the violation of a well known rule of law.

Upon the third ground of alleged error, it is, that the plaintiff most strongly relies. The proof showed that the warrant issued years after the relation of landlord and tenant had ceased, between the parties and the property distrained was not upon the premises which had been rented. Upon these facts the jury were instructed by the court, that the plaintiff could not recover. 1st, Because there was no warrant in law for this proceeding, if the relation of landlord and tenant had ceased. And 2dly, because there is no authority in the act for the levy of a distress warrant beyond the demised premises.

The court now inclines to the opinion that it erred upon the second point. There is nothing in the act which confines the levying of the distress to the premises. It may be levied "on any property belonging to the said tenant." The form of proceeding does not seem to confine the levy to "property of the tenant" on the premises. It is strictly a judicial proceeding. The warrant must be issued by a justice of the peace, and be levied by a constable or sheriff according to the amount, and may become, as has been seen, the foundation of a suit in the Justice's Court, as well as the Inferior or Superior Courts. In it the landlord is but the actor, and there is no reason why the warrant should not be co-extensive with the authority or bailiwick of the levying officer. The words of the act do not restrain it; and a narrower construction would greatly impair the usefulness of the remedy.

But the warrant is to be levied on the property of the "tenant." This term must be understood in a technical sense. It seems to have been so used by the legislature. A tenant is technically one who holds under another; not a debtor. And it could not have been intended that all debtors for rent should be liable to this summary remedy, or the legislature would have used words sufficiently general to have conveyed that meaning, and not have used terms which limit it to those holding the relation of landlord and tenant. And acts giving summary remedy, out of the ordi-

nary course of judicial proceedings, should be strictly construed, and confined to the cases clearly contemplated.

As to the 4th ground, if the court be correct in its views of the extent of the remedy, it follows necessarily, that the whole proceeding having been unauthorized by law, must be utterly void ab initio; and if so the irregularity may be taken advantage of at any time. Motion refused.

Thomas, for plaintiff.

Miller, for defendant.

# 107 \*George W. Redmond v. William Glover.

In Richmond Superior Court, July, 1832.

**Statutes—"Months"—Meaning.**—When the term "months" is used in a statute without defining what kind of months, the courts adjudge that lunar months are intended.

But a single question arises in this case, and that is upon the computation of time. Six lunar months have elapsed since the rule nisi, and the mortgagee is entitled to his rule absolute, unless the court decide in favor of the computation by calendar months.

The divisions of time into years, months, weeks, and days, have long been settled by common law. A year is a well known and determinate period, consisting of three hundred and sixty-five days and the fraction of a day, being one entire revolution of the seasons. The period of a month is not so determinate, as there are in common use two ways of calculating it; one lunar, consisting of twenty-eight days, of which there are thirteen in a year, the other according to the Julian division, commencing at the calends of each month. Of these there are twelve in each year, and they of unequal lengths. These different modes of computing months may not be capriciously used, as their particular use and application have been settled by law. In all ecclesiastical and commercial transactions, the calendar month is used. *Franco v. Alvares*, 3 Atk. 346; *Leffingwell and Pierpont v. White*, 1 John. Ca. 99. And the Court of Chancery has adopted the calendar month in its orders and decrees, 3 Eq. Cas. Ab. 605. But these are to be considered as exceptions to the general rule: For a month in law is a lunar month, unless otherwise expressed. 2 Blk. Com. 141. In *Franco v. Alvares*, the Chancellor says "It has been truly said in acts of Parliament the word months means lunar months, except in the case of *Tempus Semestre* with regard to lapse of livings, and the other case of the six months allowed in respect to prohibitions, both upon the same reason, because relative to and according to the computation of time in the ecclesiastical court. In the case of *Lacon v. Hooper*, Lord Kenyon says "I confess I wish that when the rule was first established, it had been decided that months should be understood to mean calendar and

not lunar months; but the contrary has been so long determined and so frequently, that it ought not again to be brought in question. In the instance of a quare impedit, the computation of time is by calendar months, but that depends on the words of an act of parliament, tempus semestre. But for all other purposes, and in all acts of parliament where months are spoken of, without the word calendar, and nothing is added from which a clear inference can be drawn, that the legislature intended calendar months, it is understood \*to mean lunar months." 6 T. Rep. 224. And of the same opinion were the whole court; considering it a question too well settled to be doubted.

Such, then, is the common law of England upon this subject. The colonists who first settled the State brought with them all the laws of the mother country, applicable to their new condition, and necessary for their good government. Such was the law regulating the division of time, and directing its mode of computation. After the separation of the governments, the legislature of Georgia in the year 1784, expressly adopted the common laws of England so far as they are not contrary to the Constitution, laws, and established form of government. That part of the common law under consideration is not within the exception. It perhaps might be well for the legislature to establish some uniform manner of calculating time applicable to all purposes, adopting the lunar, or calendar month, as in their wisdom might seem best; but until that is done, things must remain as they are, for the courts have not the power to alter that which is established. Neither in the judicial act of 1799, nor in the acts of 1826 and 1829, amendatory thereof, under which this proceeding is had, is the calendar month mentioned, or any thing from which it may be clearly inferred that such was intended. The common law rule must therefore prevail, and the legislature be presumed to have intended lunar months.

Let the rule absolute be entered.

Black for plaintiff, and Reid for defendant.

**Henry Casnard v. Joseph C. Eve, George M. Ringland and Angus Martin.**

In Richmond Superior Court, July, 1832.

**Pleadings—Amendment—New Parties—New Cause of Action.**—Neither the judiciary act of 1799, nor any

\*Common-Law Pleading—Amendment.—At common law the court may amend in all cases while the proceedings are in paper, that is, until judgment signed. *Coombs v. Low*, R. M. Charl. 396. But in the principal case it is held that neither the judiciary act of 1799, nor the act amendatory thereof, the common law, nor the English statute of jeofails, will authorize the courts to permit a change of parties, and the introduction of a new cause of action by way of amendment in the pleading.

act amendatory thereof, the common law, nor the English Statute of Jeofails, will authorize the courts to permit a change of parties, and the introduction of a new cause of action, by way of amendment in the pleading.

This is a motion to amend, and the case is this. The plaintiff brought his action against these defendants jointly, according to the provision of the act of 1826, "to define the liability of indorsers of promissory notes, and other instruments, and to place them upon the same footing with securities" averring the first two partners, trading under the name of Joseph C. Eve & Co., to be the makers and the last to be indorser of a certain note, to recover the amount of which, suit was brought. It turned out upon proof that Eve was no way liable, and that the note was in fact the individual note of Ringland, made by him on his own account, though using the name of Joseph C. Eve & Co. without any authority, and that this was known to the plaintiff at the time the note was  
109 \*made; that it was made for plaintiff's benefit, the transaction being between him and Ringland, and the name of Martin indorsed as security. The contract averred in the declaration, and that proven, being thus entirely variant, the plaintiff sought to avoid the difficulty by entering a nolle prosequi as to Eve; which he moved to do, with leave to proceed against the others. This was refused by the court upon the rule laid down in 1 Chitty on Pleading, p. 34. See also 7 T. R. 352; 1 East, 52; Bul. N. P. 129; 1 H. Bl. 37; 1 Phil. Ev. 168, and cases there cited. He then submitted to a verdict against himself, appealed and now moves to amend his declaration by striking out the name of Ringland and setting forth the contract truly.

Our courts have gone great lengths in allowing amendments both as to substance and to form, for the attainment of justice and avoiding expense, and vexatious delay; but never so far, it is believed, as to allow an amendment, which not only changes the cause of action, but also the parties. Such a proceeding would find no sanction in the common law, nor in the English statute of Jeofails; and if warranted at all, it must be under the acts of our own legislature.

The amendments allowed by the judicial act of 1799, are only as to matters of form, "and no petition, answer, return, process, judgment or other proceeding in any civil cause shall be abated, arrested, quashed or reversed, for any defect in matter of form, or for any clerical mistake or omission not affecting the real merits of the cause, &c." The act of 1818, to explain and enforce that of 1799, gives greater power to the courts of so moulding the proceedings as to attain the justice of every cause. The first section provides "that in every case where there is a good and legal cause of action, every other objection shall be on motion amended without delay or ad-



ditional costs." And in the second section that "no nonsuit shall be awarded when the cause of action is substantially set forth in the declaration, for any formal variance between the allegation and the proof." But neither of these provisions authorises a change of parties by way of amendment. The first requires a good and legal cause of action to be plainly and distinctly set forth, and allows every other objection to be amended on motion. A cause of action to be good and legal must be such upon which the court (proper proof being made) may render its judgment. If no such cause be set forth in the declaration, the court finds here no authority for allowing an amendment to introduce one; much less an amendment which shall introduce a different cause of action between different parties in substitution for cause of action which cannot be sustained by proof.

The second section cannot affect this question, as it relates only to formal variances between the allegation and the proof, and the variance here is substantial.

110 Unless, therefore, the \*court would undertake to form a new law on this subject, which is not within its province, the amendment cannot be allowed.

The motion is denied.

A. J. Miller, for plaintiff.

R. R. Reid, for Eve.

Cumming and Crawford and I. P. King, for Martin.

### S. J. Bomgaux v. J. V. Bevan.

In Chatham Superior Court, July, 1831.

#### Executors and Administrators—Statute—Prescribing Priority of Payment of Debts—To What Applies.—

The exceptions in favour of judgments, mortgages and executions contained in the act of 1792, prescribing the priority to be observed by executors and administrators in the payment of debts due by the estates of their testators or intestates, apply only to such executions, judgments and mortgages as existed in the lifetime of the testator or intestate and had created a lien upon their estates.

#### Same—Bond Debts—Priority over Simple Contract

**Debts.**—If there be bond-debts, and the executor be sued upon a simple contract debt, he may neither pay it, nor suffer the plaintiff to recover in his action; for if he do, and he have not assets besides to satisfy the debts due upon bonds, he must satisfy so much out of his own estate as he has so paid, or suffered to be recovered from him; for in case of an action brought, he is to plead and set forth these debts upon specialties, and to say that he hath no more than what is sufficient to satisfy them, and thereby he shall bar the plaintiff in his action.

**Same—Priority of Debts.**—The nature of the debts at the time of the testator's or intestate's death is to regulate the priority of their payment, by the executor and administrator, and no preference can be created either by greater diligence on the part of the creditor or by the acts of the executor or administrator himself.

This case presents itself upon the follow-

ing statement of facts. An action was commenced by the plaintiff against the defendant as the administrator de bonis non of William Craig deceased, returned to the July Term, 1827, of the Inferior Court of Chatham county. Sundry creditors of William Craig had commenced suits against John McNish the executor of Craig; upon whose death and the grant of administration de bonis non to Bevan, they sued out sci. fas. against Bevan, and obtained judgments at an earlier period than the present plaintiff. The debts were of equal degree, being all promissory notes, and were all specially pleaded in each action respectively. The debt due to Bomgaux was pleaded as an outstanding unsatisfied debt in equal degree in the sci. fas. and the notes upon which they were brought were pleaded to Bomgaux's action. The jury rendered the following verdict, "We find for the plaintiff, &c. payable out of such assets as now are, or shall hereafter come to the defendant's hands to be administered, ratably with debts of equal degree in the plea of the defendant pleaded." The administrator subsequently refused to let in the present plaintiff for his proportion of the assets admitted by the plea to be in the defendant's hands, but distributed the funds among the judgments recovered in the sci. fa. cases. The present action is brought to charge the administrator with a devastavit. A verdict was taken subject to the opinion of the court.

In deciding this question the attention of the court is necessarily directed to the 8th section of the provincial act of Georgia, passed in 1764, which directs "That no administration of intestate estates shall be granted to a principal creditor or creditors, but upon special trust and confidence for all and singular the creditors; and that all debts for an equal nature shall be paid in average and proportion as far as the assets will extend, and that no preference shall be given among creditors in equal degree;" and also to the 10th section of the act of the legislature of Georgia, passed in 1792, which prescribes the order to be observed

by executors and administrators, 111 \*with reference to priority in the payment of debts of their testator or intestate—and which also declares that no preference shall be given among creditors in equal degree except in cases of judgments, mortgages that have been recorded, from the time of recording, and executions lodged in the sheriff's office, the oldest of which shall be first paid.

In order to a right understanding and just construction of these acts it seems to the court necessary to consider what the law was anterior to their enactment. By the law of England, which obtained here, a rule of legal priority was prescribed for the payment of the debts of a deceased person, which the executor or administrator was bound at his peril to observe, and by which he was inhibited from paying a debt of inferior classification in preference to one of higher dignity in the prescribed or-

der. But it was permitted him among debts of equal degree to give a preference by paying one creditor to the entire exclusion of another of whose debt he had not been notified by the commencement of a suit. And even after an action commenced, he might give a preference by confessing judgment upon a suit subsequently brought. Apart from this voluntary action on the part of the legal representative in contributing to a preference among creditors in equal degree, it was competent to the creditor himself to obtain this preference by the exercise of superior vigilance in resorting to legal or equitable process. The creditor who first commenced his action and obtained his judgment at law (and a decree in equity was available to the same end) secured a preference. In the order established by law, exclusive of the rights of the crown, debts of record, among which judgments ranked the highest, were entitled to priority, and the executor or administrator was bound at his peril to take notice of them—if he paid debts of an inferior character, he was guilty of a devastavit. As the judgment however created no lien upon the personal property of the testator, or intestate, as among judgments, the first execution issued obtained a preference. To protect himself against a devastavit, it is necessary that the executor or administrator specially plead such judgments as may have been obtained against his testator or intestate in his life-time—and if he be sued upon a simple contract debt, he must plead outstanding unsatisfied debts by specialty, the omission to do which will deprive him of the right to plead a judgment so obtained upon simple contract to an action afterwards brought upon the specialty; because the omission to plead the specialty debt to the action on simple contract, is an admission of assets as to the simple contract debt. It has already been remarked, that a decree in equity was as effectual to the securing a preference among creditors in equal degree as a judgment at law; for although the executor could not plead such a decree to an action brought, yet after a decree to account, a creditor proceeding at law would be enjoined \*from going on to judgment, upon mere motion, without filing a new bill, and after a final decree he would be entitled to come in for his proportion of the assets. In marshalling which a court of equity follows the rule of law; if there are judgment creditors existing against the testator in his life-time, their priority is preserved, and the remaining assets distributed in a course of administration. The court is aware that it has been said that a Court of Equity in England will distribute the assets ratably among all the creditors without regard to the order of dignity prescribed by law. This is the opinion of Sir James Mansfield, 1 Campb. Rep. and after a review of the English cases acquiesced in by a distinguished Chancellor in America, 4 John. Ch. Rep.

Be this as it may, it remains to be determined whether a Court of Equity in Georgia can so far disregard the positive injunctions of a statute as to prescribe an order at variance with its provisions. Thus we perceive that under the English law which was of force in Georgia, previously to the acts referred to, the debts of a deceased person were paid in the order of priority as they stood at the death of the decedent, not liable to be varied either by any voluntary act of the executor or vigilance of the creditor, except in cases of debts of equal degree. Let us now inquire what are the changes introduced by the enactments referred to.

The great and important change, which it is necessary to notice for the purpose of this decision is, that the executor or administrator can no longer give a preference among creditors in equal degree either by voluntary payment, or confession of judgment—and although it may be conceded that the preference spoken of is a voluntary and not a compulsory preference through the medium of the courts, yet is believed, it will be found of important consequence in the law of administration. Based upon the order prescribed by the English law, the act of 1764 commits the administration to a creditor in trust for all the creditors—declares that debts in equal degree shall be paid in average and proportion, and that no preference shall be given among creditors in equal degree. The act of 1792 prescribes a new order for the payment of debts, and directs that no preference shall be given among creditors in equal degree, where there is a deficiency in assets, except in cases of judgments, mortgages, &c. These acts are to be considered as directory to executors and administrators, as furnishing a rule for their conduct from which they may not depart but at their peril. The spirit which animates them, is the spirit of equity and justice. They seek to introduce equality among creditors in equal degree; to destroy a principle of arbitrary preference which before their enactment had obtained. Why then the exception in favor of judgments, mortgages and executions? Is it ascribable to the favor which the law allows to superior vigilance? The race \*of diligence, if permitted here, would overturn and destroy that very principle of equality which the legislature intended to introduce, and which is so accordant with equity in the distribution of an insufficient fund. The various creditors whose debts were within the jurisdiction of the ordinary magistrates' courts, would first obtain their judgments in defiance of equal vigilance on the part of a creditor whose demand was of greater magnitude. It is known now to be a common practice, to split up large debts into many separate small notes which are thus taken for the express purpose of bringing them within the jurisdiction of these courts to secure the greater dispatch and facility in collecting them. Next would follow, in the course, the creditors who were



enabled to bring their suits within the jurisdiction of the corporation or city courts. And lastly those would attain the goal, who being constrained to come into the higher and more tedious courts had used the same vigilance, but with less propitious result than their more fortunate competitors. In the mean time the assets are constantly diminishing, and the estate deteriorating by being subjected to an overwhelming bill of costs. But this is not the extent of the inequality in this race of diligence. It is competent for an executor or administrator to appeal from the verdict of a petit jury without security, and in some instances it would become his duty to exercise this right. The consequence to the creditor is inevitable, he is postponed whilst others, who started even with him succeed over him. And since the executor may exercise this right, he may exercise it arbitrarily, and thus give that preference through the medium of the proceedings of the courts, which he is not permitted to do without.

The true cause for the exception, it is believed, will be found in the consideration, that the judgments, mortgages and executions excepted, existed against the testator or intestate in his life time, and had created a lien upon the estate. There is here a vested right which it would be inequitable to divest. The principle of equality could not be made to reach such a case. It is a general rule that a party will not be divested of a prior lien, unless there has been fraud or deception in the transaction. The judgment spoken of in the English law, as constituting a distinct class of debts in the order of payment, are understood to be judgments existing against the decedent. In *Shep. Touch.* 477, it is said after the king is served, the debts due by record, by any judgment had against the deceased in any judicial proceeding in any court of record, next, debts due by statutes or recognizances entered into by the deceased. 3. Debts due by obligation, &c. In the order prescribed by the 10th sec. of the act of 1792, it says after debts due to the public, next judgments, mortgages and executions, the oldest first—using the same language employed in the exception, and evidently referring \*the excepted case to those judgments, mortgages and executions specified as a distinct class of debts. Will it be argued that under the act of 1799 the judgment creditor has a lien upon all the property of his debtor from the date of his judgment, and that his lien is as effectual whether the judgment be obtained against the executor or the testator in his life time?—Let us examine this question. In England the judgment creditor who issued execution and lodged it with the sheriff, secured a lien upon the property of his debtor equally as efficient as that given here from the date of the judgment. Now will it be contended that by virtue of this lien he could take precedence of specialty creditors? If there be bond debts, and the executor be sued upon a simple con-

tract debt, he may neither pay it, nor suffer the plaintiff to recover in his action; for if he do, and he have not assets besides to satisfy the debts due upon bonds, he must satisfy so much out of his own estate as he has so paid or suffered to be recovered from him; for in case of an action brought—he is to plead and to set forth these debts upon specialties, and to say that he hath no more than what is sufficient to satisfy them, &c. and thereby he shall bar the plaintiff in his action. *Touchstone*, 478. If after paying debts of superior degree in the plea pleaded, there be a balance, the jury must find the precise amount, or the court cannot enter up judgment, the judgment must be entered up for the precise amount found in the defendant's hands. It is true the judgment creditor in the action against the executor, may obtain an advantage over a specialty creditor, by the omission of the executor to plead, and hence the strictness of the rule by which the executor is bound down to plead in the case of debts of inferior and superior grade. What is the effect of a judgment then obtained subject to such a plea? Surely the debts of superior dignity thus pleaded retain their priority notwithstanding the judgment. The statutes which prescribe the order for the payment of debts inobligatory upon the courts—they are bound to give effect to them, hence it is that when the executor pleads a debt of superior dignity it becomes a bar to the action. But by the statute of Georgia, no preference shall be given among debts in equal degree. Are not the courts as much bound to give effect to this provision of the statute? Unquestionably they are—and if the executor shows by his plea that there are debts of equal degree unsatisfied, the verdict and judgment will direct, as in this case, a ratable distribution. From the death of the testator, these notes were all of equal dignity, and were by law to be paid *pari passu*. The court has no power to vary the order. The effect of a judgment thus obtained would only be to ascertain the amount of the debt if upon open account, to bring forward the property to a sale, to push the other debts in equal degree and claim the proportion to which it is entitled. If the reverse of this were true, \*it would follow, that a judgment obtained upon simple contract would, by virtue of the lien created, ride over and postpone a debt by specialty; and if this were true, it would draw after it, the right of the administrator or executor to retain his own debt in preference to all others, instead of limiting the right as it is understood to be, to a preference among debts in equal degree. We have seen that in England a court of equity may marshal the assets among creditors in equal degree, and prevent the preference which the English law allows to him who commences the first action, or obtains the first judgment. By our act, an executor may do here what a court of equity does in England. Nay, he is required to do it. And in the absence of pre-existing liens, if he suffers a prefer-

ence to be gained contrary to the directions of the act, he renders himself liable to a devastavit.

The court is aware that from the view taken of these acts it must follow, that the ancient and well established doctrine of retainer must undergo a change, that the executor or administrator, instead of retaining in exclusion of other creditors in equal degree, must ratably divide with them. This court is also aware that a different view of this subject has been taken by one of its predecessors, upon the weight of whose opinion it might securely have rested, and from whom it cannot differ but with the most distrustful diffidence of its own judgment. It is a source of unfeigned gratification under such circumstances, to believe, that the conclusion to which the court has felt itself bound to come, however defective and imperfect the course of reflections by which it has been lead to it, is supported by the decisions of sister States upon analogous statutes. The statute of Pennsylvania prescribes the mode in which the debts of decedents shall be paid, and after enumerating the debts entitled to priority, it directs an average of the remaining assets among the creditors pro rata. Upon this statute it has been determined in Pennsylvania, that a judgment obtained against the executor or administrator of a deceased person gained no priority as to payment, and that the dignity of the debt when the party died, formed the sole characteristic feature of distinction. *Wootering v. Executors of Stewart*, 1 Yeates, 483. That though the personal representatives of a deceased person might by their bona fide acts conclusively define the extent of claim of the different creditors, they could not vary the vested interest of such creditors, nor change the order of payment; for this would militate against the express provisions of the law. Nor can the jury by their verdict violate the provisions introduced for the benefit of the general creditors. *Prevost v. Nichols*, 4 Yeates, 487.

In the case of *Scott, Administrator of Patterson v. Ramsay*, C. J. Tilghman says, "The order of payment was to be according to the nature of the debt at the time of the testator's \*decease; and consequently a simple contract creditor obtained no preference by obtaining judgment against the executor." 1 Binn. 221. In ex parte Meason the same judge says, "The right of retainer only placed the administrator in the same situation in which he would have been if the law had permitted him to bring an action. He could not retain against a creditor of superior nature, because if he had been allowed to bring an action he could not have recovered in prejudice of such creditor. Apply this principle to the act of assembly, if the administrator were permitted to bring suit against himself, could he recover his whole debt? He could not, because the act directs that the creditors shall be paid pro rata." 5 Binn. 174.

We find in the statutory provisions of

South Carolina upon this subject, literally and verbatim the same expressions as are contained in the two sections of the Georgia acts, to which we have referred.

In the case of *Lenoir v. Winn*, in the decree of the Chancellor, it is affirmed that debts of the same degree, from the death of the intestate, are to be paid in the same order; and that the administrator cannot retain the whole of his debt, but only in average and proportion with the other creditors. 4 Dess. Eq. R. 65. In the case of *Somers v. Tidmore*, recently decided, it is stated that all the creditors stood in the same degree. The plaintiff, supposing that a judgment recovered would give him a preference, instituted his action against the administrator, and recovered the decree in which the present process is founded, subject to the plea of plene administravit præter. The court says "I do not think the plaintiff entitled to any preference, he stood on the same footing with the other creditors at the death of the intestate. They were by law to be paid off in equal proportions, and the plaintiff cannot by obtaining a decree, and thereby subjecting the estate to unnecessary costs entitle himself to a preference over the rest of the creditors. The defendant is at perfect liberty to make an honest and fair distribution of the amount in hand among all the creditors of the deceased." 1 M'Cord's Rep. 270.

In conclusion, the court is of opinion, that the plaintiff *Bomgaux* is entitled to his proportion of the assets admitted to have been in the hands of the defendant, that the administrator by paying the other creditors to this exclusion has been guilty of a misapplication of the fund, and rendered himself liable in the present action.

#### 117 \*A. Slaughter and C. Labuzan v. Cabel Thompkins.

In Richmond Superior Court. July, 1832.

##### Pleading—Non-Residence—How Taken Advantage of.—

Non-residence must be pleaded, and cannot be taken advantage of, on motion in arrest of judgment before the Superior Courts of the state of Georgia.

Same—Same—Waiver of Objection.—Defendants in such cases by appearing and filing issuable pleas, waive their right to be sued in the county where they reside.

The alleged error, made the ground of this motion, is, "That the plaintiffs have failed to give jurisdiction to the court in the pleadings, by averring that the defendant was at the time of action commenced, a citizen, and resident of the county of Richmond."

If this were a court of limited jurisdiction, and that jurisdiction were dependent upon the residence of the defendant, there could be no question about sustaining the motion. But there can be little difficulty or hesitation in determining, that our Superior



Courts are of general jurisdiction. They have exclusive and final jurisdiction in criminal matters, and general jurisdiction over all civil cases; (exclusive in such as respect titles to land, and concurrent with other courts in all other cases;) they have the general superintendency and control over all inferior judicatories, to restrain them if they exceed their jurisdiction, and to correct their errors.

That provision in the 1st section of the 3d article of the Constitution which alone creates any difficulty on this subject applies expressly to the Inferior Court. There is no such provision in the grant of power to the Superior Court. Suppose, however, the terms "which shall be tried in the county wherein the defendant resides" which apply to the Inferior, might, by the use of the word "concurrent" in the grant of power to each, be extended to the Superior Court, still they cannot produce the effect of changing the character of the court from one of general, to one of limited and special powers. They should be considered as conferring a personal privilege, (which in fact they do) rather than as limiting the jurisdiction of the court: They are directory of the place of trial, and not restrictive of the power of the court; and this direction is for the benefit of defendants, it being the manifest intention of the framers of the Constitution to bring justice as near to every man's door as possible.

If this position be correct, the conclusion is easy. The rule of law being, that in courts of general jurisdiction, every thing is to be intended within their jurisdiction, unless the contrary is made specially to appear: the defendant should have plead his non-residence, and cannot take advantage of it by motion in arrest of judgment.

The authority of cases arising in the Circuit Courts of the United States, has been invoked in favor of this motion. Those are courts of strictly limited jurisdiction, not only as to the character of the parties,

but also as to the subject-matter  
118 \*of suit; and the principles of the cases cited, and of the present, differ as widely as the nature of the two courts. There the presumption is against the jurisdiction, which must be expressly shown to exist: Here the presumption is in favor of the jurisdiction, which must as expressly be shown not to exist.

But there is a provision in the organization of the Circuit Courts, very much in principle like that provision in the Constitution of Georgia, which gives rise to this motion. It is declared in the 11th section of the judiciary act of 1789, that "no civil suit shall be brought before either of said courts (District or Circuit) against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Here the words, which give the privilege of being sued alone in the district of which one is an inhabitant, are much stronger than those used in the Constitution

of Georgia; and the construction which they have always received in the Supreme Court has been, "that it was not necessary to aver, on the record, that the defendant was an inhabitant of the district, or found therein. That it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties. The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by voluntary appearance. That if the process was returned by the marshal or served upon him within the district, it was sufficient; and that where the defendant voluntarily appeared in the court below, without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter." 8 Wheaton, 699.

In the present case the sheriff of Richmond county returns that he arrested the defendant, and that he gave bail. The defendant appeared at court and plead several pleas, all issuable, among which was a plea of set-off, and a balance claimed in terms of our law. The defendant thus actually assumed the offensive attitude, and endeavoured both by proof and by argument to obtain the judgment of the court in his favor, for a considerable sum, though he failed. And surely if any conduct could amount to a waiver of privilege, the conduct of the defendant in this case does; and nothing short of a clear, manifest want of authority in the court to award judgment would warrant it in sustaining this motion.

The motion is refused.

R. H. and I. W. Wilde and Crawford and Cumming for plaintiffs.

W. B. Thomas and I. P. King for defendants.

119 \*Andrew J. Miller v. Samuel Hale, and George W. Butler, Executors of John Burton Deceased.

In Richmond Superior Court. July, 1832.

**Witnesses—Interest—Effect.**—Where a person is manifestly interested in the event of a suit he is incompetent as a witness.

The defendants are sued for the amount of two notes, of which the following are copies. "Augusta, April 10th, 1828. Twelve months after date, I promise to pay to A. J. Miller, Esqr. or order, ninety dollars for value received. Daniel S. Roman." "Due A. J. Miller thirty dollars borrowed money. February 21st, 1829. Daniel S. Roman."

Upon an averment that a copartnership had existed between Roman and Burton, the testator, these defendants as his representatives are sued in a several action, according to the provisions of "an act pointing out the mode of collecting a cer-

tain description of debts therein mentioned;" Prince's Dig. 229, and the copartnership is denied by the defendants. At the trial Daniel S. Roman was offered as a witness to prove the copartnership and was rejected by the court as incompetent. The plaintiff having no evidence to prove the copartnership, took a verdict against himself, and now moves for a new trial upon the ground of an alleged error in the rejection of the witness. The following release was executed by the plaintiff and tendered to the witness. "Andrew J. Miller v. Samuel Hale and George W. Butler, Executors of John Burton. Assumpsit. In the court of Common Pleas for the city of Augusta, Georgia. I do hereby release and discharge the said Daniel S. Roman, his heirs, executors and administrators from all and all manner of cause and causes of action which I the said Andrew J. Miller against the said Daniel S. Roman ever had, now have, or may hereafter have against him individually (and not jointly with John Burton), by reason of any matter, cause, or thing arising out of, or connected with or relating to the transactions which are the cause of action whereupon the said suit was commenced and is still prosecuted against the said defendants as executors of John Burton deceased. In testimony whereof, I have hereunto set my hand and seal, this twenty-ninth day of March, A. D. 1831. A. G. Miller. (seal.)"

There are two questions raised for the determination of the court. 1st. Was the witnesses competent without the release. 2d. If incompetent, will the release restore his competency?

That he was incompetent without the release is very plain. Upon these notes Roman was certainly liable either as an individual, or as a copartner with 120 Burton, the testator. He \*was therefore directly interested in the evidence he was called to give, to make the executors for Burton equally liable with himself: For should the plaintiff fail, he, Roman, would be still responsible for the amount of the notes; but should the plaintiff succeed, then Roman would have a right to a contribution from the defendants. Brown v. Brown, 4 Taunt. 752.

Let us then see what effect the release has produced upon his interest. A very slight examination will show that it has produced no effect whatever; and that the exception in it, of Roman's joint liability with Burton, the testator, has to all legal intents, left Roman just as he was before the release was executed. If the copartnership ever existed, as it is averred in the declaration, and as the witness is ready to prove, then Roman is responsible, as survivor, for the whole debt, notwithstanding the release and has precisely the same interest in dividing the responsibility as if the release had never been executed; for if the plaintiff succeed, Roman will have a right to contribution from the defendants; but if the plaintiff fail, Roman will be still liable for the whole debt. A new trial is refused.

Charles A. Harden et al. Complainants, and Eliza Miller Administratrix of Morris Miller, Defendant.

*In Equity.*

In Chatham Superior Court, July, 1832.

**Purchase of Land—Purchase Money Chargeable on Personalty—When Land Chargeable.**—On sale of landed estate the purchase-money becomes a debt on the personal estate, and the equitable lien ought to be extended to only so much of the purchased estate as the personal estate is insufficient to pay: The purchase-money is not an original charge upon the landed estate, but only an equity to resort to it, in case the personal estate should prove deficient:

**Same—Right of Vendor.**—But notwithstanding the admission of these principles, there is no authority for requiring the vendor, first to obtain judgment at law and a return on his execution as preliminary to his application to a Court of Equity to obtain an account of the personal estate, and a decree of payment, if it may be so, otherwise that the lien be declared and the land sold.

The bill alleges the existence of an agreement made and entered into, between Henry Harden deceased, the intestate of the complainant Maxwell, and the father of the other complainants, and Morris Miller deceased, whose representative the defendant is. By the terms of which Miller agreed to purchase from Harding, a tract of land to be paid for, by the assumption on the part of Miller of the payment of a judgment held by the Messrs. Bottons against Harden. In pursuance of the agreement, Miller was put into possession of the land, and preferring the sheriff's title, he had the land levied on and sold under the same judgment, and Miller bid it off at the price of \$400—that this sum was paid to the Messrs. Bottons, and that Miller died without having paid the balance of judgment. That the Bottons apprehending the insolvency of Miller's estate, have forced the payment of the balance from Harden's estate—that the complainants have a lien on the land for such balance, and pray that the defendant may be decreed to pay said balance, or the lien declared, and the land be sold for that purpose.

121 \*To this bill a general demurrer has been filed. In support of this demurrer, it is insisted that the bill does not allege assets come to the hands of defendant, nor charge the insolvency of Miller's estate; that for any thing apparent from the bill, the plaintiffs have all the testimony necessary to enable them to proceed at law—that their proper remedy is at law by action of assumpsit.

The general rule is that whenever a case is made in which a Court of Equity gives relief, the bill cannot be demurred to for want of equity; but where no sufficient ground is shown for a Court of Equity to interfere, the defendant may demur for want of equity in the plaintiff's case to support the jurisdiction of the court.

The bill charges, that upon the death of



Mr. Miller the defendant, his widow assumed the administration of his estate; and has ever since been in the enjoyment and possession of said tract of land. There is no allegation of the insolvency of Miller's estate, other than as connected with the motive of the Bottons in resorting to Harden's estate. But the idea, that before a vendor can come for a lien for unpaid purchase money, he must show that the personal estate has been exhausted, cannot be supported to the extent for which the counsel contends. It is true the plaintiff cannot have a decree for a lien if there are personal assets to discharge the debt; and this is on the principle laid down by Sugden on Vendors, that on sale of an estate, the purchase-money becomes a debt on the personal estate, and the equitable lien ought to be extended to only so much of the purchased estate as the personal estate is insufficient to pay. It is not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient. But notwithstanding the admission of these principles, there is no authority for requiring the vendor first to obtain judgment at law and a return on his execution as preliminary to his application here—the object for coming here is to obtain an account of the personal estate, and a decree for payment, if it may be so; otherwise, that the lien be declared and the land sold.

This is in conformity with all the cases. In the case of Pollexfen v. Moore, the plaintiff brought his bill against the representatives of the real and personal estate of Moore and Kemp to be paid the remainder of the purchase-money. The Chancellor declared that the remainder of purchase-money ought in the first place to be paid out of the personal estate of Moore, and if that were insufficient, that it should come out of the purchase estate. 3 Atkyns, 273. In the case of Hughes and Kearney at the hearing, an account of the personal estate of Kearney the purchaser was directed, and it being reported that he left no personal estate, it was decreed that the purchase-money was a charge upon, and to be raised out of the purchased land.

122 1 Sch. and Lef. 132. The \*court is referred to the case of Garson v. Green et al., 1 John. Ch. Rep. 308, in which Chancellor Kent says "The failure of the personal estate is sufficiently shown in the first instance; and there is nothing to gainsay it, and I shall accordingly decree a sale of the one third of the house, &c." In that case the seller had taken a note and brought an action upon it against the purchaser's administratrix, she pleaded plene administravit and he took a judgment for assets in futuro. The amount of the case is, the facts which appeared rendered further inquiry into the personal estate unnecessary, and authorized an absolute decree at once for the sale of the house. In the case of Mackay v. Green, the same chancellor says, the personal estate is the first and primary fund for the payment of debts, and the plaintiff ought to have resorted, at law, to

that fund. But it will be remarked, that he had declared the notion of an equitable lien, under the facts of the case entirely without foundation; and then the only question was, whether as a mere creditor seeking an account of assets, the plaintiff was properly before the court. He can only come here, says the Chancellor, for an account and discovery of assets, and on the ground of a trust in the executor or administrator to pay the debts.

The bill is not intended for that purpose, but only to enforce a sale of the land by reason of the supposed lien. In determining the validity of this demurrer, the court is bound to consider the whole relief sought, and if any part is due, the demurrer must be overruled. In England the Courts of Chancery constantly assume jurisdiction in cases against executors or administrators. It is not proposed to affirm such a jurisdiction here without any qualification; but when there is some special cause, some ground of relief to which he may be entitled and which this court alone is competent to give, he may come here in the first instance. Such is the situation of this case, and the plaintiff's right to equitable relief may very much depend upon the circumstances which will be disclosed by the evidence. A demurrer must be founded upon some certain and absolute proposition, some dry point of law, from which it appears that under no circumstances at the hearing could the plaintiff obtain a decree.

It is therefore ordered that the demurrer in this case do stand overruled.

## 123 \*Wakeman and Wife v. William Roache.

In Chatham Superior Court, July, 1832.

**Dower—Statute of Limitations.**—The statute of limitations of 1767, is no bar to an application for the assignment of dower.

**Same—Alienation of Land by Husband—Effect.**—The husband by alienation cannot divest the estate

**\*Dower—Statute of Limitations.**—The application by a widow for an assignment of her dower in the estate of her deceased husband, is not within the statute of limitations of 1767. *Tooke v. Hardeman*, 7 Ga. 30, citing *Wakeman v. Roach*, *Dud.* 123. And in *Chapman v. Schroeder*, 10 Ga. 327, it is held that, citing the principal case, the widow's right of dower is not within the statute of limitations of this state, prior to the act of 1839 nor is it barred by lapse of time, independent of any other equitable circumstances.

The act of 1839 which limits the widow's application for dower to seven years from the death of her husband, operates prospectively and does not apply to cases where the husband died before the passage of the act. *Tooke v. Hardeman*, 7 Ga. 20.

And in *Smith v. King*, 50 Ga. 194, it is said, as to the widow's right of dower, the act of 1839 would not bar her, except as against purchasers or others holding adversely. Certainly not when she is herself in possession. The principal case is also cited on the question of the limitation of the widow's right to dower in *Austell v. Swann*, 74 Ga. 282.

which the law casts upon his wife, nor can it be done by public sale under execution.

Upon the application of the plaintiffs to have an assignment of dower under the act of 1824, the defendant plead in bar the statute of limitations, and on the trial of the issue thereupon made up, the jury returned a verdict for the plaintiffs. This is a motion for a new trial, and the question the court is called on to decide is upon the validity and efficiency of the plea so offered in bar.

The court, in the course of its investigation of this question, has found no case, in which the right to have an assignment of dower has been held to be embraced within the provisions of either of the English statutes of 32 Hen. 8, c. 2, or of 21 Jas. 1, c. 16. On the contrary, the authorities lead to a different conclusion. In equity, upon a bill filed for an assignment of dower and an account of the arrears, it is declared by numerous decisions, that there is no limitation either in equity or at law without some special ground, and the account is uniformly carried back to the death of the husband without regard to time, notwithstanding the general rule of a Court of Equity is, to adopt a period in analogy to the statute of limitations. *Curtis v. Curtis*, 2 Brown. C. C. 620; *Mundy v. Mundy*, 2 Ves. jr. 122; *Oliver v. Richardson*, 9 Ves. 222, and the note to *Boyle v. Rowand*, 3 Dess. Rep. 556. Park, in his treatise on Dower, says, that no statute of limitations has prescribed any period for the bringing of a writ of dower. Park on Dower, 311. Chancellor Kent says, dower is not within the ordinary statutes of limitations of England. 4 Comm. 68. If the remedy, by which the right to an assignment of dower is attempted to be enforced, be considered as partaking of the nature of a real action as in the writ of right of dower, the statute of 32 Hen. 8, cannot apply to such remedy, because it does not extend to cases where the demandant does not count upon the seisin of himself or his ancestor. Ang. on Lim. 33.

And for the same reason it would be inapplicable to any possessory real action brought for an assignment of dower. If the remedy be of the class of possessory actions it is not embraced by the 21 Jas. 1, c. 16, because until assignment the doweress has no right of entry. A doweress is considered in regard to her title as being in possession of the lands assigned to her by her husband. Her estate is a continuation of her husband's; and upon the assignment of her dower, in legal contemplation, she is in from the death of her husband. She cannot be said, therefore, to declare upon the possession or  
124 seisin of \*herself or ancestor. Three things are necessary to complete a title to a dower, marriage, seisin and death of husband. Upon the concurrence of these requisites, the title is consummated. Did it confer a corresponding right of reducing it to possession by entry, there could, it is apprehended, be no reason why the statute of James should not be a bar. But complete as the title is, it confers no such right. The title of the widow to be endowed is not of an

undivided third of the entirety, but of a third part in severalty. Until that third part is ascertained and assigned by metes and bounds, she has no right of entry. Upon what would she enter? An undivided third? She is not a tenant in common, and therefore this cannot be. Before the assignment of dower, her right rests merely in action; and until that right is reduced to certainty, by the ascertainment of her third part in severalty, there is nothing upon which she can enter, or which she may reduce to possession. Upon this subject the authorities are conclusive. In all cases, says Littleton, where the certainty appeareth what lands or tenements the wife shall have for her dower, then she may enter after the death of her husband without assignment. But when the certainty appeareth not, as to be endowed of the third part to have in severalty, it behoveth that dower be assigned unto her after her husband's death, because it doth not appear before assignment what part of the land she shall have. Little. 43. Coke says, when the demand is uncertain, as in writs of dower at common law, there, albeit the thing itself be certain, yet shall she not take it without assignment. Co. Lit. 37, b.; 37, a. Park says, although the title of dower is consummate on the death of the husband, the title of entry does not accrue until the ministerial act of assigning to her a third part in certainty has been performed by some other person. In the mean time, her situation is an anomalous case in the law of England. It is probably the only existing case in which a title, though complete, and unopposed by any adverse right of possession, does not confer on the person in whom it is vested, the right of reducing it into possession by entry. Park on Dower, 324. That the widow cannot enter for her dower until it is assigned is affirmed in the following American authorities: 7 John. Rep. 247; 17 John. 167; 20 John. 411; 4 Munf. 382; 5 Munf. 346. All possessory actions are founded on the right of entry, and it is for this reason that the action of ejectment cannot be maintained for dower before assignment. Adams on Ejectment, 69; Doe ex Dem. Nutt v. Nutt, 2 Com. p. 430. If the writ of dower unde nihil habet be of the class of possessory actions, the statute of James could not commence to run against it until the right of entry accrued.

It is the right of entry which this statute bars—the principle on which it operates is, that there must be a right of entry existing at the time of the bar which can be  
125 affected. Eo \*nomine it embraces writs of formedon in descender, remainder and reverter, and then proceeds "That no person that now hath any right or title of entry, shall thereunto enter, &c." The statute of limitations of Connecticut, declares that no person shall at any time hereafter make entry into any lands or tenements, but within fifteen years next after his right or title shall first descend or accrue to the same. It is for the purpose of this question, substantially the same with the statute of James, and it has received the same construction, for it is held in that State, that the



statute of limitations does not bar the claim of dower. Swift's *sys.* 256.

Several cases have been referred to from the English books, by counsel who argued this motion for the defendant, for the purpose of showing that this claim was embraced within the English statutes, *Co. In.* 216, *Dyer*, 224, and others, were all founded upon the statute of 4 *Hen.* 7, or statutes of non-claims—and it was also contended that there was an analogy between the present question and the case of a fine levied with proclamations. But no such analogy can exist; the two cases are entirely distinct and must be decided upon wholly different principles. The statute of non-claims declares that a fine levied with proclamations shall be a final end, and conclude all privies and strangers to the same. This statute is in affirmation of the common law, altering only the time within which the claims must be interposed. A fine so levied is matter of record—it is a judgment of the court. It not only transfers the right of the vendor, but also extinguishes the rights of all others who do not claim within the time prescribed. It operates not merely as a bar to the remedy, which is the characteristic of the ordinary statutes of limitations, but is *per se* an investment of a good, perfect and complete title, and therefore a law of the right as well as remedy of all other persons. *Cruise's Dig.* tit. Fine; 2 *Inst.* 713; 13 *John. Rep.* 428; 2 *Gal. Cir. Ct. Repts.* 318.

So far as the case, which has been cited from 1 *S. C. Com. Rep.* 112, was attempted to be supported by the English cases, which were invoked to its aid, these cases being decided upon the statute 4 *Hen.* 7, must fail to afford the desired assistance, unless the provisions of the statute of limitations of South Carolina are analogous to those of the statute 4 *Hen.* 7, and then it would afford no assistance in the interpretation of our statute. Considered as the judgment of the court, apart from the authority of the English cases, upon the words of the South Carolina statute, it is an authority directly, so far as that statute is analogous to ours.

We shall now proceed to the consideration of our own statute. It is almost a transcript of the 21 *Jas.* 1, c. 16, but with this addition, after specifying writs of formedon, &c. it says or any other writ, suit or action whatsoever. These words would seem sufficiently

comprehensive to embrace every remedy; \*and unless the case of dower is excepted because of its own distinguishing peculiarities, it must be included. Every title, as it accrues, carries with it, and confers on him in whom it is vested a right to reduce the same to possession by entry. In this respect we have seen that the title of dower is peculiar and forms an exception. It is as *Park* observes, the only probable case in which a complete title does not confer the right to reduce the same to possession by entry. Our statute, like that of *James*, and unlike that of 4 *Hen.* 7, does not take away or destroy the right, it only bars the remedy. We have no droit or real actions. The only action known to us for trial

of title to lands, is the action of ejectment. If, however, the statute should be held to operate as a bar to the enforcement of a mere right, unattended by a right of entry to be affected by it,—there is nevertheless an insuperable difficulty in the court's mind to the application of it in this case. We have seen there is a continuity of title from the husband to the wife; that after assignment she is in by relation from the death of the husband; the intermediate entry and seisin of the heir between the death of husband and assignment, is not adverse, and does not disturb the continuity of title. *Coke* says, the law adjudgeth no mesne seisin between the husband and wife. *Co. Lit.* 241, a. See also *Park on Dower*, 156, 340. The assignment is considered as proceeding from and made by the husband, and this notwithstanding the estate is created by operation of law without regard to the will of the husband, and notwithstanding the intermediate possession by the heir. It is obvious from these principles, that the right of action to have an assignment of dower does not result from any adverse right of possession in the heir or feoffee, and as a consequence, says *Park* 335, the mere possession of the heir or feoffee can never become a bar to the title of the wife. A possession under color or claim of title to be a good bar under the statute, must be founded upon an adverse right of possession. It is consequently affirmed that an adverse possession will be negatived, when the parties claim under the same title, or when the possession of one party is consistent with the title of the other. *Adams on Eject.* 50. Contrary to the decisions of many of the other States, it has been held (at least in the Eastern Circuit) that a mere naked possession, without color of title, would give the occupant a right to so much as he had actually enclosed—but when possession is taken under a claim of title, the nature of that possession will be fixed with reference to the title under which it is taken.

The defendant in the present case is a purchaser. The property appears to have been sold in 1822 as the property of the husband at public sale. It was bid off by *Wilcox*, who in ten days thereafter conveyed it to *Gibbon*, the legal representative of the husband. At the sale, at which *Wilcox* 127 \*purchased, it was in proof to the jury that a public notice was given of the claim of the widow. The property was mortgaged by *Gibbon* to the bank of *Darien*, who afterwards foreclosed and sold, and *Roache*, the defendant, became the purchaser, he being the legal representative of *Gibbon* the deceased. These facts were all before the jury, and the court sees nothing in them to change the question in this case; or, as furnishing any special ground to take the case without the operation of the general principle laid down—as the husband, by his alienation, could not divest the estate which the law cast upon his wife, so a public sale under execution would not. Considering the relation in which *Gibbon* stood to *Stan-ton's* estate, and the circumstances of his purchase, and the relation which *Roache*

maintained to Gribbon's estate, together with the doctrine, that it is the duty of a purchaser to look with diligence and care to all these facts, upon the enquiry of which, he may be put by the title deeds under which he claims, or to which they necessarily direct his attention, the court sees no reason to be dissatisfied with the verdict of the jury. Another ground upon which the motion rested, was, that additional proof could be produced to them that the auctioneer did not hear the notice given at the sale in 1822. Such evidence could not weigh against the positive testimony of the fact, nor does the court consider that notice, under the circumstances of this case, as important. Upon the whole, the court is of opinion that the motion for a new trial in this case ought to be denied; and it is ordered that the supersedeas heretofore granted be discharged.

**A. M'Lellan and Wife, Complainants, and James Wallace, Administrator, and the Marine and Fire Insurance Bank, Defendants.**

In Chatham Superior Court, July, 1832.

**Devises—Liability of Personal Estate to Discharge Incumbrances—Rights of Creditors.\***—The equity the court affords a person entitled to real estate by devise, to have the incumbrances upon it discharged as a debt out of the personal estate, goes no farther than as between the heir or devisee of the estate, and the residuary legatee; it cannot interfere with the disposition of other parts, as specific or general legacies, much less with the interest of creditors.

**Equity Practice—Marshaling Assets—Effect as to Heirs Where Same Are Aliens.**—If a party has two funds liable to his claim, a person holding an interest in one only, has a right to compel the former to resort to the other if that is necessary for the satisfaction of both: But this rule has no application in a question of right between two different sets of heirs, one excluded from the real estate by being an alien, but interested in the personal, and a creditor pursuing his lien upon the real estate.

In this case it appears that M'Lellan now deceased made and executed a mortgage in his life time upon lands and negroes to the defendant, the Marine and Fire Insurance Bank. The Bank is attempting to foreclose its mortgage upon the land, and the bill is filed by the complainants the heir of the deceased mortgagor, residing in and being a citizen of the United States. It seeks to enjoin the defendant, the Bank, from proceeding in the foreclosure of its mortgage upon the land, on the ground, that the personal estate is the primary fund for the payment of debts; and that complainants are entitled to have the real estate exonerated from the incumbrance  
128 \*of the mortgage. There are alien heirs whose incapacity to inherit real

estate (but who have an interest in the personal) renders the enforcement of this principle important to the complainants. It will be perceived, from this statement that this case depends upon the equity which the heir or devisee has, to compel an application of the personal in exoneration of the real estate. The order of marshaling assets for payment of debts, according to the rule in England, is undoubtedly, to apply first, the general personal estate. The complainants' counsel insists upon the same rule, and contends that the various statutory enactments of Georgia, in relation to the duties of executors and administrators, the directions and restrictions in regard to the sale of particular parts or kinds of estate, the order of paying debts, &c., corroborate the rule, and point to the personal as the primary fund. On the other hand it is said, that the uniform application of such a rule here, would be productive of great mischief and inconvenience from the difference in the value of lands between this country and England, and the increased value of personal property resulting from the slave population; from the difference in the rules by which land descends, its liability to be sold absolutely for payment of debts, together with its frequent inutility and unproductiveness as a means of immediate income. The court does not find it necessary to the decision of the motion before it to express any opinion upon this point—it is properly a question between those claiming an interest in the estate, and ought to be determined upon the merits in a case in which such interests are represented. For the purpose of this motion, we will admit the general rule, as claimed for complainants, and as its consequence, the equity on the part of the heir or devisee to have an incumbrance upon the real estate removed. The important inquiry is, to what extent does that equity exist? We apprehend it is confined as between the heir or devisee and the residuary legatee, or general personal estate. The authorities do not sanction the extension of the principle to specific or pecuniary legatees, or to a case in which the rights and interests of creditors are concerned. 1 Mad. Ch. 624; 2 Fonbl. 293, note; 2 Vern. 477; 2 Ves. Jr. 65. In which last case Ld. Chancellor Rosslyn says, "The equity the court affords a person entitled to real estate by devise, to have the incumbrances upon it discharged as a debt out of the personal estate can go no farther than this; as between the heir or devisee of the estate and the residuary legatee; it cannot interfere with the dispositions of other parts, as specific or general legacies, much less with the interest of creditors."

The complainants' counsel, however, has mainly relied upon the fact, that the bank holding a lien upon both the real and personal estate may be compelled to resort to the first instance to the personal, without detriment to itself. It is a  
129 \*rule that if a party has two funds liable to his claim, a person holding an interest in one only, has a right to

\*The principal case is cited in a note to Maxwell v. Maxwell, R. M. Charl. 470.



compel the former to resort to the other, if that is necessary for the satisfaction of both. It is applied in favor of a junior creditor having a lien on one fund against a prior creditor having a lien on two. It is this rule which has given rise to the marshalling of assets. A simple contract creditor, who is likely to be defeated in his claim, by the application of the personal estate, in discharge of specialty debts, may have the assets marshalled in his favor and be permitted to stand in the place of the specialty creditor. So legatees are entitled to have assets marshalled as against estates descended, and to stand in the place of mortgagees. It does not appear to the court upon any principle to be extracted from this rule, or from any precedent which the cases afford, that in a question of right between two different sets of heirs, the one excluded from the real estate because an alien, but interested in the personal, the rule could be made to apply to a creditor pursuing his lien upon the real estate. The rule as between creditors springs from a principle of equity, and is founded in natural justice. In such a case but for the interference of the court, the demand of the second creditor could not be satisfied. In the cases of substitution, the creditor is not restrained, but that principle is applied to give effect to the will of the testator, without the application of which principle it would be defeated. In the present case, the administrator may file a bill to have the rights of the parties declared; or the heir interested in the real estate may file his bill to bring forward the administrator to exonerate the estate, (as in the present instance) when, and perhaps it may be necessary to make the alien heirs parties, the rights of the different heirs may be declared, and the assets administered as they ought to have been, without interfering at all with the creditor. According to the English doctrine, the personal representative in every case is to pay the mortgage if there are assets, and it would consequently be a proper time to call upon him by making him a party in a bill to foreclose. Yet it has been decided that this need not be done. The mortgagee has nothing to do with the personal representative; who must be brought forward by the heir to exonerate the estate. *Bradshaw v. Ontram*, 13 Ves. 235; *Dunscombe v. Hernsley*, 3 P. Wms. 334, note.

It is therefore adjudged that the motion for injunction must be denied, and the rule discharged.

### 130 \*The Bank of the State of Georgia v. The Mayor and Aldermen of the City of Savannah.

In Chatham Superior Court, July, 1832.

**Banks—Right of City to Tax in Corporate Capacity without Special Power.**—No special power of taxing banks in their corporate capacity has been given to the Mayor and Aldermen of Savan-

nah by the act of 1825, and no such power can be implied from the general taxing powers conferred by that act.

**Same—Right of City to Tax Bank Stock in the Hands of the Holders.**—The city may tax bank stock in the hands of the holders, living in the city, for it is personal property and liable to tax under the act above referred to.

**Municipal Corporation—Double Taxation—When Valid.**—\*The general powers to tax conferred on towns and cities ought not to be so construed as to subject the property of a corporation to be twice taxed: unless by express words of a statute or necessary implication.

The object of the present proceeding is to test the validity of an ordinance of the Corporation of Savannah, laying a tax upon Bank Stock, passed 21st Feb. 1832.

The ordinance directs, that there shall be annually levied and paid into the city treasury a tax of thirty-one and a quarter cents on every one hundred dollars of bank stock, operated upon or employed within the city of Savannah. For the assessment and collection of the same, it is made the duty of the president and directors of each and every bank located in the city and incorporated by the legislature, and in whose charter there is no special exemption from city taxation, to cause its cashier to transmit to the treasurer of the city, on or before a specified day in each year, a return sworn to by him, in which shall be stated the amount of capital stock actually paid in, and the amount of value of capital stock in each and every bank used, operated or employed, in Savannah on a specified day, preceding such return. It points out the time when the tax is to be paid, and on the neglect or refusal to make the return, or pay the tax, the city treasurer is required to issue an execution against the president and directors of each bank so neglecting or refusing, for an amount equal to thirty one and a quarter cents on every hundred dollars of the capital stock actually subscribed for each bank. It is objected against the validity of this ordinance, that by no act of the legislature, incorporating the city of Savannah has the special power of taxing the banks, in their corporate character on account of their stock, been conferred, and that such right cannot be

**\*Municipal Corporations—Taxation.**—In *Mayor v. McWilliams*, 52 Ga. 269, it is said, it has been held by this court in several cases, that a tax on business, professions, etc., is not a tax on property. *Mayor v. Charlton*, 36 Ga. 460; *Burch v. Mayor*, 42 Ga. 596; *Bohler v. Schneider*, 49 Ga. 195. As long ago as 1832 it was held in *Bank of Georgia v. Mayor, Dud.* 130, that every man's private business, pursuit or calling, and things in which he has an interest, and many species of employment, are legitimate subjects of taxation, and are taxed; still, they are not, strictly speaking, property. They are the means from which income is derived, property made, but there is a clear distinction between the employment and the income or profits. To the same effect, the principal case is cited in *Insurance Co. v. City of Augusta*, 50 Ga. 543; *Mayor v. Hartridge*, 8 Ga. 29.

implied from the general taxing powers bestowed upon the city, for several reasons, which the court will proceed to state and consider. The right in the city, to impose this tax in the shape in which it appears, if it exist at all, must be derived from the 7th sec. of the act of 1825. The act of 1787, authorized a tax only upon lots of ground or buildings within the city. In respect of these, \*persons occupying or inhabiting them, were liable to be taxed. The act of 1805, authorizes the city to raise and establish a regular watch, and for which special purpose, the power is conferred to impose assessments and levy an annual tax on all persons and property within the city liable to taxation, by the general tax laws. It cannot be pretended that the ordinance in question is sustained by either of these acts.

It is not within the limitation of the 131 thing to \*be taxed, under the act of '87, nor within that of the purpose and object of the tax under the act of 1805. The ordinance itself declares the tax to be for other and different purposes. By the 7th sec. of the act of 1825, it is enacted, "that the said mayor and aldermen are authorized to raise, by poll tax, upon all such persons as reside within the corporate limits of Savannah, or by tax and assessment upon all real and personal estate within the corporate limits aforesaid, any such sum or sums, &c. necessary for the use and good government of said city, &c."

The objection urged is, that the bank stock is neither real or personal estate within the meaning of that term in the act of 1825. The term estate, technically understood, is the interest which a man has in his property—ordinarily it denotes property, is synonymous in meaning, and embraces whatever may be property, and strictly considered as property. The case of the Portland Bank v. Althorp decided by the Supreme Court of Massachusetts, has been cited in support of this objection. That case arose upon the words of the Constitution of Massachusetts authorizing the legislature to levy proportionate assessments, &c. upon estates lying, &c. It is affirmed by the court, that the taxes authorized must be proportional upon all; and consequently, that this provision would be violated by selecting for taxation any individual or company, or specific article to be assessed by themselves. The second clause of the same constitution, authorizes the legislature to impose and levy reasonable duties and excises upon any produce, goods, wares, and merchandize, and commodities brought into, produced, &c. The court held that the tax on the bank is authorized, under the term commodity. They say there are other sources of emolument and profit not strictly called property, but which are rather to be considered as the means of acquiring property, which may be taxed. Such are attorneys, barristers at law, vendue masters, tavern keepers and retailers, brokers, factors and commission merchants, and in the same light that court seemed to consider a tax imposed upon a company of

individuals incorporated for banking purposes—that is as a tax for the privilege of banking. To us it appears that bank stock in the hands of the share holders, is to be considered as property, and as constituting a part of a man's estate. It is an investment of a sum of money from which an income is derived, and the evidence of the existence of, and proprietary interest in which, is the scrip in the hands of the holders. In the case of *Ellis v. The Proprietors of the Essex Merrimack bridge*, the question was, whether under the act of 1783 of Massachusetts, prescribing the powers and duties of guardians, a guardian could sell stock in a bridge corporation. The act speaks always of the real and personal estate of the ward—the word used throughout the act, is estate. The court, after affirming the

132 \*right of the guardian to sell the personal estate of his ward under this act, proceed to say, we do not see any reasonable ground of exception in favor of the species of property transferred by the guardian in this case. If bank stock, insurance stock, stock in the public funds could be disposed of by guardians, shares in a bridge corporation might. And that all this kind of property was considered to be under the control and at the disposal of the guardian under the general act, admits of no doubt. It is obvious, therefore, that Ch. J. Parker, by whom the opinion was delivered in the case of the Portland Bank, did consider, in this case, bank stock as the personal estate of the stockholder. In various other cases, bank stock is spoken of and treated as the private property of the stockholder. Viewed in this light it is perfectly plain that the city has a right to tax all the stock held or owned in the city. It is a tax on the person in respect of his property. But this is a tax imposed directly on the institution, and not on the stockholders. It is important to inquire, whether this is to be considered, in the shape in which it is laid, as a tax upon property; or, upon the franchise, the operations or business of the bank. The capital stock of the bank is a fund deposited for payment of its debts, upon the pledged faith and security of which, it discounts and circulates its notes. To this purpose as specified in the charter, can it alone be applied by the corporation. In it the stockholders have an interest, individual and personal, and represented by their respective shares. The creditors of the bank, its bill holders, may acquire an equity in this form for payment of their debts superior to the stockholders, but the title of the stockholder subject to this equity, is a perfect one. Now, this tax must be considered either as a tax imposed upon the franchise, the privilege of banking, upon the operations of the bank; or, it is a tax upon property, upon this fund, or private property thus employed in the manner described in the business of banking. It has already been stated that the shares in the stock of the bank are liable to be taxed in the hands of the stockholders, they constitute a part of the personal estate of the holder, and are manifestly, therefore, included under the general



expressions in the 7th sec. of the act. It is a principle of common justice that the same property should not be twice burdened for the same tax; and consequently, in construing general powers bestowed on towns and cities to impose taxes, a construction ought not to be given which would subject the property of a corporation to be twice taxed. This principle was distinctly affirmed and acted on by the Supreme Court of Massachusetts, in the case of the Salem Iron Factory v. Inhabitants of Danvers, 10 Mass. Rep. 514, and again recognized in the case of the Amesbury Woollen and Cotton Manufacturing Company, in 17 Mass. Rep. 461. In the

former case, the court say, we should 133 not \*adopt any construction of the law, which would subject the same property to be twice charged for the same tax, unless required by the express words of a statute, or by necessary implication. In applying this principle to the present case, we can adopt the language of the court in that. There is no such necessity existing here. The stockholders are liable to be taxed for their shares—it is a part of their personal property or estate, and there is nothing in the law which necessarily renders the bank as a corporation, subject to the taxes for the money or stock, which constitutes those shares, and which is deposited simply as a security against the responsibilities which may be incurred in conducting its business.

The ordinance in this case directs, upon a failure to make return by the bank, execution to issue for so much per cent. upon the entire capital subscribed for.—This ordinance is a transcript of the act of the legislature of 1817, imposing a tax on banks. There is a material difference between the effects of this provision in the act of the Legislature, where the State imposes a general tax which is laid and confined to the principal bank, and the ordinance of the city, by which the principal bank is taxed for the whole amount of its capital stock, when each of the branches may be subjected to taxation in the town or city where it may be located. It is not attempted to be supported as a penalty upon the bank for refusing to make the return, but it is said to be an alternative from which the bank may relieve itself by making the return. It belongs, however, to the Court to consider the effect of this branch of the ordinance, as it is attempted to be enforced—and the necessary consequence of a tax imposed upon the entire capital in Savannah, is to subject so much of that capital as is used by the branches to be twice taxed.

The bank, like an individual, is liable to be taxed for the real estate held in the corporate name, and is also liable to be taxed for shares of its own stock held and owned by the corporation. It does, in fact, pay a tax upon its real estate lying within the city. The enforcement of the ordinance in its present shape is to tax the real estate as real estate, and also to tax it as a part of the capital stock of the bank. These objections are limited to so much of this ordinance as is attempted to be enforced, or to the course it prescribes upon the failure of the bank to

make return. But there is another consideration which may not be disregarded in interpreting the general powers given to the city, and which is co-extensive with the entire ordinance. The State is a stockholder in this institution—she owns a large portion of the stock of this corporation. It is admitted that the State, by engaging in a trading company, does not confer on the company the attributes of sovereignty, but takes on herself so far as concerns the transactions of that company, the character of a private citizen. This is the principle laid down 134 by the Supreme \*Court of the United States, in the case of the Planters' Bank, cited in the argument in this. The connexion with the State does not exempt the company from liability to suit—her interest in the trust fund is equally pledged for the payment of debts. Still the interest of each stockholder is separate and distinct, although a common fund for certain purposes. The interest of each is capable of being transferred and sold—it may be levied on under execution as the property of the proprietor, and each holder, in respect of his interest is liable to the burden of taxation.

The sovereign cannot be taxed—she cannot tax herself, nor permit a subordinate authority to tax her. The State, then, considered as a share holder, could not be taxed in respect of her interest or shares in this bank. But by laying the tax on the institution, or corporate stock in the hands of the corporation which constitute those shares, the city is enabled indirectly to burden the property and diminish the profits of the State, which directly could not be done. Ought such a construction to be placed upon the general powers of the city as would produce such a result? It cannot be supposed for a moment, that the State ever intended to confer upon a subordinate authority the right to tax its property and means; and such a decision by this court would no doubt be followed by immediate legislation upon the subject.

It is also contended, that such a construction as would support the right claimed by the city, ought not to be given to the 7th section of the act of 1825, because the exercise of this right by the city, would enable it to destroy the bank. This point presents itself with stronger claims upon the consideration of the court, because of an adjudication heretofore made upon it in the State and which will be referred to.

The State must be presumed to retain the power to maintain and preserve an institution which she has authorized to exist. The incorporation of the bank and conferring upon it privileges, lays the State under an obligation to maintain and preserve that existence. The exercise of a right or power by a subordinate authority, which endangers such existence, ought to be held repugnant to the laws of the State conferring the charter. In giving construction to an act of the legislature, investing the corporation of Savannah with general powers to raise revenue for city purposes, it ought to be so construed as to avoid this repugnancy.

In the case of M'Cullock, the following propositions are laid down by the Supreme Court of the United States. 1st. That a power to create, implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, the powers to create and preserve. 3d. That when this repugnancy exists, the authority which is supreme must control.

In that case the question was between \*the General and State Governments, and the force of the argument consisted in the inability of the national government to control the legislation of the State, if the right to tax the bank were once conceded. Let us see how the principles stated apply to the present case.

May the power of taxing by the city endanger the existence of the bank? The Corporation of the city of Savannah is a political corporation instituted for the purpose of city government. Over such corporations, the State possesses a controlling power; she may restrain the legislation of the city, repeal its ordinances and interpose whenever the city should abuse the power of taxation. It is nevertheless true, if the right be conceded to the city, that it at present exists without limitation; and that, if she may impose the present tax, she may impose a tax of 100 per cent. The consequence would be immediate ruin to the institution. The legislature might repeal the ordinance and prevent its future operation, but rights already accrued to the city, would be vested. But this is an extreme case, and one which will probably never occur. The question for the court is, not what use will be made of this power by the city, but what may be made. It may be asked, is not this the necessary consequence of the taxing power? It is necessarily so, as far as it is exercised by the sovereign power. The responsibility of the legislature to its constituents, forms the only protection against excessive taxation—and in the exercise of the taxing power by a subordinate authority, upon persons and property generally, the same protection may be realized. But where a specific thing is selected, or an institution of this sort, for taxation, and a special tax is imposed, the question assumes a different aspect. In the imposition of a general tax, the taxing power is responsible to its constituents, and are moreover interested personally in the measure of the tax—because each member of the taxing power is liable to the practical operation of the tax upon himself. To this responsibility and personal interest, their constituents look for protection from excessive taxation. It is not so when a specific tax is laid upon a single object, which in proportion to the magnitude of its tax diminishes the burden upon the community at large. Upon this subject we have the decision of the late Judge Dooley, a gentleman whose talents were highly appreciated on the bench. It was made in the county of Wilkes, in the year 1819, in the case of the Branch Bank v. the Town of Washington. It affirms the position, that the commissioners of the town of Washington have no right to

impose a tax upon the Branch Bank in that town, as such right may, in its exercise, repeal the act incorporating the bank of the State of Georgia. The certiorari in that case was consequently sustained, and the proceedings of the town set aside. We limit the operation of this principle, and the argument predicated upon it to what we conceive 136 to \*be its legitimate effect, viz.: That it would require a clear manifestation and expression of the legislative will, to concede the existence of a right capable of such consequences in its exercise.

But can this be considered a tax on the stock or property? It is as this court apprehends, a tax upon the privilege of the bank in using the money invested in its stock for banking purposes,—it is a tax upon the operations of the bank, upon the franchise. The reference had to the stock in the ordinance is as the mere means and measure by which the assessment shall be made. How does it differ in principle from a tax requiring a stipulated sum to be paid annually by the bank? How shall that sum be assessed? The taxing power must resort to some measure, standard, or rule, and this is entirely arbitrary. It may be so much for every hundred or thousand dollars of the capital subscribed or paid in, or it may be a specified sum upon the entire capital. It is in either shape a tax upon the bank, and those are the different modes in which it may be estimated or assessed. A tax thus imposed, operates indirectly, it is true, upon the capital, it diminishes profits, and if sufficiently extended, may encroach upon the capital itself. It is still a tax upon the franchise. In the case of the Portland Bank, the State directed that every bank should pay to the Treasurer of the Commonwealth, a tax one half of one per cent. on the amount of the original stock of said banks actually paid in. We have already seen the light in which this tax was viewed—it was clearly considered by the Supreme Court of Massachusetts, as a tax upon the privilege of the bank, upon its business. The act of the State of Maryland, upon which the case of M'Cullock arose, required the notes of the bank to be issued upon stamp-paper; for which the bank should pay a certain sum, and from which it might relieve itself by the annual payment of a specified tax. This is expressly declared by the Supreme Court of the United States to be a tax on the operations of the bank. Now the question is not whether banking institutions or the privilege or business of banking, are legitimate subjects of taxation; nor whether the legislature (upon whom in this respect the Constitution of this State has imposed no limitation) may tax them, or transfer the power to do so to a subordinate authority; but whether this power has in fact been conferred? Not whether the bank claims exemption from any burden which the city ever had a right to impose, but whether such right ever existed. If the power be conceded in this case, then the city has the right to tax every species of business carried on by individuals, since there is nothing in the



nature of an incorporation, which would render it liable, when an individual carrying on the same business would be exempt. Subsequently to the act of 1805, the city has imposed a tax on professions and various kinds of business, but all those ordinances \*are passed for the specific purpose of maintaining a watch, under the powers derived by the act of 1805, and so expressly declared to be in all the ordinances. In 1817, all the taxes of the city were increased 25 per cent. for the purpose of the Dry Culture Contract. This increased tax, the court has always understood was imposed at the instance of the citizens of Savannah, and has been silently acquiesced in. Neither of these, therefore, can furnish any assistance in interpreting the act of 1825. The regulation of taverns, and granting licenses—taxing and licensing vendue-masters,—taxing peddlers and persons vending goods, wares and merchandize in the city, are powers distinctly conferred by other sections of the act of 1825, and not claimed under the general powers granted in the seventh section; but this would not have been necessary, if the legislature had supposed these powers embraced in the 7th section. Several previous laws also gave the power to tax and license auctioneers. Every man's private business, pursuit or calling, are things in which he has an interest, and many species of employments are legitimate subjects of taxation, and are taxed—still they are not, strictly speaking, property; they are the means from which income is derived, property made,—but there is a clear distinction between the employment and the income or profits. Franchises are incorporeal hereditaments. From the exercise of the business authorized, and the privileges conferred, income is derived; but the money produced is not to be confounded with the corporations from which it is derived. The present is not a tax upon the income, but upon the operations of the bank. It exists and is assessed without regard to the income. Franchises, from the vested interest which the corporators take under the legislative grant, have been denominated a species of legal estate. So from the nature of the interest which a man may have in his office or profession, it is considered as his freehold. In the absence of an express grant, there is an implied permission of the government, to carry on any lawful business or employment, and whether by express grant or implied permission, the right, whilst permitted to be exercised, is the same, and derived from the same source. There is nothing in the nature of an express grant that would subject the grantee to burdens which individuals pursuing similar occupations, by implied permission, would be exempt from. We apprehend it cannot be pretended, that under a general power to tax real and personal estate, the city acquired a right to tax officers, professions, and employments of every description, and it was not the legislative understanding, as is manifest from the special authority given in the same act to tax particular occupations. The

distinction, the court thinks, is clear and sound between what may be properly and strictly considered property, and rights and interests which are only the sources of emolument and profits, and from which property \*may be derived. So far then as this tax may be viewed in the light of a tax upon the franchise, the operations of the bank, and this is the true light in which the court thinks it ought to be considered, we are satisfied, that the city is unauthorized to impose it by any power conferred on it by the legislature in the act of 1825.

An argument was advanced in this case in favor of the city, drawn from the exemption contained in the charter of the Planters' Bank, from city taxation. But confessedly, when that charter was granted, no general right existed in the city to tax the bank for general purposes. If any such power existed, it was under the act of 1805, for a specific purpose, viz.: to raise and support a city watch—and admitting for the sake of the argument, what is not necessary to be decided here, that such a power does exist under the act of 1805, the inference to be deduced from the exemption of the Planters' Bank, could only extend to the liability of the other banks, to the imposition of a tax under an existing power in the city. The liability of exemption of the bank, whose charter contained no such provisions, to taxation under a subsequent authority conferred upon the city, must depend upon the terms of that authority—the question being confined to the legislative intent and will, not extending to an inquiry into its powers.

Believing that the mayor and aldermen of the city of Savannah are not authorized by any act of the legislature to pass the ordinance in question, imposing this tax, it is ordered that the certiorari be sustained, and the proceedings below be set aside.

**Joseph and Lemuel Brewster v. John Harde-  
man, Thomas N. Poullain, and Thomas  
Wray, Executor of Philip Wray,  
Deceased. (a)**

In Oglethorpe Superior Court, October Term, 1830.

1. **Partnership—Power of One Partner to Bind Firm—Confidential Relation.**—The authority of one partner to make contracts which bind the whole, arises from the confidential nature of the partnership relation.
2. **Same—Dissolution—Powers of Members.**—When that relation ceases, the authority which grows out of it, and is dependent upon it, also terminates, except so far as a continuing authority touching the unsettled business of the firm, is expressly delegated, or necessarily implied for the benefit of all the parties.
3. **Debt Barred by Statute—How Revived.**—A debt, when once barred by the statute of limitations, can be revived only by a new promise, express or

(a) This opinion was pronounced by JUDGE LAMAR, in June, 1831, and received the concurrence of the Judges in Convention at their session in July, 1832. —Note in Original Edition.

implied, and for which the old debt forms the consideration.

4. **Partnership—Dissolution—Debt Barred by Statute—Authority of a Member to Revive.**—After the dissolution of a copartnership, a power in each partner thus to revive against all, a debt from the obligation of which they have once been legally absolved, does not fall within the exception mentioned in the second proposition, and therefore cannot be implied.
5. **Same—Same—Same—Same.**—Hence the acknowledgment of a debt, or a promise to pay it, made by one partner, after the dissolution of the firm, and after the debt has been barred by the statute, will not revive the debt against the former partners.
6. **Same—Same—Effect of New Promise by One Member Where Debt Not Barred.\***—But according to "precedent and authority" the admission of a debt by one partner after dissolution, but before the statute has interposed its bar, will be binding upon the other partners so far as to constitute a new point from which the statute shall commence running.
7. **Same—Same—Authority of One Member to Convert Open Account to Liquidated Demand.**—After dissolution, one partner cannot by his separate acknowledgment, convert an open account into a liquidated demand so as to charge his former partners with interest.

The facts in this case are admitted by the parties to be as follows. On the 14th day of October, in the year 1822, John Hardeman, the active partner of the firm of John Hardeman & Co. (which was composed of John Hardeman, Thomas N. Poullain, and Philip Wray), addressed an order in the name of the firm, to the plaintiffs in New York, for a certain number of hats, which were forwarded pursuant to order. The plaintiffs, confiding in the solvency of the firm, were in no  
139 \*haste to push their demand, but after some time placed the account in the

hands of their agents, Brewster & Prescott of Augusta, to whom John Hardeman afterwards in the name of the firm promised to pay the same between the first and fifteenth of November, in the year 1826. Plaintiffs allowed themselves to be put off by this promise until April, 1829, when they forwarded the account to an attorney for collection, with instructions to commence a suit; but before suit was brought, the account was withdrawn from his hands by the plaintiffs, for the purpose of instituting an action, as they supposed they might do, in the District Court at Savannah. Upon learning, however, that the case was not cognizable in that court, they, on the 18th of March, 1830, enclosed the account to a professional gentleman at Lexington, who, in the April following, commenced a suit, but agreed to suspend the same upon J. Hardeman's promising to see Poullain, and the executor of Philip Wray, deceased, and confidently asserting that the account should be paid before the next term of the court. The suit was suspended, but the money not having been paid, was renewed, and service effected on the 14th day of September, 1830. Philip Wray died in the fall of 1827. At the time of the dissolution of the firm, a full settlement was made by the other partners with John Hardeman—the former not knowing of the existence of the debt in question, but, by way of caution, taking a bond in the sum of \$15,000 from Hardeman, conditioned to pay outstanding debts, if there were any. It is also admitted that John Hardeman is now insolvent, but at the time of the dissolution of the partnership, and for three years afterwards he was good for the money, and that if his former partners had been apprized of the existence of the debt, they during that time could have forced him to pay it. The point in controversy between the parties, and which has been referred to me for my decision, is, whether the two defendants, Thomas N. Poullain and Thomas Wray, executor of Philip Wray, deceased, can protect themselves from the payment of this debt by the plea of the statute of limitations?

If it were necessary to rely exclusively upon the foregoing statement of facts, it would be impossible to give a definite solution to the question submitted; for it does not appear in that statement, whether the promise of Hardeman to pay the debt between the first and the fifteenth of November, 1826, was made prior or subsequent to the dissolution of the partnership. Neither the time of the dissolution, nor of the promise, is disclosed. Among the papers, however, which accompany the statement, and to which I presume it was intended that I should refer, I find that Hardeman's promise to pay the account by the first or fifteenth of November, 1826, was contained in a letter signed in his individual name  
140 addressed \*to Brewster & Prescott of Augusta (plaintiff's agents), and dated the 8th October, 1826. And it seems that on the twenty-second of December, 1828, he again acknowledged the debt, and offered to give his

**\*Joint Obligors—Promise by One to Pay Debt before Barred—Effect.**—Where one of four joint and several promisors, promise to pay the debt before the statute of limitations has operated a bar, it takes the case out of the statute as to the others. *Cox v. Bailey*, 9 Ga. 471, citing *Brewster v. Hardeman*, *Dud.* 150. To the same effect, the principal case is cited in *Fellows v. Guimarin*, *Dud.* 100, and *note*.

In *Tillinghast v. Nourse*, 14 Ga. 641, the court says, payment made by one of two or more joint contractors before the bar of the statute has attached, constitutes a new starting point for the statute. Such was the decision of this court in *Cox v. Bailey*, 9 Ga. 467. In that case the court reaffirmed the same principles announced in *Brewster v. Hardeman*, *Dud.* 138, to wit: that, the admission of a debt, by one partner, after dissolution, but before the statute had interposed its bar, will be binding on the other partners, so far as to constitute a new point, from which the statute will commence running. The same rule applies to joint contracts, as to partnership notes. And this doctrine has been considered the settled law of the state, for a quarter of a century at least and for that reason, if for no other, should be changed only by the legislature. The correctness of this principle has been frequently doubted and sometimes denied.



individual note at thirty days, for the amount, including interest after four months from the date of the account. All embarrassment, however, which might have arisen from an imperfect statement of the facts, is entirely obviated by the explicit and definite language in which the questions submitted to my consideration are propounded. The gentlemen by whom the case has been referred to me, say—"The legal questions which we conceive to be involved, and which we propose for the determination of Judge Lamar, are these. First, Whether the admission made by John Hardeman, one of the partners of the firm of John Hardeman, Thomas N. Poullain, and Philip Wray, after the dissolution of the partnership, concerning the joint contract with the plaintiffs, that took place during the partnership, is competent evidence to take the debt out of the statute of limitations, and charge the other partners? Secondly, Whether if the plaintiffs are entitled to recover at all, they are not entitled to interest after four months, according to the contract?"

The counsel for the plaintiffs in support of the affirmative side of the first question, has cited a number of cases, which are certainly in point, and if consistent with established principles of law, and uncontrolled by counter decisions, would of course be conclusive upon the subject. (Whitcomb v. Whiting, 2 Doug. 651; Wood v. Braddick, 1 Taunton, 104; Smith v. Ludlow, 6 John. 267; 15 John. 3; 4 Conn. 336; 2 Pickering, 581; 3 Pick. 291; Starkie's case, 81; Peakes' cases, 203; 2 Bing. 306.) It must be conceded, however, that the decision in the case of Whitcomb v. Whiting, upon the authority of which the subsequent cases mainly rest, has not been regarded with uniform approbation even in the Court of King's Bench in which it was pronounced. In *Brandram v. Wharton*, 1 Barn. & All. 463, Lord Ellenborough, although he seemed to yield a reluctant respect to its authority, expressed his decided conviction that the principle of the case should not be extended. In *Atkyns v. Fredgold*, 2 Barn. & Cres. 23, the authority of Whitcomb v. Whiting was again impugned, but not expressly overruled.—Chief Justice Abbot remarked that it was contrary to a former decision in *Ventris*. Bailey, J., said, "it may be questionable whether it does not go beyond proper legal limits." Holroyd, J., also spoke of it as a case of doubtful obligation, and the whole court concurred in the opinion that any extension of the principle would be improper. From these judicial dicta which were gradually undermining the authority of the case, its ultimate overthrow in the English Courts might have been

141 \*reasonably expected. Such however had not yet been the result (a). In 1824 a case occurred in the Court of Common

Pleas;—*Peckam v. Raynal* and others, 2 Bing. 306, in which an explicit recognition, or rejection of the doctrine became unavoidable. Best, C. J., felt himself bound to sustain it, and applied it to the case then before the court. In 1827, the Supreme Court of Pennsylvania, after full argument, held, that the acknowledgment by one partner after the dissolution of the partnership will not revive a debt barred by the statute of limitations so as to make the former partners liable. And subsequently a similar decision was made by the Supreme Court of the United States in the case of *Bell v. Morrison*, 1 Peters, 351. I am not aware that the point has ever been determined in this State. Probably this is the first case in which it has arisen. It may then be considered as a question open for discussion, and which should be settled upon principle, with a just regard for authority, but without a slavish reliance upon precedents which cease to be authoritative when they become contradictory.

*Bland v. Hazling*, 2 Ventris, 151, is the first case upon this point which we find in the books. That was an action against four upon a joint promise, and the statute of limitations was pleaded. The jury returned a special verdict that one did promise within six years, and that the others did not; whereupon it was decided by the court, that judgment could not be had against the party who had made the promise. I have not had an opportunity of referring to the report of the case for the reasons assigned by the Judges for their decision; but the simple statement of the case would seem to warrant the conclusion that they considered the separate promise of one insufficient to bind the rest, otherwise there could have been no difficulty in rendering a judgment against all. Douglass, in his report of *Whitcomb v. Whiting*, says that the decision in the case of *Bland v. Hazling* "may be explained upon the manner of the finding—for as the plea was joint, and the replication must have alleged a joint undertaking, the verdict did not find what the plaintiff had bound himself to prove." But in reply to this specious suggestion, I would ask—if the court had entertained the opinion that the promise of one was as effectual to take a case out of the statute as the promise of all, would they not have held that the finding of the jury that one had promised was equivalent to finding that all had promised, and that consequently the plaintiff might have a judgment against all? The fair presumption is that they would have so determined; for the one proposition is but the obvious consequence of the other.

142 The statement in the verdict that "some of the parties did not promise, could hardly have presented an obstacle to such a decision, for under the view just taken, the court might well have considered that part of the verdict to be controlled by the supposed legal effect of the finding that one had promised. It would appear then to be a legitimate conclusion, that in the case of *Bland v. Hazling*, the Judges were of opinion that the separate promise of one joint debtor to pay the debt was not sufficient to take a barred debt

(a) But very important modifications of the laws as to what shall be sufficient to take a case out of the statute have been made by act of parliament, 9th Geo. 4. c. 14, the provisions of which may be found in 14th English Common Law Rep. 315, and are well worthy of the consideration of our own legislature. —Note in Original Edition.

out of the statute so as to charge the other parties.

The case of *Whitcomb v. Whiting*, (2 Doug. 652) was the next in order of time. It was an action against one of the makers of a joint and several note; and Lord Mansfield, Willes, J., concurring, decided that payment of the interest on the note and a part of the principal by one of the other joint makers within six years took the debt out of the statute as to all the makers, and was admissible in evidence in an action against any one of them. He said, "payment by one is payment for all, the one acting virtually for all the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." Willes, J., remarked, "the defendant has had the advantage of the partial payment, and therefore must be bound by it." This decision of Lord Mansfield rests upon the assumption that in reference to a joint debt, a mutual agency exists among the joint debtors by virtue of which each may not only do acts in discharge of their joint liability, but may also prolong such liability, or renew it when expired. The proposition is doubtless correct in the case of partnership debts, during the continuance of the partnership, for such mutual agency necessarily results from the partnership relation, and had its origin in the compact of the parties. But after that relation had been severed and destroyed, the general agency which grew out of it must also expire. It is true that a qualified agency must of necessity remain in regard to the unsettled business of the former partnership. But the necessity which sustains, must also limit and control the continuing agency. The unsettled business of an expired firm is divisible into rights of the firm, and liabilities of the firm. The necessity then by which the qualified agency is supported, extends only to the security or enforcement of those rights on the one hand, and the extinguishment of the liabilities on the other. In the accomplishment of these objects all the partners have a mutual interest, and effecting either or both, one partner may be regarded as acting not only for himself, but as agent for the others. But beyond these objects the authority does not reach. It does not extend to the creation of a new obligation. The very object of dissolving a partnership is to divest each partner of the power to bind the rest by any future contract. No liability, or, in other words, no obligation that can be judicially

143 \*enforced exists when a debt is barred by the statute of limitations. As to such a debt, then, the sole ground on which an agency can be presumed is wholly removed. There is certainly some incongruity in the idea of an implied agency, to extinguish a debt already extinguished by law. An implied authority, like an implied promise, is raised by operation of law, and as such must relate to something which the law itself presumes to exist. But the law does not presume a debt barred by the statute to exist, and therefore cannot be said to raise an authority to pay it.

After dissolution the continuing authority of the several partners in relation to the unsettled transactions of the firm is founded solely upon the presumption that such authority is necessary for their mutual benefit. But a power in each by his separate acknowledgment to burthen the whole with debts for which they had ceased to be liable, could in no event become advantageous to all, and therefore cannot be implied. Suppose a creditor, whose right of action had been barred by lapse of time, should demand payment of his debt from the assembled members of the former partnership. One of them acknowledges the debt, and promises to pay it; the others (say four) at the same time deny all indebtedness, and absolutely refuse to make payment, would the debt be revived against all? According to the doctrine of *Whitcomb v. Whiting* it would, upon the ground that the acknowledgment was made by the partner not only for himself, but as agent of the others; where in fact the idea of agency is wholly repelled by the contemporaneous declarations and conduct of those alleged to be represented. But if after dissolution, one partner is to be considered as agent for the others, when he makes an admission that takes a barred debt out of the statute, is he not also to be regarded as an agent for them, when instead of acknowledging the debt, he positively denies it? The one proposition seems to be quite as well founded as the other; and if both be granted, then the case which I have just supposed, would present this singular state of things. The partner admitting the debt to be due, would be confronted by four agents, authorized in his behalf to deny, and actually denying that it was due; and the four partners denying the existence of the debt would also be represented by an agent, authorized in their behalf to admit, and actually admitting the debt to be due. The impossibility of maintaining an effective agency, both in the admission, and in the denial is sufficiently apparent; but plain, inartificial common sense, would obviate the whole difficulty by discarding the notion of a virtual agency both in the denial and in the admission. But perhaps it may be said that the case stated would be only an exception to the doctrine, and that the actual denial of the other partners as supposed, would prevent them from being affected by the acknowledgment of one. Such a con-

144 cession \*I should hold to be a virtual surrender of the question. It would be in effect to say, that the other partners, notwithstanding the acknowledgment of one, had a right to protect themselves by actual denial of the debt. The pleading of the statute, is itself such a denial. If it should be retorted that the denial must be contemporaneous with the acknowledgment, I would reply that there is no good reason for such a requisition. If the partners have a right to protect themselves from the effect of an admission by a former partner, made after the debt is barred, the means and opportunity of exercising that right must be conceded. To require that the denial should



be simultaneous with the acknowledgment, would be to deprive the parties of the right in question. An opportunity for a simultaneous denial by them would probably never occur. They might not be apprized of the existence of the debt. The creditor might present it only to one without the knowledge of the others, and a suit might be the first notice to them, of the intention of the creditor to require payment. Even in the case of a payment by one of several joint debtors upon a debt not barred by the statute, Mr. Justice Story seems to think that there is no necessity for adopting the idea of an agency for the rest. In delivering the opinion of the Supreme Court in the case of *Bell v. Morrison*, 1 Peters, 368, he said "It is true that a payment by one does enure for the benefit of the whole, but this arises not so much from any virtual agency for the whole, as by operation of law—for the payment extinguishes the debt. If such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt, pays it to discharge himself, and so far from binding the others conclusively by this act, as virtually theirs also, he cannot recover over against them in contribution without such payment has been rightfully made." The obligation of a joint debtor to pay the debt arises solely from his own original promise to do so. When the legal force of that promise has expired by lapse of time, it is no longer a joint debt in contemplation of law. The parties are all released. It is true that it still remains a moral basis sufficient to sustain a new contract, but the same concurrence of will and assent which originally bound the joint debtors, is necessary to rebind them, and one has no more authority to bind the whole in the latter than he had in the first instance. Upon the whole I am inclined to think that the summary reasoning of Lord Mansfield in the case of *Whitcomb v. Whiting*, involves a *petitio principii*, and is altogether inconclusive in the case of a joint debt barred by the statute at the time of the acknowledgment. Lord Ellenborough considered the doctrine as fraught with much hardship. In the case of *Brandram v. Wharton*, 1 B.

145 \* & A. 463, he puts this strong case, "Suppose a person liable jointly with thirty or forty others to a debt, he may have actually paid it; he may have had in his possession the document by which that payment was proved, but may have lost his receipt. Then though this was one of the very cases which the statute was passed to protect, he may still be bound, and his liabilities renewed by a random acknowledgment by some one of the thirty or forty others who may be careless of what mischief he is doing, and who may even not know of the payment which has been made." That the case of *Whitcomb v. Whiting* has not been overruled in England, at least, so far as it involves the doctrine that an acknowledgment of one joint debtor, made after the statute has attached, will revive

the debt against all, as perhaps owing more to the profound deference which is paid to the high character of Lord Mansfield as a jurist, than from any thorough conviction of the soundness of the doctrine itself. It seems to be the prerogative of a lofty mind not only to enlighten by its wisdom, but to enslave by its authority. In the case of *Peckham v. Raynal*, 2 Bingham, 306, Best, C. J., observed, "It has been supposed that this case (*Whitcomb v. Whiting*) is not law. However, I should be slow to decide that any thing which fell from Lord Mansfield is not law." Accordingly in the case then before him which was nearly parallel to the case of *Whitcomb v. Whiting*, the Chief Justice of the Common Pleas recognized the authority of the latter. He said "if we were to decide otherwise, we should establish an anomaly in the law, because in other cases the acknowledgment of one of many who are jointly concerned, is binding on the others." The reply to this is that after the statute has barred a debt, the persons who were the debtors, are no longer jointly concerned. Time has severed the ligament that bound them together as joint debtors, and it cannot be reunited but by the consent of all. He also adverted to what he deemed analogous decisions in cases of joint trespass, conspiracy, treason, &c., in which it has been held that after the connexion between the parties, has been established by aliunde proof, the declarations of one in relation to the common object are admissible against the others. But the analogy does not hold good. It is true that in such cases the declarations of one, whilst engaged in the prosecution of the common design are admissible against all, as being virtually the declarations of all and constituting a part of the *res gestæ*. They are admissible in consequence of the community of purpose. But the common object must be in a course of prosecution, or in some form existent at the time of the declarations, otherwise I apprehend they would not be evidence against any other than the party making them. Now when a debt has been barred by the statute of limitations, there

is no longer any community of interest between the persons who were, but who by operation of the statute had ceased to be joint debtors, and consequently the admission of one cannot be given in evidence against the others. This view of the subject also destroys the force of Mr. Justice Willes' remark in *Whitcomb v. Whiting*, viz. "That the defendant has had the benefit of the partial payment, and must therefore be bound by it." It cannot be said that a person is benefited by the partial payment of a supposed debt which he has not admitted, and which he is not bound to pay.

The principle assumed in the case of *Whitcomb v. Whiting*, was acted upon in the case of *Jackson v. Fairbank*, (2 H. Blk. 343) which was an action against one of two makers of a joint and several promissory note. The other maker had become a bankrupt, and the payee had received from the

assignees a dividend on account of the note. The payment of this dividend under the commission was held to be sufficient to prevent the other joint maker who had been sued for the remainder of the debt from availing himself of the statutory protection. Whether the doctrine of *Whitcomb v. Whiting* be well or ill-founded, in this instance it was evidently pushed to an unwarrantable extent, for as the bankrupt himself had not acknowledged the debt, there was in fact no acknowledgment by either of the joint debtors. But *Jackson v. Fairbank*, is not now entitled to much consideration. It was disregarded by Lord Ellenborough in the case of *Brandram v. Wharton*, and condemned by Chancellor Kent in *Roosevelt v. Marks*, 6 John. Ch. R. 291-2.

We have already seen that in the case of *Atkins v. Tredgold*, 2 Barn. & Cres. 23, some of the judges questioned the correctness of Lord Mansfield's doctrine, and in their solicitude to restrict it within the narrowest limits, it is by no means clear that they did not encroach upon the doctrine itself, although they were of opinion that the case then before them was distinguishable from *Whitcomb v. Whiting*. The case was this. Robert Tredgold and John Tredgold, became the makers of three joint and several promissory notes, payable on demand to John Atkins. John T. was merely a security, and died in 1810. Robert T. continued to pay interest on the notes after the death of J. T. and the last payment was made by him in 1816. The suit was brought upon these notes by the executors of Atkins against the executors of John Tredgold of whom Robert Tredgold was one. The declaration contained counts upon promises by the testator, and also upon promises by the executors. Upon the trial, the jury, believing that the payment of interest by Robert T. was made by him on his own account and not as executor, under the direction of the court, found a verdict for the defendants. Upon a motion for a new trial it was held that there could be no recovery of the first counts, because the testator having died ten years before the commencement of the

147 action no \*promise made by him within six years could be implied. Neither could there be a recovery upon the second counts, because the payment by Robert T. having been made by him in his own character as an original debtor, and not as executor could not raise an implied promise by the executors. In the present case however, the executor of Philip Wray can derive no benefit from the decision in *Atkins v. Tredgold*, because Philip Wray was in life when the debt was acknowledged by Hardeman; to wit, on the 8th of October 1826: within four years from which time the action was commenced.

In *Wood v. Braddick*, 1 Taunton, 104, it was decided that the admission of one partner made after the dissolution of the partnership, but concerning a partnership contract which occurred before the dissolution was binding upon the other partners; and the decision was placed upon the broad ground

that in respect to antecedent transactions the partnership still subsisted. If unrestricted scope be given to this doctrine, it is of course decisive of the question which we are now considering. But it appears to be contrary to the decision of Lord Alvanley, in the case of *Potherick v. Turner*, cited by Serjt. Cockell in *Wood v. Braddick*. And in New York it has been repeatedly determined that the acknowledgment of a debt by one partner after the dissolution of the partnership, will not establish the existence of the debt as against the other partners, and to the same effect are the adjudications of some of the other State Courts. *Hackley v. Patrick*, 3 Johnson, 536; 6 Ib. 267; 15 Ib. 409; 15 Ib. 3; Anth. N. P. 119; 3 Munf. 191; 4 Munf. 215; 1 Marshall, 189. In *Hackley v. Patrick*, the Superior Court of New York remarked "that after a dissolution of a partnership the power of one party to bind the others wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners any more than his giving a promissory note, or any other act." This proposition would seem to exclude the idea that a cause of action barred by the statute can be revived against all the members of a former firm, by the acknowledgment of one partner after the partnership has been dissolved. Yet the same court, certainly not without some apparent inconsistency admits the doctrine that a cause of action may be thus revived by one against all, provided the existence of the original partnership debt be established aliunde. *Smith v. Ludlow*, 6 John. 267; 15 Ib. 409, 424. What legal principle is it that imparts such controlling energy to an acknowledgment in the one case, and leaves it so powerless in the other? The reason assigned in *Smith v. Ludlow*, for rejecting such acknowledgment as proof of the original debt is, that to give it the force of proof for that purpose "would enable one party to bind the other in new contracts." Now if it be true as the weight of authority would seem to prove, that the revival of a debt once barred by the statute, results from a 148 new promise express or \*implied, and for which the previous debt is the consideration, then the reason assigned in *Smith v. Ludlow* for excluding an acknowledgment as proof of the original debt, would equally exclude it as a mean for withdrawing the protection of the statute from those who are not parties to the new promise. To consider it efficacious in either instance, would be to enable "one party to bind the other in new contracts"—the power to do which does not exist after the partnership has terminated. Mr. Justice Story in *Bell v. Morrison*, after giving his sanction to the doctrine that such an acknowledgment does not supply the place of aliunde proof of the original debt, forcibly remarks: "If it does not establish the existence of a debt against a partnership, why should it be evidence against it at all? If evidence aliunde, of facts within the reach of the statute, as to the existence of the debt, be necessary before the acknowledgment binds, is not this letting in all the mischief against which the



statute intended to guard the parties, viz.: the introduction of stale and dormant demands of long standing and uncertain proof? If the acknowledgment *per se* does not bind the parties, where is the propriety of admitting proof of an antecedent debt extinguished by the statute as to them to be revived without their consent? It seems difficult to find a satisfactory reason why an acknowledgment should raise a new promise, when the consideration upon which alone it rests as a legal obligation is not coupled with it in such a shape as to bind the parties; that the parties are not bound by the admission of the debt as a debt, but are bound by the acknowledgment of the debt as a promise upon extrinsic proof."

It has already been suggested that the reanimating principle by which a debt once barred by the statute is revived, consists in a new promise express or implied, and for which the old debt forms the consideration. The obvious bearing of this position upon the present inquiry will justify a reference to a few authorities in support of it. Chief Justice Holt in *Heyling v. Hastings*, (1 *Ld. Raymond*, 389, 421), reserved for consideration the following question, "Whether the acknowledgment of a debt within six years would amount to a new promise to bring it back out of the statute?" This question he submitted to all the Judges except one, "and they were all of opinion that it would not, but that it was evidence of a promise, and Rokeby, Justice, compared it to the case of trover and conversion where demand and denial is held to be evidence of a conversion, but not a conversion." It is not fairly inferable from this language that the Judges considered a new promise, as the means by which a barred debt is revived, and that an acknowledgment takes such debt out of the statute only because it is evidence of a new promise? Lord Ellenborough in *Boydell v. Drummond*, 2 *Camp*. 157, observed, "If a man acknowledges the existence of a debt barred 149 by the \*statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived." There is some conclusion and perhaps some inconsistency in the cases on this subject, says Chief Justice Tilghman, in the case of *Jones v. Moore* (5 *Binney's Rep.* 577), but it appears to me from the reason of the thing, and from a review of all the cases that an acknowledgment of the debt can only be considered as a new promise, or what is pretty much the same thing in substance, as a circumstance from which the law will imply a new promise. Mr. Justice Story in delivering the opinion of the Supreme Court of the United States, in *Bell v. Morrison*, (1 *Peters*, 370, 2) takes the same view of the subject, asserts it to be in conformity with the general current of English and American authorities, and supports it by a course of argument, which as the point seems to be well settled, it is unnecessary to introduce.

The result then of this inquiry may be summed up in the following propositions.

1st. The authority of one partner to make contracts which bind the whole arises from

the confidential nature of the partnership relation.

2d. When that relation ceases, the authority which grows out of it, and is dependent upon it, also terminates; except so far as a continuing authority, touching the unsettled business of the firm is expressly delegated or necessarily implied for the benefit of all the parties.

3d. A debt barred by the statute of limitations, can be revived only by a new promise, express or implied, and for which the old debt forms the consideration.

4th. After the dissolution of a partnership, a power in each partner, thus to revive against all, a debt, from the obligation of which they are legally absolved, does not fall within the exception mentioned in the second proposition—because such a power in each could in no event become beneficial to all, and therefore cannot be implied.

5th. From the united force of these propositions, it necessarily follows, that the acknowledgment of a debt, or a promise to pay it, made by one partner after the dissolution of the firm and after the debt has been barred by the statute, will not revive the debt against the former partners.

With this conclusion, which rests upon the solid basis of principle—is supported by the decisions of the Supreme Court of Pennsylvania, and sanctioned by the highest judicial tribunal of our country, I am the better satisfied, because it secures to a large and valuable class of the community, the protection of a beneficial statute, of which, by a contrary doctrine, they would be in a great measure deprived and subjected to interminable liability. Neither law nor sound policy can require that after the statute has once interposed its shield, it shall be withdrawn without the consent of all the parties in interest, and the fortunes of men, at a time when they have a 150 right to \*expect security and repose, placed within the blighting influence of careless, inadvertent, or possibly fraudulent admissions, made by an individual with whom they had long ceased to be connected.

Perhaps the foregoing decision may be deemed a sufficient answer to the first question submitted for my determination. But do not the facts of the case as stated, present another question which has not yet been considered? It appears that the first acknowledgment of Hardeman was made before the statute had barred the debt; four years not having intervened from the time that the debt was contracted to the time of his acknowledgment. It appears also that he again recognized the debt within four years from the first acknowledgment. The pending action was commenced in September, 1830. It was instituted, therefore within four years from the time of the first acknowledgment. Hence the question arises, whether the acknowledgment of a debt by one partner after the dissolution of the firm, but before the statute has barred the debt, will intercept the course of the statute, and constitute a new starting point, from which

it shall commence running? This point is not distinctly suggested in the question submitted by the parties, and it is not embraced in the opinion already pronounced. Much of the argument in support of that opinion rests upon the supposition of an acknowledgment made after the action of the statute upon the debt, had been fully consummated, and therefore cannot apply to a case where the acknowledgment occurred before the statute had attached. For example, it cannot be said in the latter, as in the former case, that there was no debt, subsisting in contemplation of law at the time of the acknowledgment, that there was no identity of interest—no joint liability—that a partial payment by one could not be considered as beneficial to the others, &c. Nor can it be affirmed that an acknowledgment or new promise made before the statute has interposed its bar, revives the debt, for to adopt the language of Mr. Justice Story—"the revival of a debt supposes that it has been once extinct and gone, and that there has been a period in which it had lost its legal use and validity"—which cannot be predicated of a debt at the time of an acknowledgment made before the statute has attached. On the part of the plaintiffs, then, it may be insisted, if not unanswerably, at least with great plausibility, that as the debt was legally as well as morally subsisting at the time of the acknowledgment—as the connexion between the parties as joint debtors had not been dissolved by time;—as their joint liability remained undiminished and complete; and as there was then no necessity for a new contract to resuscitate the debt, such admission of the debt by one whose interest and obligation were identical with the rest, ought to be obligatory upon all, at least so far as to arrest the progress of the statute; and so

151 fix a new point from which it shall commence its course. And \*under this aspect of the case the analogies suggested by Chief Justice Best in *Pecham v. Raynal*, 2 Bingham, 306, are not wholly inapplicable.

On the other hand it may be objected, that by a succession of acknowledgments, made at intervals short of the period mentioned in the statute, one partner would have it in his power to protract the liability of his former partners for an unreasonable length of time. This is true, but there is hardly any principle of law however well settled, or however salutary in its general operation, which may not in some possible case be attended with hardship. The necessity that the acknowledgment shall be made before the statute has operated, affords some protection to the other partners.

But it is unnecessary for me, upon the present occasion, to inquire into the possible consequences of the doctrine. The matter in controversy has been referred to me to be decided upon the narrow ground of "precedent and authority." With the exception of the old case of *Bland v. Hazling* in which there is considerable obscurity,

and the decision in *Pennsylvania*, and the case of *Bell v. Morrison*, the authorities English and American, so far as they have fallen under my notice, uniformly recognize the doctrine, that an admission of a debt by one partner after the dissolution of the partnership, will take the debt out of the statute as to all the partners. The decision of the Supreme Court of the United States in the case of *Bell v. Morrison* establishes a contrary doctrine as to admissions made after the statute has actually attached. But it, I apprehend, goes no farther. It does not seem to extend to admissions made before the statute has operated. Indeed Mr. Justice Story, in delivering the opinion of the court expressly stated that "the question is not as to the authority of a partner after the dissolution, to adjust an admitted and subsisting debt, we mean admitted by the whole partnership, or unbarred by the statute; but whether he can by his sole act after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose." This question was decided by the court in the negative, and although some of the Judges did not concur in the decision, it was supported by Mr. Justice Story with a cogency of argument, which cannot be well resisted. The report of the case in *Pennsylvania*, I have not seen. My knowledge of it is derived from a note of Mr. Peters to *Bell v. Morrison*, 1 Peters, 369, in which he states upon the authority of Mr. Chief Justice Gibson, that the Supreme Court of *Pennsylvania* had decided "that the acknowledgment of a partner after dissolution of the partnership, will not take the debt out of the statute, so as to make the other former partners liable." It does not appear whether in that case the admission was made before or after the statute had operated. The presumption is, that it was made afterwards.

152 \*In conclusion, as the doctrine which prevailed before the decision in *Pennsylvania*, and the case of *Bell v. Morrison*, appears to have been actually overruled only so far as it extended to admissions made after the statute had attached, I am constrained to say, that "upon precedent and authority" the admission of a debt by one partner after dissolution, but previous to the action of the statute, will be binding upon the other partners so far as to constitute a new point from which the statute shall commence running. And even leaving the circumscribed ground of mere authority, I should hold upon principle that a partial payment by one partner after dissolution, upon a debt not barred by the statute at the time of such payment, ought to have this effect. I am not prepared wholly to discard the idea of a virtual agency among former copartners, as Mr. Justice Story seems to be in relation to ordinary joint debtors(a). In the collection

(a) See his remarks already quoted from 1 Peters, 269.—Note in Original Edition.



of debts due to, and the payment of debts legally subsisting against the firm, a continuing authority in each to act for all, may be presumed. It falls within the reason of the exception mentioned in the second of the series of propositions with which I closed the previous part of this investigation. Where the debt is not barred by the statute at the time of the partial payment by one partner, an advantage accrues to the whole from the payment. It is an act in which they are all legally bound to co-operate—and the law presumes that co-operation for which there exists a legal obligation. But as a bare acknowledgment of the debt, unaccompanied by a partial payment, secures no advantage whatever to the partners; and as the virtual agency which remains in each after dissolution, is founded upon the idea of mutual benefit, it might admit of much doubt;—if the whole doctrine was now to be settled for the first time; whether such acknowledgment ought to operate against any but the party making it, when the creditor has notice of the dissolution. Hitherto, however, the courts have not recognized any distinction between the force of a partial payment by a joint debtor, or former partner, and his mere naked, but explicit acknowledgment of the present existence of the debt.

As to interest, I am inclined to think that it is not recoverable against Poullain and Wray. Our statute, (Prince Dig. 212,) provides that "no verdict shall be received on any unliquidated demand where the jury have increased their verdict on account of interest, nor shall interest be given on any open account in the nature of damages." The debt in this case was an open account at the time it was contracted. It was an open account at the time of the dissolution, as it had not been acknowledged. It still remains an open account as to Poullain & Wray.

153 We have already seen that \*an acknowledgment of a debt by one partner after dissolution does not establish the existence of a debt against the other partners. It must still be proved aliunde. And I think that there is equal reason for holding that one partner after dissolution has no power by his separate act to change the nature of the debt—to convert an open account into a liquidated demand—and thereby to charge the former partners with interest.

Note. The case of Whitcomb v. Whiting has always been considered as setting up the doctrine, that an acknowledgment by one joint debtor, though made after the statute has actually attached will revive the debt against all. But from the report of the case, it does not fully appear whether the partial payment was made before or after the expiration of six years from the maturity of the note. It was made however, within six years next preceding the commencement of the action, and that alone the court seemed to think was sufficient to take it out of the statute. —Note in Original Edition.

**George Rives v. Oliver Boulware, Defendant, and the President, Directors, & Co. of the Mechanic's Bank, Garnishee.**

In Richmond Superior Court, July, 1832.

**Corporations\*—Garnishment.**—A corporation cannot be garnished under the statute of 1822, authorizing garnishments in certain cases, therein mentioned.

In this case, a summons of garnishment under the act of 1822, entitled "an act to authorize parties plaintiff to issue summons of garnishment in certain cases, as in cases of attachment," was directed to the President, Directors & Co. of the Mechanics' Bank, who move to have the writ or summons dismissed as to them, upon the ground that a corporation is not by law subject to this process; and the question is submitted without argument.

Corporations are liable to suit, and may be compelled, in the ordinary course of judicial proceedings, as individuals may, to perform every contract or duty legally entered into by, or devolving upon them. In ordinary suits there must be some privity between the parties; that is, there must be in one a legal right to demand, and in the other a legal obligation to respond.

Such right and such obligation in this case exist only between the defendant and the garnishees, and not between them and the plaintiff. But this is an extraordinary rem-

**\*Corporations—Persons.**—In the principal case the court construed a statute, allowing a summons of garnishment to be directed to any *person or persons indebted* to the defendant, to refer to *natural persons* only, because in referring to the word "person," they use the personal pronouns, his, her, and their, thus clearly indicating the intention of the legislature to refer to natural persons alone.

But as a general rule, the word "person," both in civil and penal statutes, applies to artificial as well as natural persons. Therefore corporations are embraced in the words of a statute under the designation of persons, unless expressly excepted or excluded by necessary implication, on the ground of the total inapplicability of the statute, as to the subject-matter, to them. *South-Western R. Co. v. Paulk*, 24 Ga. 356; *Loudon v. Coleman*, 59 Ga. 653; *Collins Park Co. v. Short Co.*, 9 Ga. 64, 25 S. E. Rep. 929.

Or, as the rule is sometimes stated, corporations are to be deemed and considered as persons, when the circumstances in which they are placed are identical with those of natural persons, expressly included in a statute. *Home Ins. Co. v. City Council of Augusta*, 50 Ga. 541, citing *South Carolina R. Co. v. McDonald*, 5 Ga. 531.

**Prior to incorporation.**—But a corporation is not a person in law until after the grant of its charter. Therefore, where, pending the application for a charter, a summons of garnishment was sued out and served on one as the president of such corporation, it was void, and a judgment by default, also rendered before the grant of the charter, based on such summons, was likewise void, and could be attacked by affidavit of illegality. *Code*, § 3536; *Bartram, Hendrix & Co. v. The Collins Manufacturing Co.*, 69 Ga. 751.

edy which allows a creditor to proceed directly against his debtor's debtor; and whether it extends to corporations, must depend upon the construction to be given to the act creating it.

The words of the act in the first section are, "It shall and may be lawful for the plaintiff or his attorney to issue a summons of garnishment to be directed to any person or persons who may be indebted to the defendant, or who may have any

154 \*money, effects, property either real or personal, or any bonds, notes, or other evidences of debt whatsoever in his, her, or their hands, belonging to the said defendant, &c." The act is remedial, and should receive such construction as to make the remedy as complete as possible, and to embrace artificial as well as natural persons, if there were no words in the act to restrain this liberal rule of construction. There is also a rule in construing statutes that "words and phrases, the meaning of which in a statute has been ascertained, are, when used in a subsequent statute, to be understood in the same sense." 4th Bacon's Abr. 644. A fortiori they must be understood in the same sense when used in the same statute. And the second rule laid down by Bacon for construing statutes, is, "That in the construction of one part of a statute every other part ought to be taken into consideration." And if any part of a statute be obscure, it is proper to consider the other parts; for if the words and meaning of one part of a statute do frequently lead to the sense of another.—Ib. 646; citing Plow. 365; 11 Mod. 161. The application of these rules, (which are but the dictates of reason and sound sense) to the act under which this proceeding takes place, will render its construction easy.

In the 1st section, already quoted, the terms seem to refer rather to natural than artificial persons. In the 3d and 6th sections, the summons is required to be served on the garnishee "personally." The means of enforcing obedience to the writ are provided in the 4th section in these words: "When any person shall fail to appear and depose, on being summoned as a garnishee, the court on application shall proceed against him by attachment for contempt, &c."

Here the person is again mentioned, and in a subsequent part of the sentence is clearly referred to as a natural person, by the use of the pronoun him. But the means of enforcing obedience to the writ, namely, attachment for contempt, leaves no doubt but that natural persons were meant. To have authorized this process would, of itself, have given the Courts power to enforce it: but the legislature seem to have intended that nothing should be left to implication, and have therefore specially prescribed the means of compelling obedience. As corporations cannot be attached, being mere legal entities incapable of imprisonment, this section illustrates the intention of the legislature as clearly as if they had used the words natural persons. The motion is allowed.\*

A. B. Longstreet, for Plaintiff.

Sohley and Glascock, for Boulware.

\*Since this opinion was pronounced, the legislature

## 155 \*The State v. John Dozier.

In Tallaferro Superior Court, July, 1832.

**Swindling—Indictment—Defect of Proof—Nolle Prosequi.**—On indictment for swindling, the proof was, that defendant had by false representations induced the prosecutor to purchase and pay for a tract of land, which defendant had already sold and conveyed to another: Motion to enter nolle pros. for defect of proof; prosecutor not having tested his title by action of ejectment. The motion was overruled.

The statute imposing the punishment of swindling, prescribes fine and imprisonment, and the restitution of the property swindled. Henry B. Thompson, the person swindled was offered as a witness. Objection was tendered to his competency, by defendant's counsel, on the ground that he would be a witness to support his own interests as much as if an action of deceit to recover damages resulting from a fraud practised upon him. In reply, the penal code, page 373 was cited, which renders the party injured a competent witness in a variety of instances, and among them cases where his property had been injured by fraud. In this case, the defendant had injured the witness to the extent of the value of the property of which he was swindled, which was effected by representing himself the owner of a tract of land, that he had previously sold and conveyed to another person; and by means of such false representations, induced the witness to purchase, and pay him for the said tract of land. The defendant acknowledged to the witness, after the payment of the consideration, that he had previously sold and conveyed the said land to another person. The execution of the deed to the witness, was proven by a subscribing witness to the deed. Counsel for the State here closed the testimony; when defendant's counsel moved to have a nolle prosequi entered for defect of proof, because until an action of ejectment had been brought by the prosecutor, and the validity of the former deed had been established at law, the defendant could not be convicted, for peradventure the prior deed might be defective, and void in law, and might not pass the fee, in which case no swindling had been practised. The motion was overruled by the court.

## Henry Spratlin v. William Hudspeth.

In Wilkes Superior Court, July, 1832.

**Joint and Several Bond—Parties Defendant.**—If a bond be joint and several, the party for whose

of this State passed a law subjecting banks and other corporations to the process of garnishment in like manner with individuals. See Acts 1832. Pamph. 113.—Note in Original Edition.

\***Joint and Several Bond—Joinder of Defendants.**—On a joint and several bond, suit may be brought against one of the sureties, without joining another with him, and the defendant cannot plead a release because his co-surety was not joined with him. Poullain v. Brown, 80 Ga. 27, 5 S. E. Rep. 107.



benefit it was made may sue either or both obligors at his election.

**Bond to Indemnify—Action on—Record.**—In an action on a bond to save harmless a security on another bond, it is sufficient that the record shows the security to have been damnified, and the evidence upon which he became damnified need not be produced.

An execution had been levied upon the property of one Simeon Echols, which had been claimed by Richard Hudspeth, father of the defendant, with Henry Spratlin the plaintiff security, subsequent to the execution of the bond, \*which was to prosecute the claim and to deliver the property, if the claim of Richard Hudspeth should not be established: William Hudspeth, the defendant, gave as a security to his father, a bond to indemnify and save harmless the plaintiff from loss or damage in consequence of the bond he had executed as security to Richard Hudspeth. Plaintiff offered in evidence, a writ and judgment by which he had been adjudged to pay the sum of \$100 in consequence of the non delivery of the property; and offered the plaintiff in that action to prove the receipt of the money recovered in the last action. Defendant's counsel objected to the admissibility of the evidence, alleging that the execution ought to be produced. It was further objected, that in the action brought against the plaintiff, Richard Hudspeth was joined in the writ, but was not served. It was still further objected, that in the present action, Richard Hudspeth was not joined with the defendant. To which it was relied, that the bonds were joint and several; that plaintiff had a right to elect whether he would consider the bond joint or several. That he had elected to consider the bond several. It was further alleged by plaintiff's counsel, that Richard Hudspeth, the principal in both bonds, had run away and could not be served. The defendant's counsel then objected that the judgment was no evidence in this case. That defendant was neither party nor privy to the action in which the judgment had been rendered, and that his right ought not to be affected by the judgment. That the bond or indemnity was given, to save plaintiff harmless from the consequences of the claim, and non delivery of the property, and that the recovery against the plaintiff was for the non delivery of the property. That it was incumbent on the plaintiff now to produce the evidence of the breach of the condition of the bond which was the foundation of the judgment now tendered. That if this was done, the defendant would have the right of cross examining the witnesses and offering rebutting evidence, which had heretofore not been the case. It was admitted that the bonds were joint and several, and that the obligees had a right to elect whether they should be joint or several, and that Richard Hudspeth had run away.

By the court.—It has been contended, that the action in which the judgment was obtained and is now the foundation of this ac-

tion should have been against Richard Hudspeth, and the present plaintiff. Two reasons have been assigned why the action was not so prosecuted; either of which is valid in law. The second objection is answered by the same allegation, viz. that the bond was joint and several, and that the principal obligor had run away. To the objection that the judgment against the present plaintiff is no evidence of the breach of the condition of the bond of the defendant, and that he was not a party or privy to the action in which that breach was established by the records

157 of the court, is of no \*avail in the present case. The bond was to indemnify and save the plaintiff harmless, from the consequences of a bond he had executed jointly with the plaintiff's father. When he executed that bond, he knew that he could not be a party to the action upon the bond given by the plaintiff as security to his father. The condition of that bond was to save the present plaintiff harmless. Has he complied with that condition? The record says he has not; the original plaintiff says he has not. But he contends that the plaintiff shall now produce the evidence upon which judgment was rendered against him for \$100. Has he a right to this evidence. Between the rendition of that judgment and the trial of this issue, the witnesses by whom the breach of the condition of the bond was established may have died. The condition of his bond was not that the original plaintiff should prove to his satisfaction that the plaintiff's bond had not been performed, but that the present plaintiff should suffer no loss or damage from entering into that bond. The plaintiff has proven both by written and oral testimony, that he has suffered loss to the amount of \$100, which he has a right to recover in this action. Objections overruled.

### C. Daniel v. J. G. Andrews.

In Wilkes Superior Court, July Term. 1832.

**Negotiable Promissory Notes—Proof of Consideration.**\*—The legislature of Georgia, in making promissory notes negotiable, whether given for money or other thing, ipso facto made them exempt from the necessity of proving consideration.

This action was founded on a note of hand, couched in these words; "On the 25th day of December next, I promise to pay Cunningham Daniel, two hundred and fifty dollars in money, or small notes on John G. Andrews, for value received."

When the note was produced, the defendant excepted to it, on the ground that it was not a promissory note according to the British authorities. That by these authorities, two properties were imparted to promissory notes, that did not belong to other instruments; viz. that consideration was implied, and

\***Promissory Note—Consideration.**—A paper may be a good promissory note although no consideration is mentioned in it. *Mitchell v. Rome R. R. Co.*, 17 Ga. 574.

negotiability conferred. That in the present case, if the instrument declared upon should be adjudged not to be a promissory note, the plaintiff would have to prove the consideration, which he could not do, because there was none. That the judiciary act of 1799, makes notes for specific articles or other things negotiable, but does not declare them promissory notes, nor give them the privileges of promissory notes, except as to negotiability; and does not impart to them the implication of consideration. No act of assembly, since the act of 1799, makes any innovation of the provisions of that act.

By the court. It is true that deeds or 158 bonds and promissory \*notes are the only contracts in which it is unnecessary to state and prove a consideration. 2 Blk. Com. 446. It is also true, that the statutes of this State do not, *eo nomine*, make notes for specific articles, promissory notes within the statute of Ann., but they recognize promissory notes for specific articles, and other things besides, for the payment of money, and make them negotiable under the rules and regulations applicable to promissory notes. What is the reason why the statute of Ann. places promissory notes on an equal footing with specialties? Promissory notes and specialties are at the extremes of written agreements. The one the highest and most solemn act that is performed by an individual, and the other in the lowest class. What is the reason of the law for placing these two instruments upon the same level? The reasons of the legislature were manifestly different. Specialties imply consideration on account of their dignity, and the deliberation and solemnity with which they are executed. Promissory notes imply consideration for the benefit of commerce. They are in fact considered a species of circulating medium, and have been so treated by writers in commercial countries. It would utterly disqualify them from subserving the interest of commerce, if every indorsee or holder into whose hands they might come, should be required to prove the consideration upon which they had been given. It is then the very essence of a negotiable paper, that its consideration should be implied. The legislature of this State in making promissory notes negotiable, whether given for money or other thing, *ipso facto* made them promissory notes, and exempted them from the necessity of proving consideration. The objections are overruled.

#### Charles C. Mills v. Jesse Mercer and Wife.

In Wilkes Superior Court, July Term, 1832.

**Fi. Fa.—Verbal Transfer of.\***—A verbal transfer of a *fi. fa.*, for a valuable consideration, is an equitable transfer of the interest; but the actual delivery and consideration must be proved.

**\*Chose in Action—How Assigned.**—The principal case is cited in Price v. Bradford, 5 Ga. 366, to the point that a chose in action may be assigned by parol upon delivery and payment of a consideration.

**Bill of Sale—Alteration—Consideration.**—An alteration of a bill of sale, by note at the foot thereof, from an absolute one to one which limits the interest in the property, conveyed to a mere estate for life, although by consent of parties, ought to be upon valuable consideration or the courts will not enforce it.

**Execution of Promissory Note—Settlement of Accounts—Evidence.**—The execution of a promissory note is evidence in law of a full settlement of all accounts up to the date thereof, except such as are specially accepted at the time.

In this case a bill was filed for account, and for the enforcement of a contract, alleged to have been entered into, for an execution against one Ruddle; and for setting up and recording a bill of sale from complainant to Nancy Simons, (now Nancy Mercer) for two negroes. The bill of sale contained a stipulation that the negroes were to revert to complainant on the death of the said Nancy Simons.

When the bill was read, two objections were made. 1st. That a bill for specific performance was not sustainable, touching the personalty. 2d. That matters of account are cognizable at law, and therefore not relievable in equity. In this case the respondents had filed a cross-bill, and had therefore given jurisdiction to the court; and it was therefore incompetent 159 \*for them to object to the jurisdiction of the court, as the cross-bill covered the whole ground of the original bill. The plaintiff then offered evidence to prove that one of the respondents had said she had given the execution against Ruddle to her brother the complainant. This evidence was objected to, by respondents' counsel, on the ground that a *fi. fa.* could be transferred only by written assignment. In support of the evidence, a case was cited from Massachusetts Reports, in which it had been determined that a verbal transfer of a *fi. fa.* for a valuable consideration, was an equitable transfer of the interest. The case cited was in substance as follows; A. had obtained a judgment against B. and placed the *fi. fa.* issued thereon in the hands of C. an officer for collection. C. neglected to raise the money. When A. called for the money, C. paid him the amount due; and A. directed his attorney to make a written assignment of the *fi. fa.* which was not done. C. instituted a suit upon the judgment to recover the amount of B. It was objected that the action would not lie, which was brought in the name of A. for the use of C. The action was sustained by the Court of Appeals. Upon the authority of this case the court permitted the complainant to proceed with his evidence, deciding that if he proved a delivering and a valuable consideration he was entitled to a recovery. The evidence of Benjamin Slack proved that he heard the respondent, Nancy Simons, say she had given the execution to complainant. This was in the early part of the summer of

**†Execution of Promissory Note—Settlement of Accounts—Evidence.**—The principal case is cited and approved in Broughton v. Thornton, 50 Ga. 571.



1826. About five months after, he heard the same respondent say, she had taken the *fi. fa.* back again, upon an agreement to pay the complainant the value of the *fi. fa.*, in other property. James Wellborn swore he heard the same respondent say some time in the year 1825, or 1826, and he thinks in the latter year several times, that she had given the said *fi. fa.* to her brother the complainant. He heard nothing about taking it back. The respondents produced the execution docket, by which it appeared that the *fi. fa.* had issued the 14th September 1826. John Burkes, the sheriff, proved that the *fi. fa.* had been delivered to him by the clerk, and that it had remained in his hands till November 1829, when he returned *nulla bona* upon it; that shortly after the return he got possession of it again, and has had it ever since in his possession. The complainant admitted in his answer to the cross-bill, that he had never had possession of it. Here the testimony touching the *fi. fa.* closed. The bill alleged that the respondent Nancy had bought a negro woman Charlotte and her child Wiley of him. That when he executed a bill of sale for them, he proposed to his sister, that, as she had no children, the said negroes should belong to him and his heirs, after her death. To this, respondent assented; and respondent substantially admitted the allegations of the bill, but 160 asserted, that when the bill \*of sale was first written it was absolute, but at the request of the complainant, she gratuitously consented that the condition should be added at the foot of the bill of sale. The next exhibit was a bill of particulars for articles purchased by complainant, and delivered to his sister the respondent, with the allegation that they were purchased at her request, and that she promised the amount should be credited on a note given by him for cotton before that time purchased by him of the respondent. Upon comparing the date of the bills of particulars, with that of the note, it appeared that the bills of particulars were dated the 26th of March, and the note was dated the 29th of March of the same year. It was contended that the execution of a note for upwards of \$1300 by the complainant to the respondent extinguished all open accounts existing between the parties, unless they were expressly excepted at the time the note was executed.

The court in charging the jury stated that if the complainants' answer to the cross-bill had been disclosed to the court before complainant's evidence had been introduced touching the *fi. fa.* the whole of that evidence would have been repelled as inadmissible even under the authority of the case from Massachusetts Reports; for there an actual delivery and a valuable consideration had been proved. In the case under consideration, neither had been established. On the contrary, complainant expressly admitted in his answer to the cross-bill that he had never had possession of the *fi. fa.* With regard to the bill of sale sought to be set up, the court stated to the jury, that if they were satisfied from the evi-

dence that the original bargain for the negroes was for the absolute property in them, and that there was no consideration given by complainant to respondent, for the acceptance by her of a mere life estate in the negroes, they ought to find for the respondent; but if they were not satisfied of these facts, they would find for the complainant, on that part of his bill. The court charged the jury, that the execution of the note of \$1300 by the complainant to the respondent, was evidence in law of a full settlement of all accounts between the parties except such as were specially excepted. That as the accounts set forth in complainant's bill bore date anterior to the note, and had not been proven to be accepted, they were in contemplation of law finally settled by the note.

The jury found for complainant as to the bill of sale, and for respondents on the other grounds of complaint.

### 161 \*Benjamin Slack v. John S. Moss.

In Wilkes Superior Court, July Term, 1832.

**Promissory Note—Consideration—Forbearance.\***—The court refused to decide that a note given in consideration of forbearance to sue, is void, for want of consideration; but when the cause of action forborne, is clearly illegal and void, a note given in consideration of forbearance is tainted with the nature of that cause of action.

**Same—Witness—Competency.†**—The payee of a promissory note is a competent witness to prove its consideration under some circumstances.

The notes on which this action is founded, appear by the evidence to have been given in consideration of notes to a much larger amount which had been won at gaming, from the present defendant. The note upon which the question arose was for \$25; defendant contended that in contemplation of law it was a note given for gaming. The answer set forth the gaming act, and relied

**\*Promissory Note—Consideration—Forbearance.**—Forbearance to prosecute a legal claim, and the compromise of a doubtful right, are both sufficient considerations to support a promissory note. *Austell v. Rice*, 5 Ga. 472.

**†Negotiable Instruments—Witness—Competency.**—The decision of Lord Mansfield in *Walton v. Shelly*, 1 T. R. 300, that a person who has signed a negotiable instrument, thereby giving it credit and circulation, should not be permitted to give testimony impeaching its validity after it has passed into the hands of an innocent holder, was rejected by the principal case, and it is believed that the courts of Georgia have very generally acquiesced in that decision. See the principal case cited in *Winkler v. Scudder*, 1 Ga. 108.

And in England, too, the decision in *Walton v. Shelly*, has been repudiated, and the rule laid down that payees and indorsers of negotiable instruments may be admitted to prove them voidable or void *ab initio*, unless the witnesses are disqualified for some other reason. *Jordan v. Laish-brooke*, 7 T. R. 598.

For example, where the maker and indorser of a

upon it for defence. Plaintiff's counsel contended that a note given in consideration for forbear suing (which was the case here) was a note given upon legal consideration. That in this case plaintiff had notes to a large amount and had prima facie a good cause of action, and the notes given in lieu of them were for a much less sum, and a longer term of payment.

The question here presented, so far as the court recollects, is a new one. It is admitted that the notes sued upon were given in consideration of other notes won at gaming, or given for a gaming consideration. The court cannot decide generally that a note given in consideration of forbearance to sue, is void, for want of consideration; but when the cause of action forborne to be sued, is clearly illegal and void, as in the present case, the court is inclined to the opinion, that the notes given in lieu and in consideration of the gaming notes, or even as a compromise for them, or for forbearance to sue upon them, are contaminated with the illegal consideration upon which the original notes were given. If they were not so adjudged, the statute of gaming would be frequently, if not always evaded, because a note given in consideration of such notes might be frequently obtained, by making some deduction in the amount, and extending the time of payment.

In the course of the trial, the payee of the first notes was called as a witness, to prove the consideration, upon which those notes were given. His competency was objected to on the authority of *Walton and Shelly*, 1 Durn. and East, 296, and some decisions at *Nisi Prius*, and a recent decision said to have been made in the middle Circuit, in which the principle adjudged in *Walton and Shelly* was recognized to be law in this state. The case of *Walton and Shelly* is the first case in the British law books in which the principle attempted to be established in that case, is to be found. That case was decided in the year 1786, two years in point of date after the act of the legislature of this State and more than ten years after the date of the 14th May, 1776, which was adopted by that act as the period

note are sued in the same action, and the maker is dismissed from the action on account of his having received his discharge in bankruptcy, he is a competent witness in behalf of the indorser. *Hayden v. McKnight*, 45 Ga. 147.

But an indorser of a note is an incompetent witness, on the score of interest, to prove the payment of money by him to the attorney of the plaintiff, in an action against the attorney, unless released. *Nisbet v. Lawson*, 1 Ga. 275.

**What Decisions Are Authority in Georgia.**—The court in *Thornton v. Lane*, 11 Ga. 500 *et seq.*, in discussing the question as to what adjudications are authority in Georgia, and what are opinion merely, cited the principal case determining between the conflicting decisions in the English cases of *Walton v. Shelly* and *Jordan v. Laishbrooke*. It was said: "In cases which are authority, we must look alone to the principle of the decision, for that alone is authority."

by which to determine what British  
162 \*Statutes, and what part of the common law should be in force in this State. If the principle settled in *Walton and Shelly* was not law in England on the 14th day of May, 1776, a fortiori it was not law in Georgia on that day, and the adopting statute recognizes neither British common or statute law which was not in force in the province of Georgia on that day. But independent of this view of the question, there is abundant reason for rejecting the authority of *Walton and Shelly* in the courts of this State. That case is not authority in the Courts of Great Britain at this day. The case of *Jordan v. Laishbrooke*, 7 Durn. & East, 601, decided in 1798 in the same court that decided the case of *Walton and Shelly*, overturned the authority of that case, expressly, by three judges against one. The case of *Walton and Shelly* is remarkable for the circumstances attending it. The counsel for the plaintiff rely almost entirely upon cases recently decided, and which appear not to have been reported. The only reported case referred to is in *Viner's Abridgment*, an authority which the presiding Judge has never seen. The counsel laid down as an incontestible principle of law, that no person whose name is upon a negotiable instrument, is a competent witness, to impeach its validity. The Judges, in their opinions, assume the same principle as settled law, and what is still more surprising, the adverse counsel acquiesce in this assumption of court and counsel, but endeavor to draw a distinction to prevent its application. They contended that the principle had been confined to instruments which were the immediate cause of action, which would have rendered it inapplicable in that case. In that case the instrument, the foundation of the action, had been given in consideration of two notes. The defendant called one of the indorsers of those notes to the plaintiff, to prove that the notes were given for usurious consideration and the witness was repelled on the ground, that having indorsed it, and put it in circulation he was an incompetent witness to impeach its validity. We have seen that this was in 1786. Twelve years afterwards, in 1798, the case of *Jordan and Laishbrooke* was decided in the same court, when the principle decided in *Walton and Shelly* was overturned and declared not to be law. It was declared in that case, that no case had been decided in the courts of Westminster Hall, before the case of *Walton and Shelly*, in which the principle decided in that case had been recognized as law. The cases referred to in *Walton and Shelly* must therefore have been decisions at *Nisi Prius*. It may be properly asserted that the principle decided in that case is not supported by a single elementary writer on the law of evidence, of established reputation. But it may be said that the case of *Walton and Shelly* was decided in the time of Lord Mansfield, and principally through his influence, and the case of *Jordan and Laishbrooke* in the time of Lord Chief Justice Kenyon, and that Lord Mansfield's decisions



163 \*are entitled to more respect than those of Lord Kenyon. As a general rule this is willingly admitted. But in the two cases which are here the subject of investigation, we have only to consider the reasons upon which the two cases were decided. Fortunately, the reasons for both decisions are presented to the inquirer after judicial truth. We are not reduced to the necessity of deciding according to the authority of the presiding judges in either case. The commercial law of England is greatly indebted to the distinguished Lord Mansfield. Like other innovators he suffered his powerful mind to slide into error upon what appears to have been a favorite subject with him, the law merchant, which before his time was in a chaotic state. He appears to have been a decided friend of the commercial interest of his country, and in order to place it upon what he deemed solid ground, he departed from the established principles of evidence. Before the decision of the case of Walton and Shelly the general rule was settled that all persons were competent to be heard as witnesses who were not interested, or were not infamous. Courts of law in England for the last hundred years, have very uniformly relaxed the rules of evidence established in more remote times; and no Judge has contributed more to this relaxation than Lord Mansfield; yet in the case of Walton and Shelly, in violation of his general train of decisions, he retrograded, and excluded a witness or the ground of incompetency, who would have been admitted one or even two hundred years before, for in the case of Walton and Shelly, the witness was called upon to testify against his interest, if he had any. It is understood that the states of New York, Massachusetts and Pennsylvania have adopted the principle decided in Walton and Shelly. And even in South Carolina the same principle has been adopted. In the case of Craig v. Newton, (1 Const. Repts. page ) the majority of the court rejected the evidence of the maker in a case between an indorsee and indorser, on the ground that he was interested because he was liable to the cost. But two of the three judges which formed the majority of the court, appear to place great reliance upon the case of Walton and Shelly. Judges Cheves and Nott dissented, holding the maker to be a competent witness. Judge Colcock, before whom the case was tried, is by the reporter made to declare, that he considers there is no difference between indorsing a note knowing that it may be invalidated by his evidence, and forging. This opinion is given in the course of an argument to sustain the case of Walton and Shelly against that of Jordan and Laishbrooke. The extravagance of this opinion is only equalled by its folly. By indorsing a note the payee knew that he rendered himself liable to pay it, if the drawer did not. By giving evidence to exonerate the drawer from the payment of it, he imposed upon himself the obligation to pay it. Yet 164 this act is held to be \*as atrocious as forgery. The decisions of the state courts are not authority in the courts of this State, for two reasons. First, because the

adoption by the states of the British Statute and common law, is as variant, as the varied interests of the several States in local matters. And secondly, because the degrees in which the British Statutes and common law have been changed by state legislation is also as various as their local interests. Those decisions are of use in this State only so far as their reasons are sound, and applicable to our statutes and the existing state of things here. The case of Walton and Shelly was decided to subvert the commercial interests of England, at the expense of all the other interests of that nation. For that reason it has been overruled even there. The state of New York is one of the most commercial states in the union. It is therefore not surprising that the principle decided in Walton and Shelly should have been adopted in that state before it was reversed in England. The cities of Boston and Philadelphia are commercial cities, and probably the Judges of those states have been principally taken from those cities. If so, that may account for the adoption of Walton and Shelly by their courts. But if Judge Cheves has given a correct history of the decisions of New York upon that subject, (and there can be no doubt that he has) they have been laboring ever since the adoption of it, to evade its force. If the courts in South Carolina have adopted the principle of that case, they will in all probability adopt the same measures to get rid of it, which Judge Cheves charges upon the courts of New York. If the principle of Walton and Shelly has not been adopted in the case of Craig v. Newton, the decision in that case is at least as indefensible. In Craig v. Newton, the action was by the indorsee against the indorser. The drawer or maker was called as a witness to prove notice to the indorser. A verdict had been previously rendered against him on the same instrument. He was repelled on the ground of interest, because it was said by one Judge he was liable for the costs of the action; the other two Judges appearing to rely principally on Walton and Shelly. If he was liable to the costs of that action, it must have been in an action between the then plaintiff and him on the note. He certainly could not be held to pay the cost of the suit between the indorsee and indorser by any process issuing in that case. If the plaintiff had been cast in his suit, he would have had the right to sue the maker and recover of him the cost of the former action upon the same note; and if the plaintiff was successful in the first instance against the indorser, the indorsee had precisely the same right to sue the maker and recover of him the cost of the original action. The interest of the maker, therefore, was perfectly balanced, in which case Judge Colcock himself admitted he was a competent witness. Yet the witness was re- 165 jected by Judge \*Colcock. Upon a full consideration of the cases of Walton and Shelly, and Jordan and Laishbrooke, and the reasons upon which those cases rest, the court decide, that the payee in this case is a competent witness. It rejects the authority of the case of Walton and Shelly on the following grounds:

1. Because the principle decided in that case was first decided to be law more than ten years after the period determined by the adopting act of this State.

2. Because the principle therein decided is not now law in England, and never was, except from the year 1786, to the year 1798.

3. Because the principle decided in that case is unsupported by any elementary treatise on the law of evidence.

4. Because it was evidently decided in subservience to the commercial interests of that country, to the injury of every other; thereby encouraging a spirit of favoritism at war with the genius of our constitution, and adverse to the tranquility and harmony of our government.

### Slack v. Slack.

In Wilkes Superior Court, July, 1832.

**Temporary Alimony—Ne Exeat—Case at Bar.**—The court refused to order an allowance by way of temporary alimony for a married woman, out of her husband's estate, during the pendency of a libel for divorce, and a bill of "ne exeat," when it appeared by his answer that the husband was willing to take her to his bed and board and treat her well.

This is a motion to obtain an order to compel respondent to allow the complainant an allowance in the nature of temporary alimony, and to defray the expenses of the libel for divorce now pending in this court. In support of this motion two cases were cited from the New York Reports. In opposition to the motion, it was contended that the New York cases were by no means analogous to the case under consideration. The cases in New York were founded upon the pendency of a bill for alimony. The application was for temporary allowance by way of temporary alimony, and to prosecute the bill for alimony supported by affidavits which were not controverted by an answer. Here a bill of ne exeat has been filed and is now pending, which the respondent has not only answered, but has in fact denied all its material allegations. The answer further shows that respondent is willing to cohabit and live with the complainant, and denies that he has driven complainant, his wife, from his house, and that she now is in possession of two negroes, the property of respondent. The answer also alleges that respondent has solicited complainant to return and live with him and promise to treat her kindly. Cases were read from the South Carolina Reports and others, showing that when the court decrees temporary alimony, it is only until the husband shall receive his wife, and promised to treat her kindly. Prathro v.

Prathro, 4 Dessau. Cha. Repts. 33, Purcell v. Purcell, 4 Hen. & Munf. \*507; Jelineau v. Jelineau, 2 Dessau. Cha. Rep. 50. According to Ball v. Montgomery, 2 Vesey, 189, and Bullock v. Menzies, 4 Vesey, 798, alimony will not be decreed out

of a separate estate where the husband promises to receive his wife and treat her kindly. (a)

**PER CURIAM.** Upon the authority of the cases cited by respondent's counsel, and which are not contradicted by those cited for the complainant, I feel constrained to refuse the motion. Applications of this nature, generally appeal strongly to the sympathy of the courts, but in the case under consideration, there are circumstances to blunt that sympathy. The complainant is an elderly lady who has connected herself in marriage with a man much younger than herself, and whose family and connexions ought to have warned her against the matrimonial union which she has formed. It may be productive of the welfare of society to permit her to reap the fruits of her indiscretion, at least as far as the rules of law and the practice of courts of equity usually authorize: beyond that point this court will interfere to protect her against the consequences of her indiscretion, but no farther. The motion is overruled.

### Rene Stone v. S. B. Head, and R. H. Long, Defendants in Execution, and Jesse Mercer, Claimant.

In Wilkes Superior Court, July, 1832.

**Dormant Judgments—Construction of Statute.**—The construction put upon the st. of 22d Dec. 1823, in relation to dormant judgments, is, that when seven years have elapsed without any entry on the fi. fa. showing vigilance on the part of the plaintiff or owner, the judgment is void.

In this case a fi. fa. had been levied upon a tract of land which was claimed by Jesse Mercer. The sheriff who made the levy,

(a) See also Head v. Head, 3 Atkyns, 547; Seeling v. Crawley, 2 Vern. 386; Oxenden v. Oxenden, 2 Vern. 493; Angier v. Angier, Prec. in Chan. 496.—Note in Original Edition.

**\*Dormant Judgments—Construction of Statute.**—The construction given by the principal case to the Act of 1823 in relation to dormant judgments was approved and followed in Booth v. Williams, 2 Ga. 256. But see the principal case cited in Worthy v. Lowry, 19 Ga. 519, where JUDGE LUMPKIN, delivering the opinion of the court, said that he had yielded very reluctantly to the judgment pronounced in Booth v. Williams, *supra*, and that they might yet be driven, by the necessity of the case, to return to the plain and obvious language of the law. He said its only practical effect was to operate very harshly upon kind-hearted and careless creditors. See Code 1895, § 3761.

In Ector v. Ector, 25 Ga. 274, an execution was issued in 1841, and money was collected on it from the sale of the defendant's property in 1846; in 1848 there was a return of no property; in 1850 money was raised on a fi. fa. in favor of the defendants, and paid over by order of the court to this execution against him, which was receipted for on the fi. fa. by the plaintiff's attorney. It was held that the execution was not inoperative under the dormant judgment act of 1823.

**Same—Statute of Limitations.**—The dormant judg-



proved that the claimant lived on the land at the time the levy was made and also that Long, one of the defendants, lived upon it at a period subsequent to the date of the judgment. Plaintiff in *fi. fa.* contended that he had proved enough to remove the onus and put the claimant to the production of his title. This was opposed by claimant's counsel. Pending the discussion it was discovered that more than seven years had elapsed between the date of the last entry and the date of the levy, and that the entry was subsequent to the 22d of December, 1823, the date of the act rendering judgments void after such lapse of time. The construction of that statute, which has been adopted by the judges in convention, is, that where seven years have elapsed, without an entry on the *fi. fa.* showing vigilance on the part of the plaintiff or owner, the judgment is void. In conformity with this construction, the *fi. fa.* now before the court is adjudged to be void and of no effect.

167 \*The counsel for plaintiff in *fi. fa.* then stated that the administrators of Stone believed the *fi. fa.* to have been satisfied, but finding it with other papers of their intestate, they had felt it to be their duty to levy it upon property which they knew had belonged to one of the defendants since the date of the judgment. Evidence was then offered which proved that the *fi. fa.* had been satisfied with defendant's money. The *fi. fa.* was ordered to be returned satisfied.

### Semmes v. Porter.

In Wilkes Superior Court, July Term, 1832.

**Executor De Son Tort\*—Interest in Property—Case at Bar.**—Although a son under his father's will, may have an interest in the crop growing upon land devised, for the support of himself, his mother and other children; if his mother die, and he seizes upon the crop without being appointed executor or administrator of his mother, his interest in the crop will not shield him from liability as executor *de son tort*.

This action has been brought against the defendant as executor *de son tort*. The plaintiff's demand was for articles for the sup-

port and clothing of the three youngest children of Thomas Porter deceased, the testator. In the first clause of his will he directed, that his wife Mary Porter and his three youngest children should reside on the plantation whereon he died. In a subse-

quent clause he directed, that his wife Mary Porter should be executor of his estate. The meddler is executor. *Alfriend v. Daniel*, 48 Ga. 155.

**Same—Rule Where There Is a Rightful Executor.**—In some of the earlier cases it was held that there may be a rightful executor and an executor *de son tort* of the same person. Therefore if one takes possession of the goods of a deceased person, claiming to be executor, or does those acts which only an executor can do, he may be charged as executor *de son tort*, though there be a rightful executor or administrator. *Gleaton v. Lewis*, 24 Ga. 209; *Howland v. Dews*, R. M. Charl. 383.

**Same—Same—Effect of Statute.**—But this rule, it would seem, has been changed by the statute, declaring that an executor *de son tort* is one who intermeddles with the personalty of a deceased individual whose estate has no legal representative.

In *Willingham v. Rushing*, 105 Ga. 79, 31 S. E. Rep. 132, it is said: "Under the terms of this section, (Civil Code, § 3310), it appears that no person can be charged in this state as executor in his own wrong where there is a lawfully appointed legal representative upon the estate. If there is no legal representative upon the estate, the same acts, and no others, which would charge him at common law as an executor in his own wrong would charge him in this state in like capacity."

**An Executor De Son Tort of an Executor De Son Tort**, represents the first testator, and where property is held by the first testator in trust the statute of limitations does not begin to run in respect to such property in favor of the executor *de son tort* of the person who was executor *de son tort* of the first testator until he has terminated the relation by converting the trust property to his own use. *Dawson v. Callaway*, 18 Ga. 573.

**But the Administrator of an Executor De Son Tort** does not himself become an executor *de son tort* by taking possession of property found in the possession of his intestate at his death, even though that property was in the possession of the intestate as the executor *de son tort* of another person. *Alfriend v. Daniel*, 48 Ga. 154.

### What Acts Constitute One Executor De Son Tort.

**Intermeddling.**—One who wrongfully intermeddles, without authority of law, with the personalty of the decedent, or converts the same to his own use, is an executor *de son tort*. *Wilson v. Hall*, 67 Ga. 53.

Likewise, if a person has some color to intermeddle with the goods of an intestate, but he exceeds his authority, that will make him an executor *de son tort*. *Wiley v. Truett*, 12 Ga. 588.

**Intermeddling with Realty by Heirs.**—But for heirs to intermeddle with realty will not constitute them executors *de son tort*; any sale made by them would leave the lands subject to administration for the payment of debts. *Johnson v. Johnson*, 80 Ga. 260, 5 S. E. Rep. 620.

And the heirs at law of an estate may, as between themselves, divide the estate by agreement, without administration; but as against creditors, if they convert to their own use the personal effects, they are executors *de son tort* and liable as such. *Barron v. Burney*, 38 Ga. 264.

**Same—Judgments Obtained Prior to December, 1823.**—Moreover, the dormant judgment act of 1823 does not apply to judgments obtained prior to December, 1822, and, therefore such judgments need not be renewed. *Jones v. Tarver*, 19 Ga. 279; *Hollingsworth v. Dickey*, 24 Ga. 434.

**\*Executors De Son Tort—Definition.**—An executor *de son tort* is any person, who, without authority of law, wrongfully intermeddles with, or converts to his own use, the personalty of a deceased individual whose estate has no legal representative. Code 1895, § 2441; *Wiley v. Hall*, 67 Ga. 53.

**The Theory of an Executorship De Son Tort** is that if one intermeddles with the property of a dead man, it is a fair presumption that there is a will and that

quent bequest, he gave his negroes during her life for her support, and the support of his three youngest children, of whom the defendant is one. In an after clause of his will he gave to the defendant six hundred acres of land to be laid off out of the tract whereon he lived at the time of his death, but that he should not take entire possession of his land: that his wife and his two youngest children should reside upon it. Nor after the death of his wife should the said Solon have entire possession of the land, if his two daughters should not be of full age or be married.

Mary Porter died in the month of August, 1831, and left a crop of cotton on the land,

which the defendant sold, and offers the will to show his interest in the cotton and contended that the sale of it could not make him an executor of son tort.

The court, upon the reflection that the case permitted, held that the cotton left on the plantation belonged to the estate of Mary Porter, and ought to be assets in the hands of her representative to satisfy the demand of the plaintiff and such other debts as might be due by Mary Porter in her life time. That the interest of the defendant in the land could not exempt him from the charge of intermeddling with the estate of Mary Porter deceased. The jury found according to the opinion of the court.

**Character of the Intermeddling.**—But in order to charge one, who intermeddles with the goods of the deceased, as executor *de son tort*, the intermeddling must be of such a character as to indicate that the wrongdoer is endeavoring to perform an act which should be performed only by the legal representative. Therefore, if a person is lawfully in possession of and sells the goods of a deceased person, under a *bona fide* claim of right, and without any intention to take upon himself the exercise of those duties which appertain to the office of a legal representative only, it is sufficient to exempt him from being charged as an executor *de son tort*, though he may not be able to make out a completely strict and legal right. *Willingham v. Rushing*, 105 Ga. 72, 31 S. E. Rep. 180.

**Selling or Giving Away of the Property.**—So also, if one man takes the goods of the deceased and sells or gives them to another person, this will charge him as executor *de son tort*, but not such other person. *Wiley v. Truett*, 12 Ga. 588; *Bryant v. Helton*, 66 Ga. 477.

**Filing Will for Record.**—One may become an executor *de son tort* by filing and recording a will left with him by the decedent. For example, where a decedent left a will with another, who filed it and had it recorded by the ordinary, but took out no letters of administration with the will annexed, nor any other legal authority to administer on the estate, it was held that he became an executor *de son tort*. *Morrow v. Cloud*, 77 Ga. 114.

**Possession Taken under Fraudulent Conveyance.**—Where a debtor in his lifetime makes a fraudulent or voluntary conveyance of his property with a view to defrauding his creditors, the fraudulent grantee or donee, who takes or retains possession of the property under the conveyance, is, after the death of the grantor, liable to the latter's creditors as executor *de son tort*. *Howland v. Dews*, R. M. Charl. 383; *Clayton v. Tucker*, 20 Ga. 452; *Gleaton v. Lewis*, 24 Ga. 209.

But he is not liable as executor *de son tort* to the creditors of the deceased grantor, if he took possession under mistake and without fraud. *Howland v. Dews*, R. M. Charl. 383.

**A Purchase of Land Made by a Son from His Insolvent Mother to Defraud Her Creditors**, and his reduction of the land to his possession before or after her death, and a subsequent sale of the same, will not fix him with the character of executor *de son tort*, nor tend to do so. *Johnson v. Johnson*, 80 Ga. 260, 5 S. E. Rep. 620. This case cites the principal case.

**Assignment for Benefit of Creditors.**—If the assignee for the benefit of creditors accepts the trust, goes into possession of the goods conveyed, sells

168 \*Richard Roe and Kenchen Harrison, Tenant in Possession, and John Kichens, Security Appellant v. John Doe ex dem. Thomas Neal, Respondent.

In Warren Superior Court, April Term, 1832.

**Claim Laws—Nature of.**—Though it is for the benefit

them, some before and some after the assignor's death, and applies the proceeds to the debts mentioned in the assignment, such executor cannot be charged as an executor *de son tort* of the assignor, though the deed of assignment be void for want of a proper affidavit as to the list of creditors. *Chattanooga Stove Co. v. Adams*, 81 Ga. 319, 6 S. E. Rep. 695.

**Validity of Acts of Executor De Son Tort.**—The acts of an executor *de son tort* will be upheld, if they are such as the regular executor would be bound to do. *Dorsett v. Frith*, 25 Ga. 537.

**Same—As to Third Persons.**—But an executor *de son tort* can give to a third person no legal control of the decedent's property. *Wylly v. King*, Ga. Dec. pt. 2, p. 7.

**Rights of Executors De Son Tort—Set-Off.**—Debts paid by an executor *de son tort*, if paid voluntarily, cannot be set off by him against an action by a distributee of the estate for his share of the property. But in a suit against him by the distributees, he may set off the year's support of the family paid to the widow. *Bryant v. Helton*, 66 Ga. 477; *Barron v. Burney*, 38 Ga. 264.

**Liabilities of Executors De Son Tort—Allowance to Widow.**—If executors *de son tort* have, in good faith, furnished the widow her year's support, according to her circumstances in life, and this has exhausted the effects they have used, they are not liable, except for the excess, although, under the Code, executors *de son tort* cannot get credit for any debt they may have paid. *Barron v. Burney*, 38 Ga. 264.

**Same—Continuing Suit against Executor De Son Tort.**—A suit pending against a defendant cannot, on his death, be continued against an executor *de son tort*. *Irwin v. Sterling*, 27 Ga. 563.

**Same—Liability of His Estate.**—Where an executor *de son tort* dies, his estate is charged in the same manner and to the same extent as he himself would have been if living. *Alfriend v. Daniel*, 48 Ga. 154.

**Same—Relief from Liability by Grant of Administration.**—But the fact that a person is an executor *de son tort* does not, *per se*, destroy his rights to administration. But administration may be granted to an executor *de son tort*, and this administration purges and legalizes his tortious acts. *Carnochan v. Abrahams*, T. U. P. Charl. 196.

**\*The Claim Laws Are Permissive and not mandatory.** *Whittington v. Wright*, 9 Ga. 23.



of society that claims to property levied on, should be interposed and settled before the same is subjected to sale by the sheriff, yet the law regulating claims is merely permissive, not mandatory. See *Irwin v. Morell*, ante, 72.

**Same—Evidence of Title—Possession.**—In cases of claim to land, the courts have always required proof of the possession of the defendant in execution at the date of the judgment, or subsequent to it, and though possession is the weakest evidence of title, it is held sufficient to put the claimant to the production of his title.

**Secondary Evidence—Copy—Seal.**—Upon proof that the clerk of the court of Ordinary had been ordered by that court never to permit an original paper to be taken out of his office, a certified copy was allowed in evidence; and the court said there was no law requiring the copy to be under seal. See acts of 1830, Pamph. p. 121.

**Recordation of Deeds—Whom It Concerns.**†—The recording or not recording a deed concerns no one, except those who derive title from the same feoffor by a deed of subsequent date.

**Ancient Deeds—Evidence.**‡—Deeds more than 30 years old need not be proved when possession accompanied the deed from its execution, and that the act of 1785 did not innovate upon the English law respecting ancient deeds. Gilb. Law of Evidence, 94.

**Hearsay Evidence—Admissibility—Age.**—Hearsay evidence is not admissible to prove age.

**Same.**—See 3 Term Reports, 707, where hearsay evidence is fully discussed.

This action was brought upon a sheriff's title for five hundred acres of land, more or less. The land was levied upon, and sold as the property of Crassus Few. Neal proved that Harrison lived upon the tract of land

†**Recordation of Deeds—Whom It Concerns.**—The principal case is cited in *Whittington v. Wright*, 9 Ga. 29, as authority for the proposition that a failure to record a deed concerns no person except those who derived title from the same feoffor by a deed of subsequent date to that under which the party claims title. See the principal case cited in this connection in *Tucker v. Harris*, 13 Ga. 6.

‡**Ancient Documents—Evidence.—A Deed More Than Thirty Years Old**, coming from the proper custody, and free from all suspicious appearances, is admissible in evidence without proof of execution. *Settle v. Allison*, 8 Ga. 201; *Doe v. Roe*, 31 Ga. 593; *Weitman v. Thiot*, 64 Ga. 11; *King v. Sears*, 91 Ga. 577, 18 S. E. Rep. 830; *Bell v. McCawley*, 29 Ga. 355; *Pridgen v. Green*, 80 Ga. 737, 7 S. E. Rep. 97; *Thursby v. Myers*, 57 Ga. 155.

The principal case is cited in *Matthews v. Castleberry*, 43 Ga. 350.

**Same—How Time Computed.**—And a deed more than thirty years old at the time of the trial is an ancient document, though it was under thirty when the suit was commenced. *Gardner v. Granniss*, 57 Ga. 539.

**Same—Possession under the Deed.**—Although the general rule is that possession of the land under the deed is necessary to its admission in evidence, yet this rule does not apply where it is admitted by both parties that the lot of land in controversy was a wild lot and was never occupied by any one until shortly before the suit was brought. *Pridgen v. Green*, 80 Ga. 737, 7 S. E. Rep. 97. See also, *Gardner v. Granniss*, 57 Ga. 539.

generally known to be the property of the defendant in execution. He also proved that the guardian of Crassus Few had rented out part of the tract, but not any part of the land in possession of Harrison, who had been in possession for more than six years. The plaintiff here notified the defendant that he had closed his evidence. Defendant then moved for a nonsuit, on the ground that plaintiff had not made out such a case as to entitle him to recover. Plaintiff's counsel contended that the production of sheriff's title, and proving that the deed covered the land whereon defendant lived, was sufficient to warrant a recovery. That as defendant had failed to put in a claim to the land, when he lived upon it, the law presumed he claimed under the defendant in execution. The law required the sheriff to notify the tenant in possession, whenever he levied upon land, and the presumption of law was that the notice had been given. That the practice in this State ought to be different from that of other States, because the laws of this State required persons having title to property levied upon to claim it, and have their title to it settled by the decision of the court. That the interest of the community required that his claim should be put in: That when a claim was not interposed, the presumption of law was, that the person in possession held under the defendant in execution. That to decide against this presumption was to decide against the interest of the community in favor of the individual who was in possession at the time of the levy. That his title, if a good one, would not be defeated by deciding in favor of the presumption contended for; because his failure to put in his claim did not defeat his title. In the present case, if he was able to produce a legal title, he would prevail.

The Court. The law regulating claims is permissive and not mandatory. It is however admitted, that it is for the benefit of the community, that claims to property levied upon should be made; because in that event, purchasers at sheriffs' sales would be safe in their title; that it would be for the benefit of society that all conflicting claims to property should be settled before sale by the sheriff. It is true that the law

169 \*does not require a person having title to property levied upon to interpose his claim. That the interposition of a claim certainly subjects the claimant to the expense and vexation of a lawsuit, whereas the failure to claim might eventually exempt him from that expense and vexation, still it was for the interest of the community that the claim should be interposed. The practice of the Superior Courts however has been always to require the proof of the possession of the defendant at the date of the judgment or subsequent to it. That possession is the weakest evidence of title, but that proof had always been considered sufficient to put the defendant on the production of his title.

The plaintiff might in this case prove that defendant was in possession under the de-

pendant in execution or might produce the title of the defendant in execution.

Defendant's counsel objected, that plaintiff, having notified defendant that he had closed his case, could not produce any further evidence.

The court suggested that it was for the interest of both parties that all evidence applicable to the case should be produced, as it was a case in the last resort—that if the evidence was rejected, it would produce another action of ejectment. This suggestion being acquiesced in, the plaintiff produced the copy of a grant from the State to Ignatius Few, for 925 acres, and the copy of the will of the grantee, by which he bequeathed the said land to Crassus Few, defendant in execution. The will further disclosed the fact that the land was in possession of one Davidson, and that suit was about to be commenced against him. When the copy of the will was produced, defendant's counsel objected that the original only was evidence. Plaintiff proved that he had applied to the clerk of the court of ordinary, when the will was on file, and the clerk refused to deliver the original, saying that the court had directed him not to permit any will on file to be taken out of his office. The court decided that the copy might then be read in evidence. Counsel further objected that the certified copy produced was not under the seal of the court of ordinary, nor was there any certificate that there was no seal of office. The court decided that the provisions of the act of congress, directing how the records of the courts of one State to another should be certified, did not govern this case, which embraces a certificate from the clerk of the court of ordinary of the county of Columbia, in this State. That there was no law of this State requiring the seal to the clerk's attestation; (1) the certificate was, therefore, admissible evidence in the case. The plaintiff then closed his case.

The defendant derived title from Baxter Jordan, the grantee of 200 acres. In deducing title, a deed was produced, 170 \*dated 1793, and it was proved that possession had followed the execution of the deed. The deed had not been recorded. The plaintiff's counsel required that the execution of the deed be proved according to the act of 1785. The court inquired if the plaintiff derived title from the feoffor. The reply was that he did not, but that he derived title from another grantee. The court decided that the deed not being recorded, concerns no person except those who derived title from the same feoffor, by a deed of subsequent date to that produced by defendant. The court also decided that deeds more than thirty years old need not be proved, where possessions accompanied the deed from its execution, and that the act of 1785 did not innovate upon the British law respecting ancient deeds. The defendant here closed his defence.

The plaintiff offered, as rebutting evidence, the answer of Thomas White, (executor of Ignatius Few, to prove the age of Crassus Few,) who swore that he knew nothing of his age except from information, and that he believed from that information, he was about 22 years old when he died. This evidence was objected to by defendant's counsel, as hearsay evidence; and that hearsay evidence in this case was inadmissible. The objection was sustained by the court, and the evidence repelled.

The case was then submitted to the special jury, who found for the defendant.

### Reuben Jordan v. The Heirs and Distributees of James A. Bradley.

In Oglethorpe Superior Court, October Term, 1830.

**Will—Validity—Manumission of Slaves.**—If a person, making his will, directs that, "If any of his slaves should desire to go to the African Colony, they should be permitted to go, and their expenses to the port of embarkation should be paid," such will is not void under the act of 1818; nor is it inconsistent with the policy of our laws; but ought to be executed.

This is a Bill in equity filed by the executor of James A. Bradley deceased, praying the direction of the court in the execution of the will. The will, among other things, directs, that if any of his slaves should desire to go to the African Colony, they should be permitted to go, and their expenses to the port of embarkation should be paid.

In opposition to the bill, the act of the State of Georgia was read, which prohibits the manumission of slaves, which act refers to preceding acts for the same purpose. The act of 1818, declares every will or other instrument, intended to give freedom to slaves, to be null and void.

By the Court. The act of 1818, (Prince's Dig. 465,) and those which preceded, were

**\*Will—Validity—Manumission of Slaves.**—The statute prohibiting the manumission of slaves was intended to prevent emancipation where the slaves emancipated were to remain in the state; therefore it is not against the policy of the laws of the state of Georgia for a testator to direct in his will that his slaves be removed out of the state into any other state or country where the law authorizes it, and there emancipate them. See the principal case cited in support of this proposition in Cooper v. Blakey, 10 Ga. 265; Sanders v. Ward, 25 Ga. 118, 119, 123; Cleland v. Waters, 19 Ga. 38; Roser v. Marlow, R. M. Charl. 548. See Vance v. Crawford, 4 Ga. 446.

But see the principal case cited in Sanders v. Ward, 25 Ga. 130, dissenting opinion of BENNING, J., and in Adams v. Bass, 18 Ga. 159. But the decision in Adams v. Bass does not conflict with the general rule just stated, because the testator in that case directed his slaves to be removed to states (Indiana and Illinois) which prohibited the introduction of negroes therein.

(1) See acts of 1830, Pamph. p. 121.



intended to prevent the emancipation of people of color in this State, where their presence could not fail to be injurious to the slave population. This is the evil intended to be prevented, and it is to guard against this evil that the provisions 171 of the said statute, and those \*which preceded it, were enacted. This will does not contemplate that the slaves emancipated by it will remain in the State, to the annoyance and injury of the owners of slaves. It therefore does not come within the reason of the law. It is not calculated to produce the mischief intended to be guarded against by the legislation of the State, upon this subject. The policy of our legislation since 1798, has certainly been unfavorable to the increase of the number of slaves in this State. The Constitution of that date roundly prohibits the importation of slaves into this State from Africa or other foreign places after the first day of October of that year. (Prin. Dig. 559.)

It has been suggested, that there is no fund out of which the expenses of sending the slaves to a port of embarkation can be defrayed. This ought not to be considered an insurmountable obstacle, because it is probable that the Colonization Society will pay the expenses, if it be necessary.

Upon the best consideration which the court has been able to bestow on this case, it is of opinion, that neither the letter nor intention of the several statutes of this State, are in opposition to the provisions of the will of James A. Bradley deceased, in regard to his slaves. The preamble to the act of 1818, shows conclusively the nature of the evil intended to be remedied by that act, and that evil will not be produced or increased by the execution of this will, in accordance with the obvious intentions of the testator. Neither the laws nor the settled policy of the State interposes any obstacle to its execution in relation to the slaves.

It is presumed, that the executor in this case is as competent to ascertain the desire of the slaves, touching their emigration to the African Colony, as this court is to direct him. If the court were placed in his situation, it would endeavor to convene the legatees of the estate and some of the most respectable neighbors, and proceed in their presence to interrogate the slaves, as to their desires under the will, and take memorandums of their several answers. Should any of them desire to go to Africa, they should be immediately disposed of according to the provisions of the will. If there be a deficiency of funds to defray their expenses to a port of embarkation, those desiring to emigrate might be hired out, till the requisite sum should be obtained.

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\*Birch v. Roberts.

Taliaferro Superior Court, July, 1832.

**Amendment—Writ.**—When an order to amend a writ is taken at one term, and the amendment

is not made at the next term, it cannot be amended afterwards without a new order.

In this case an order to amend the writ had been entered at January term, 1831, but no amendment was made until subsequent to the last term, and no new order for amendment was entered at that term. At this term it is contended by the defendant, that the amendment not having been made before the succeeding term, could not be made afterwards without a new order for amendment, and that such had been the uniform practice of the court in this circuit, which was admitted by the court. The case was continued by plaintiff with leave to amend the writ.

**John Morris, Indorsee, v. Charles McClain, Maker, and John Morris, Indorser.**

In Franklin Superior Court.

**Promissory Notes—Venue of Action.**—The maker of a promissory note cannot be sued with the indorser out of his county.

The declaration in this case stated that Charles McClain was the maker of the note sued on, and that he resided in the county of Rabun in this State; and that John Morris was the indorser and lived in the county of Franklin, where suit was brought against them both.

At the appearance term, the counsel for defendant McClain, moved the court to dismiss the case, on the ground of want of jurisdiction, as the declaration of plaintiff showed McClain to be not a resident of Franklin county where suit commenced—That the indorser living in Franklin did not authorize the maker to be sued in that county; that the statute of 1826, only authorized the indorser to be sued in the county where the maker lived.

**PER CURIAM.** The decision of this question must depend entirely on the construction given to the statute of this State, passed 26th December, 1826, (Daw. Dig.) declaring the liability of indorsers of promissory notes. This statute appears to have been passed for two objects. One was to dispense with the notice before that time required to be given to indorser, of a demand and refusal in order to bind them. The other to enable holders of promissory notes to sue the makers of notes and the indorsers in the same action. It cannot be considered necessary to support suits like 173 the \*present, in order to effect either of these objects. But on the contrary, much injustice would be done, if such a construction of the act of 1826 should be given as is now contended for by plaintiff. A person living in Rabun county gives his note payable at a certain day; before the note become due, it finds its way to Chatham or Camden and is indorsed by some one living there; suit is commenced in the county where the indorser lives, and a

copy sent to Rabun and served on the maker, and he compelled to defend the suit in a court some 300 miles from home. This would certainly be to deprive him of the benefit of the constitutional privilege of being sued in the county where he lived, except in certain cases. What are those exceptions? The case of joint promisors and obligors. When he intends to subject himself to these exceptions, he does so voluntarily in joining in the note when made, or indorsing it afterwards—but when he makes a note alone he does not subject himself to the exceptions, nor can he be considered as consenting to be deemed a joint promisor with any one who may afterwards indorse his note and reside in a remote corner of the State.

The motion sustained and case dismissed.

**Carmichael v. Pendleton and A. B. Holt, Attorney.**

In Walton Superior Court.

**Attorneys—Liability for Costs—Nonresident Client.\*—**

An attorney who institutes a suit for a client living out of the state or out of the county where the defendant resides, is liable for all costs, in the event of the suits being dismissed or his client cast. Or if he recover and judgment be entered up and execution issue, and there is a return thereon of no property, he is still liable for the costs.

The legal points arising in this case have been brought up on affidavit of illegality, founded on the following facts. Holt, an attorney, commenced a suit in favor of Pendleton v. Carmichael in the Inferior Court, Pendleton at that time residing out of the county of Walton. On the trial Pendleton recovered a verdict from which Carmichael entered an appeal to the Superior Court. Pending the appeal Carmichael filed a Bill in Equity, for discovery in aid of his defence at law. Before any proceedings were further had, Pendleton dismissed his suit, and the Bill of course was at an end. And the present *fi. fa.* was issued against Pendleton and Holt his attorney, for all the costs accruing in the common law case, and also the costs of the Bill filed in aid of defendant's plea at law. Holt the attorney now alleges that he is not liable.

**\*Attorneys—Liability for Costs—Nonresident Client.**

—An attorney prosecuting a suit for a nonresident plaintiff who has not given security for costs is sometimes held liable. 5 Enc. Pl. & Pr. p. 155, citing *Carmichael v. Pendleton*, *Dud.* 173; *Mackey v. Blake*, 15 Ga. 402; *Ross v. Harvey*, 32 Ga. 388; *Officers of Court v. Hines*, 33 Ga. 516.

**Same—Same—Same—Limitation of Rule.**—But this rule applies only when the plaintiff or plaintiffs are all nonresidents, and not where some of the plaintiffs are residents and some nonresidents. Accordingly it has been held that where an attorney institutes a suit in behalf of plaintiffs some of whom are residents and some nonresidents, and the plaintiffs are cast in the suit, the attorney is not liable to officers of court for any of the costs incurred. *Berrie v. Atkinson*, 114 Ga. 708, 40 S. E. Rep. 708.

1st. Because, the suit commenced by him for Pendleton in the Inferior Court, was on sundry items in an account, on which suit had been brought before in the superior Court and which were stricken out on that trial, and that Pendleton then lived in Walton county, and the second suit in the

Inferior Court must be considered 174 only as a continuation of the \*first, or a renewal of it as authorized by our statute and therefore he was not liable under the law for the costs.

2d. That if liable at all, his liability extends only to the officers' costs, and not to the cost of witnesses' fees.

3d. That he is not liable for the costs paid by Carmichael on entering the appeal, or for the costs of filing the bill in aid of his defence at law.

By the Court. The liability of A. B. Holt, one of the defendants in the above *fi. fa.* arises entirely from the statute of this State on that subject, and the extent of that liability must therefore be determined by a proper construction of that statute. (*Prince's Dig.* 225.)

If we look to the letter of the statute it will be seen that its terms are broad enough to include any costs whatever. The statute declares that when any attorney shall institute, &c. in behalf of any person or persons, residing out of the state or county, &c. such attorney shall be liable to pay all costs, &c. and that it shall be lawful for the clerk to issue execution against said attorney for the amount of the costs of said suit. It would seem also that the evil intended to be remedied by this statute, would require that the attorney should be rendered liable for all costs. The evil was, that frequently suits were instituted for and in behalf of persons residing out of the State, or in remote counties, defendants, who would be compelled to expend considerable sums in costs in defending such suits; and when they were prepared for trial, the plaintiffs either neglected their causes and were non-suited, or cast on the trial. If it happened that plaintiffs lived out of the State, the judgment for the costs bound not their property, and the officers of court must, with the defendant, lose their costs or sue on the judgment in the State where plaintiffs lived. And frequently the officers and defendants might not know where the plaintiff lived, and if they did, it was not proper that they should be subjected to the inconvenience of pursuing the plaintiff out of the State, or even in remote counties, to collect his costs. It was such an inconvenience the statute intended to obviate by making the attorney liable. He took the fee, and commenced the suit of his own free will, and takes upon himself voluntarily the risk of the costs and the punctuality of his client. And it is certainly better that he should lose it than the officers who have no discretion in the performance of their duties. The attorney in such cases must be held liable for all the costs his client would be liable for. And his client here would be liable for the costs.



paid by Carmichael to enter the appeal, and also for the Bill which he was compelled to file in aid of his defence at law. As to the witnesses' costs the attorney is as liable as his client would be.

The other ground taken by the attorney, that the items on which the suit was brought in the Inferior Court, were 175 those \*which had been sued on before in the Superior Court with other items, but were stricken out, cannot avail him. If his client had removed from the county of Walton before he commenced the second suit, he should have required security for costs. This second suit comes within the letter of the statute, and certainly within the inconvenience intended to be remedied.

The illegality must be dismissed, and the *fi. fa.* proceed.

### Barnett v. The Justices and Totly & Co.

In Clark Superior Court.

**Certiorari—Interpretation of Written Instrument.\***—A certiorari was granted and sustained upon the ground that the Justices' Court had misinterpreted the legal effect of certain articles of agreement introduced in evidence before it.

The petition and return of the Justices in this case, showed that a quantity of leather and shoes had been levied on as the property of one Silas Crawford by virtue of *fi. fas.* from a Justice's Court, in favor of John Totly and Co.—that the property was claimed by William B. Barnett in terms of the law.—There was a trial before a jury, who found half of the property subject, the question of liability turning on the fact whether Crawford and Barnett were partners in the shoemaking business. Considerable evidence as to this fact was given in both parties. In addition to circumstances given in evidence, the articles of agreement between Crawford and Barnett were also given in evidence. Some grounds of error in the court below are taken in consequence of the rejection by the court of the award of arbitrators, which it was pleaded or alleged had been made by them in an arbitration, submitted to by the parties before that time, of the same subject matter of dispute.

**PER CURIAM.** It will not be necessary to consider the errors assigned with regard to the rejection of any evidence by the Justices, as the other ground must be considered as sufficient to sustain the certiorari. Whether this agreement between Barnett and Crawford, strictly speaking, constitutes a copartnership or not, need not be determined, for if taken as constituting one, such copartnership must be controlled in its terms by the written agreement, between the parties to it. In the return of the

Justices in this case, the agreement, or the part they considered material to the case, is set forth in these words.—“That Crawford was to have no interest in the shoes until they were sold, and then at the expiration of each year he was to have half the profits.” If then this condition in this agreement is to be effective, and in any manner subserve the intentions of the parties, the shoes must be protected from Crawford's control; indeed he is declared to have 176 no interest \*in them, and if so, none can be levied on as his. In giving effect to this agreement, a remedy is not taken from Crawford's creditors to get their money, as a garnishment of Barnett before the profits were divided, would reach Crawford's share of them. The shoes cannot be legally levied on as Crawford's.

The Certiorari must be sustained, and the levy in the court below dismissed.

### Stapp v. Partlow.

In Gwinnett Superior Court, March Term, 1832.

**Malicious Prosecution—Necessity of Arrest.\***—To support an action for malicious prosecution, it is not necessary to prove an arrest.

**Same—Costs.**—The damage in this case was one dollar, and the Judges were of opinion that the plaintiff was entitled to no more costs than damages.

On the trial it appeared by the evidence of the constable, that he met the plaintiff (who had heard of his having the warrant) who ordered him not to come any nearer. The officer then promised not to arrest him—they met—conversed about the matter, and on persuasion, the plaintiff agreed to go before the magistrate and have a hearing. Plaintiff was discharged for want of evidence. Magistrate and constable both swore that plaintiff was never arrested. No express malice was proven, but sufficient want of probable cause to take the cause to the jury.

The jury found a verdict of one dollar for plaintiff, and said nothing about costs.

**\*Malicious Prosecution—Necessity of Arrest—Rule under Statute.**—The ruling in the principal case, that an action for malicious prosecution can be maintained where the criminal proceedings are instituted maliciously and without probable cause, and that it is not necessary to prove an arrest, has been changed by statute giving a right of action only where a criminal prosecution is instituted and “carried on;” that is to say, some progress beyond suing out a warrant must have been made in order to give a right of action to the injured party. Under this statute it has been held, that merely swearing out a warrant before a justice of the peace, charging one with an offence against the laws of the state when not followed up by an arrest, does not render the prosecution actionable, even if malicious and without probable cause. Before it will become so, there must at least be an arrest and an inquiry before a committing court. *Swift v. Witchard*, 103 Ga. 193, 29 S. E. Rep. 762.

**\*Certiorari—Illegality and Irregularity in Proceedings.**—That the writ of *certiorari* is the appropriate process to review and correct illegalities and irregularities in proceedings, see the principal case cited, among others, in 4 Enc. Pl. & Pr. p. 103.

The defendant now moves a rule to set aside this verdict and enter a nonsuit, on the ground, 1st, That there was no arrest proven—and 2dly, Because no express malice was proven, the charge being for malicious mischief, which is a mere trespass.

By the Convention. This action of malicious prosecution can be maintained without an arrest. Malice and want of probable cause are the foundations of this kind of action, and damages are given as well for the injury a man may sustain in his reputation as for his personal suffering. The commencement of the prosecution without probable cause, showed a disposition to harass and vex the plaintiff, and injure his character. Many cases are found in the books where this action has been supported, when a bill has been preferred before the grand jury and not found by them, and where it does not appear that any arrest was made. (Farmer v. Darling, Burrows, 1971.)

In this case, however, the plaintiff was by the act of defendant put to the necessity of going before the Justice, submitting to a trial, and was discharged for want of evidence. His not being convicted was not from the clemency or good feelings of defendant, but from his innocence.

177 \*As to the other ground, it is sufficient to say, that malicious mischief is an offence indictable, and not a mere trespass.

The rule is discharged.

The defendant has raised another question in this case, as to costs—contending that plaintiff is entitled to no more costs than damages. Decided by the Convention, that plaintiff was entitled to no more costs in this case than damages.

## Doe ex dem. Hammond v. Roe and Reddin, Tenant, &c.

In Habersham Superior Court.

**Deeds—Priority Where Neither Recorded in Time.\***—Recording gives no preference to deeds, unless it is done within the time prescribed by the statute. Between deeds standing upon the same footing in other respects, the oldest is to be preferred.

**Same—Titles Claimed from Same Grantee—Identity of Grantee.**—Where two parties claim title from the same grantee, the identity of the grantee is matter of fact, to be tried by a jury.

In this case, both parties claimed title from Kneeland Tyner, the grantee. On the second day after issuing the grant (August, 1824), a deed was executed by Kee-

land Tyner to one Alexander Bryan, who, in October, 1830, executed a deed conveying the land to John H. Hammond, the plaintiff; in a few days after, Hammond had both deeds recorded.

The defendant exhibited in evidence, a deed from Kneeland Tyner to himself, for the land in dispute, dated April, 1827, and recorded December, 1829.

The defendant contended that his deed, according to law, held the land, having been first recorded, and so required the court to charge the jury.

erence; and if all be recorded, or not recorded, within the time specified, the eldest deed shall have preference."

As applied to the case where there were two conveyances of the same property by one person but to different grantees, neither of the deeds being recorded within time, this statute did not alter the existing law, which was that the elder deed prevailed in such case. *Martin v. Williams*, 27 Ga. 406; *Lessee of Dudley v. Bradshaw*, 29 Ga. 22; *Roe v. Maund*, 48 Ga. 462; *Doe v. Roe*, 49 Ga. 165.

**Same—Senior Deed Not Recorded in Time, but Recorded before Execution of Junior.**—But a senior deed, although not recorded in time, is notice from the date of its actual recordation, and prevails over a junior deed executed subsequent to such recordation, notwithstanding the junior is recorded in time; or, in other words, a deed recorded in time, is notice from the date of its execution; but not recorded in time, it is notice from the date of its recordation only. *Hand v. McKinney*, 25 Ga. 651; *Anderson v. Dugas*, 29 Ga. 440; *White v. Interstate Bldg. & Loan Ass'n*, 106 Ga. 150, 32 S. E. Rep. 26. See Act of 1837, Cobb's Dig. 175; Code, § 3618.

**Same—Senior Not Recorded in Time, Nor Until after Execution of Junior, but Junior Grantee Having Actual Notice.**—And so if the senior deed be not recorded in time, nor until after the execution of the junior deed, yet if the junior grantee have actual notice of the existence of the former deed, he takes subject thereto. *Hand v. McKinney*, 25 Ga. 650; *Wise v. Mitchell*, 100 Ga. 614, 28 S. E. Rep. 382; *White v. Interstate Bldg. & Loan Ass'n*, 106 Ga. 146, 32 S. E. Rep. 26. So a junior grantee, though he records his deed in time, takes subject to an outstanding equity of which he had notice. *Latham v. Inman*, 88 Ga. 505, 15 S. E. Rep. 8.

**Same—Failure to Record Original Deed—Recordation of Derivative or Intermediate Deed.**—The recordation of a derivative or intermediate deed in a chain of title within time, will not cure the failure to record in time the original, or first deed, from the State's grantee, so as to affect title in another from the same grantee of the State, acquired before such recordation of the intermediate deed. *Thursby v. Myers*, 57 Ga. 156, 158.

**Same—That Younger Recorded Deed May Prevail, Conveyance Must Be from Same Grantor.**—The Act of 1837 provided that a junior recorded deed should have preference over a senior unrecorded, where they were executed by the same person or persons; and Code, § 3618, provides that a senior unrecorded deed loses priority over a junior recorded deed from the same vendor. Hence, a junior recorded deed, executed by the heir at law of the grantor in a senior unrecorded deed, was held to take no preference. *Webb v. Wilcher*, 33 Ga. 560, distinguishing *Ellis v. Smith*, 10 Ga. 253, where the junior deed

\***Recordation of Deeds—Neither Recorded in Time.**—The Act of Dec. 25, 1837, T. R. R. Cobb's Dig. 175, provided: "In all cases where two or more deeds shall hereafter be executed by the same person or persons, conveying the same premises to different persons, the one recorded within twelve months from the time of execution (if the feeoffee have no notice of a prior deed unrecorded at the time of the execution of the deed to him or her) shall have pref-



It was also contended for defendant that plaintiff could not in law recover, because the deed to Bryan was from Keeland Tyner, and the grant to Kneeland Tyner, notwithstanding the defendant's deed was also from Keeland Tyner, and not from Kneeland Tyner, and so required the court to charge the jury.

The court charged the jury, that neither of the deeds being recorded in the time required by the statute, they must stand on the same ground as to all the consequences of not recording deeds. The recording gives no preference to deeds, unless done within time, and in this case both deeds being in a similar condition as to the recording, the oldest deed must have the preference.

On the second point, the court charged that the identity of the maker of the deeds was a matter of fact for the jury to decide—that in this case the deed of the defendant was by the same person as the one who had conveyed to Bryan (to wit) Kneeland Tyner—if this Keeland Tyner be not the grantee, then the defendant can take nothing by his deed, and there being a demise in the name of Kneeland Tyner the grantee, a recovery may be had in his name, 178 as it will not appear \*that he has ever conveyed, unless he has done so in the name of Keeland Tyner.

**John G. Roberts, Administrator, &c. v. William A. Carr, Executor, &c.**

In Clarke Superior Court, August, 1832.

**Wills—Gift of Interest as Vesting Body of Legacy.\*—**  
Although as a general rule, it is true, that the

was a conveyance of property purchased at a sheriff's sale, and *Tucker v. Harris*, 13 Ga. 1, where the junior deed was a conveyance of property purchased at an administrator's sale, on the ground that in those cases the sheriff and the administrator each acted in a representative or fiduciary capacity, and transmitted not his own title, but that of the party he represented, so that the sale was, in effect, the same as if made by such party.

And so where the grantee in the junior recorded conveyance took title from a mortgagee who administered as creditor and sold and conveyed the premises as administrator, he was held to take no preference over an older unrecorded deed which emanated, not from the intestate whose administrator made the younger, but from a person who conveyed to one of the plaintiff's lessors at the time or before said intestate entered into possession. *Murphy v. Peabody*, 63 Ga. 522, 526.

**Same—Registry Acts Do Not Apply to Voluntary Conveyances.**—The registry acts giving preference to junior recorded deeds over senior deeds unrecorded apply only where the junior deed was given for valuable consideration. *Byrd v. Aspinwall*, 108 Ga. 1, 33 S. E. Rep. 688. And see *Webb v. Wilcher*, 33 Ga. 569. This is true even though the senior unrecorded deed was itself voluntary. *Toole v. Toole*, 107 Ga. 472, 33 S. E. Rep. 686.

**\*Legacies—Gift of Income as Vesting Corpus of Legacy.**—The gift by will of the interest accruing from a

gift of the interest vests the body of the legacy; yet in such cases, the gift of the interest must be unconditional and placed under the immediate control of the legatee.

**Same—Same—Construction.**—The words "I give unto my brother J. G. the sum of \$1000. to be vested in bank stock, and the net proceeds to be annually drawn and paid to him by my executor during the life-time of the said J. G." were held to be such a gift of the mere interest, as not to vest the body of the legacy.

This bill has been filed by the complainant as the administrator of James George deceased, to recover of the defendant as the executor of Thomas Carr, a legacy bequeathed in and by the last will and testament of Robert George, to which will the said Thomas was appointed executor.—On the trial of the cause, the principal question arising, and on the determination of which the case depended, was the construction to be given to the clauses in the will of Robert George, which were supposed to convey the legacy sought to be recovered.

The clauses of the will are in these words. "3d. I give and bequeath unto my brother Jordan George, two notes of two thousand dollars each, given by Daniel Low and William Low, and one five hundred dollar note given by Grimes Nicholson and Co. to Greenwood, also one note for forty dollars, given by Charles Harris, to him and his heirs forever, subject to a deduction in the hands of my executor of one thousand dollars to raise a fund for the support of my brother, James George."

"4th. I give unto my brother, James George, the sum of 1000 dollars, to be vested in bank stock, and net proceeds to be annually drawn and paid to him by my executor, during the life time of the said James."

The complainant's counsel contended that the \$1000 were given unconditionally to James George, and vested absolutely in him, and, on his death, constituted a part of his estate, and as such was recoverable by his administrator, the complainant.

The counsel for defendant contended that only a life estate was vested in James George by the will, and on the death of said James, vested in the residuary legatee of said Robert, one being appointed in and by the said will of said Robert.

By the Court. The first duty of a court, in the construction of a will, is to ascertain, if it be possible, from the words of the will itself, the intention of the testator, and to

fund, or the income, use or profit of property, without limit as to time, and without further disposition of the fund or property, vests the corpus of the gift in the beneficiary. *Adams v. Bass*, 18 Ga. 130; *Smith v. Dunwoody*, 19 Ga. 237; *Pournell v. Harris*, 29 Ga. 736; *Hill v. Clark*, 48 Ga. 526; *Bonner v. Hasty*, 90 Ga. 208, 15 S. E. Rep. 777.

And see this doctrine made statutory. Ga. Code, § 3323 (2455): "An unconditional gift of the entire income of property, or interest accruing from a fund, will be construed into a gift of the property or fund, unless the provisions of the will require a more limited meaning."

carry that intention into effect, if such intention be not contrary to law. There would be no violation of any provision of law, let either construction contended for prevail. The first intention of Robert George is quite clear. He intended to raise a fund for the support of his brother James during his life, and that such fund should be vested in bank stock, and the net

179 \*proceeds paid by his executor to that object. What should be done with such fund after the death of said James, is not set forth clearly in the will, and creates the present question, to be settled according as we may ascertain the intention of the testator. That the testator intended that James should take only a life estate, may be reasonably inferred, first, from the fact that the fund is one only for maintenance or support, which purpose must necessarily cease with the life of the said James. And secondly, from the fact, that the payment of the net proceeds of the fund, being expressly limited to the life time of the said James. And thirdly, from the nature of the security in which this fund is to be vested. Bank stock most usually, if not for necessity, is in the name of the person who is authorized to draw the dividends. If this stock had been taken in the name of James George, he alone would have drawn the dividends, and not the executor, Thomas Carr. And James George would have been enabled legally to have sold and disposed of the fund itself, as well as the net proceeds; and certainly such a proceeding would have been to defeat the expressed intention of the testator. To have prevented this control of James over the fund and the proceeds, and to enable the executor to perform the duty required of him, in paying over the proceeds, it would be necessary that the Bank stock should have been taken in his name, or be entirely under his control, by being in the name of the estate of Robert George, in either of which events, at the death of James, his representatives could not recover it. It is true as a general principle, that the gift of the interest vests the body of the legacy, but it is believed that in such cases the gift of the interest is unconditional, and placed under the immediate control of the legatee. If this principle were applied to the bequests under consideration, it must be obvious to every one that the wish of the testator would be defeated. It would be to place the legacy, fund and proceeds at the disposal of James George, when the testator has expressly declared that his executor should pay out annually the net proceeds to the said James. Could James George sell or dispose of in any way the fund directed to be vested in Bank stock by this will? He could not, for the object of the testator seems to have been directed to the prevention of such an event; there being no time fixed by him when this control of his executor should cease, and that of the legatee commence. When any period of time is mentioned as limiting the performance of the executor, it is the life time of the lega-

tee, showing, in the opinion of the court, an intention to restrict the interest of James George in this fund, to his life time. The object of Robert George appears to have been to provide for the support or maintenance of his brother James, and a gift of the interest or proceeds of a fund for that purpose, cannot be considered as vesting in the legatee the fund itself.

180 \*This will also appoints a residuary legatee, in general terms, without mentioning any residue as then being of his estate, thereby seeming to indicate a belief or knowledge that there would be at some time some portion thereof not finally disposed of by the antecedent clauses of his will. The evidence in this case, also discloses a fact which goes to support very strongly the construction drawn from the words; it is this, that James George was a lunatic. James George being thus unfortunate, there was no inducement for his brother Robert to provide further, than for his maintenance during life; none to provide for his children, for it would have been unreasonable to anticipate his having any.

The court is therefore of opinion that the intention of the testator is manifest, and that he intended, not to give the \$1000 absolutely to James George, but only a life estate therein; such intention, violating no rule of law, must be carried into effect—the said James having departed this life, his estate has determined and ceased, and that his representative can take nothing under this will.

The case turning on this question, the complainant dismissed his bill.

### Newsom v. Harris.

In Washington Superior Court, August, 1832.

**New Trial—Inadequate Damages.**—If a jury give insufficient damages, it is sometimes a good ground for granting a new trial.

\***New Trial—Inadequate Damages.**—Where the damages awarded are so inadequate as to be manifestly contrary to the evidence, it is ground for new trial no less than where they are so excessive as to be manifestly contrary to the evidence. *Belcher v. Grey*, 16 Ga. 208; *Patterson v. Phinizy & Co.*, 51 Ga. 33; *Hamer v. White*, 110 Ga. 300. 34 S. E. Rep. 1001.

In *Little v. Carmichael*, 32 Ga. 406, it is stated in the headnote that where a verdict is for a less sum than the plaintiff is entitled to under the facts of the case, the defendant has no legal ground to complain of it. This is doubtless good law, but the case hardly sustains such a proposition. The facts were that the defendant, who had made a most aggravated and unprovoked assault on the plaintiff, cutting the bone of his nose through with a saw, sought a new trial, on the ground that a verdict for \$400 damages was contrary to the evidence, as being excessive, and appealed because it was refused. The supreme court, in affirming the judgment below, sarcastically remarked that it was true that the verdict was contrary to the evidence; that it ought to have been doubled, and even then would not have been excessive.

See in this connection, Ga. Code, §§ 5477, 5482.



**Bond for Title—Breach—Damages.**—In an action on a bond for titles, the measure of damages is the value of the land at the time of the breach.

In this case a verdict being rendered for the plaintiff, he moves for a new trial, and rests on the insufficiency of the damages chiefly, to sustain the motion.

This action is on a bond to make titles to a tract of land sold by defendant to plaintiff. The breach was clearly proven, and the only question that arose was as to the measure of the damages. It was in evidence that plaintiff gave three hundred dollars for the land, and that the defendant subsequently sold it for six hundred dollars to another person; the defendant having an interest in the land as heir to an estate, to which the land belonged, of which estate he was administrator. The verdict is for the price paid for the land with interest.

A diversity of opinion has existed on the question, whether in such cases the price paid, with interest on that sum, or the value of the land at the time of the breach, should form the true measure of damage. The court adopts the latter as much more safe and consistent with justice. In this case it is apparent that the adoption of the former measure by the jury, contrary to the instruction of the court, works injustice,

181 as it \*but returns to the plaintiff his money with simple interest, while the defendant has not only enjoyed the use of that sum for many years, but also the increased price of the land, which land should have been, upon every principle of justice, in the possession and enjoyment of the plaintiff.

Believing that this verdict is contrary to law and evidence, and that by it justice is not rendered to the plaintiff, the court orders that it be set aside, and a new trial granted.

### Jordan v. The Administrators of Jordan.

In Washington Superior Court.

**Action on Note—Partial Failure of Consideration.\***—To an action upon a note, the defendant will not be allowed to prove a partial failure of consideration.

**Warranty of Title—Sale of Special Interest—Recital of Promise of Third Person.**—A sale of a special interest in land does not amount to a warranty of title; and if the relinquishment to the purchaser simply recites the promise of a third person to make title, this will not constitute a warranty.

**Same—Same—Recovery of Purchase Money—Apprehension of Future Ouster as a Defence.**—A purchaser of a special interest in land, who gives his note for the purchase money, and is in quiet possession of the land, shall not be protected from the payment of the note, from a mere apprehension of being disturbed at some future time.

The defence to this action is a failure of consideration. The consideration for the notes, to recover which the suit is brought,

\*See Hinton v. Scott, Dud. 245.

was the plaintiff's interest in a tract of land on which the plaintiff then resided, an interest well known to the intestate of the defendants. This interest was relinquished by the plaintiff to the intestate, and he was immediately put by the plaintiff in the peaceable possession of the land, which possession has never in any way been disturbed.

At the trial, the questions which arose were,

1st. Could the defence be sustained by proof of a partial failure of consideration?

2d. Could the defendants, being in the peaceable and undisturbed possession of the land for which, or a special interest in which, the notes were given, resist their recovery at law, from a mere apprehension that they might possibly at some future time be disturbed?

These questions were decided in the negative, and the court, upon advisement, believes properly so decided.

The court held at the trial, and still holds, that the sale of a special interest in land does not amount to a general warranty of title; and that the recital in the relinquishment made by the plaintiff to the defendants' intestate, of a promise from their father to make him title, did not constitute a warranty: especially as the title was known by the intestate to be in the father at the time he purchased the plaintiff's interest, which he did at the suggestion, and upon the advice of the father, who promised if he would, to give him title.

Having well considered this case, and believing the verdict to be right, and in accordance with law, equity, and justice, the motion is refused.

### 182 \*Green H. Jordan v. The Administrator of Britton Jordan.

In Washington Superior Court.

**Statute Limitations—Ceases to Run during Year Administrator Exempt from Suit.\***—An administrator cannot compute the year of his exemption from suit, in support of the plea of the statute of limitations.

**Same—When Will Not Run Continuously.**—The general rule that when the statute once attaches it will continue to run, must yield to a statutory inhibition against plaintiff's right to sue.

In this case a verdict was rendered for the plaintiff, and a motion is made to set the verdict aside, and award a nonsuit. The ground assumed by the defendant, is an alleged error of the court in disallowing his plea, which is the statute of limitations.

But a single question arises, and it is

**\*Statute Limitations—Action against Administrator.**—The statute of limitations does not run against a plaintiff during the twelve months he is forbidden to sue an administrator or executor. *Tarver v Cowart*, 5 Ga. 71, citing the principal case; *McDougald v. Carey*, 12 Ga. 562. See also, *Johnston v. White*, T. U. P. Charl. 140.

this. Shall the defendants, who are administrators, and who are sued to recover a note made by their intestate, be permitted to compute the year of their exemption from suit, in the term of six years which they insist upon as a bar to the plaintiff's right to recover?

The court ruled at the trial that they should not, and so holds still. It is true as a general rule, that when the statute of limitations once attaches to a right of action the time will continue to run; but this rule must yield to a statutory inhibition against the plaintiff's right to sue. The statute of limitations is for the benefit of defendants, so is that statute which exempts administrators from suit for twelve months; and it would be unreasonable and doing gross injustice so to construe these statutes as to put it in the power of an administrator to say to a creditor of his intestate, you shall not sue me within the year; and at the end of the year again to say to him you shall now recover, because you did not sue me within the year.

Let the rule be set aside and judgment entered for the plaintiff.

### Joseph Cumming v. John Fryer.

In Burke Superior Court, December, 1832.

**New Trial—When Two Concurring Verdicts.**—Where there have been two concurring verdicts, unless there be something grossly and manifestly wrong and unjust in them, they should not be disturbed by the court.

**Statute against Fraud—Liberal Construction.**—Statutes against fraud when they operate upon the offence are to be liberally construed so as to avoid the fraudulent transaction.

**Administration—Returns Allowed by Ordinary—How Far Evidence for Administrator.**—Returns which have been allowed by the court of ordinary are prima facie evidence for administrators when called to account for their administration; but never evidence of title for them against third persons.

**Defrauding Creditors—Property Purchased with Money of Execution Defendant.**—If on trial of a claim the jury be satisfied that the claimant purchased the property with the money of the defendant in *fi. fa.*, they ought to declare the sale void against creditors even though it should have been made by a sheriff in market overt.

This writ, with others, was levied upon a number of negroes which were claimed by the administrators of Elijah Walker, and by the jury found subject to the judgments.

**\*New Trial—When Two Concurring Verdicts.**—See the principal case cited in *Mayer v. Wiltberger*, Ga. Dec. pt. 2, p. 21, in support of substantially the same proposition as that laid down in the first head-note above. See generally, as to granting a new trial in cases of conflicting evidence, *Irwin v. Morell*, Dud. 72, and *foot-note*; *Knight v. Mantz*, Adm'r, Ga. Dec. pt. 1, p. 22, and *foot-note*; *Bagshaw v. Dorsett*, Ga. Dec. pt. 2, p. 42, and *foot-note*.

A new trial is moved for by the claimants on several grounds, which have been considered, and will be noticed in their order.

It may be proper here to remark 183 that there have in this \*case, been two concurring verdicts, and unless there be something grossly and manifestly wrong and unjust in them, they should not be disturbed by the court.

The first ground is, "that the verdict is against law and fact;" and contains a defence of the benevolence and gratitude of the claimant's intestate; amiable traits of character, which were not denied to have been possessed by him: though it was contended that he should not be allowed to indulge his benevolent and grateful feelings at the expense of John Fryer's creditors.

The facts of the case are in substance, that at the time of the transactions which gave rise to the present litigation, John Fryer was insolvent, and desired to have his property so disposed of that something might be saved for his family, and that the intestate was willing to assist him in his design. That in pursuance of this common intention the intestate assumed, to a certain extent, an agency in selling John Fryer's property, contracting it privately at a fair price, and then having it sold at sheriff's sale, and applying a part of the proceeds of the private sale to Fryer's creditors and holding the balance to be applied to the use of his family, and that on one occasion he received from Fryer money to purchase one of Fryer's negroes about to be sold by the sheriff, which money, however, he returned when the matter began to be publicly talked about. That when all Fryer's property had been disposed of either at public or private sale, except seven negroes, the intestate took from Fryer a bill of sale for them, the consideration of which was his undertaking to pay certain of Fryer's creditors; that this sale was made shortly before the court was to sit, at which judgments were to be rendered against Fryer; and that the negroes thus sold, remained on Fryer's plantation for some months after the sale, and were then removed by the intestate to his own plantation. These negroes and some of those purchased at sheriff's sale, are the subjects of this claim.

It was for the jury, under the charge of the court, to draw the inference whether or not "the transaction was perfectly fair and just." This they have done against the fairness of the transaction.

But it is said as the second ground that "The court erred in charging the jury that Elijah Walker might be considered a trustee for favored creditors under the act of 1818, since the facts of the case showed that Elijah Walker purchased bona fide and for himself."

The facts showed that he paid no money for the seven negroes contained in the deed from Fryer to him, at the time of its execution, but that the consideration of the sale was Elijah Walker's promise to pay Fryer's



note due to the creditors, who from that time looked to Walker for payment, and according to the testimony of one of them, actually received \*payment from him. The charge of the court to the jury was that if they found the negroes to have been conveyed from Fryer to Walker in trust for the payment of certain creditors, to the exclusion of other creditors from an equal share or portion thereof, though such trust may have been secret, and not expressed on the face of the deed, it would render the deed void under the act above referred to: Or if they found the notes of Fryer, then in Walker's hands, and to be paid for with the negroes, were Walker's, yet if there was a secret trust, that the negroes were to be held for the family of Fryer, and either had been, or were to be paid for by the proceeds of Fryer's property, raised by means of the transactions testified to, the deed from Fryer to Walker was void, under the statute.

Nothing has been shown to raise a doubt of the correctness of the instruction given to the jury. It is in strict accordance with the rule that statutes against fraud, when they operate upon the offence are to be liberally construed so as to avoid the fraudulent transaction. 1 Blk. Com. 88. Had such trust been expressed on the face of the deed, there could have been no doubt as to the voidness it would have created under the operation of the act.

The third ground assumed to sustain the motion is "That the court erred in allowing transactions not pertaining to the issue to be given in evidence."

At the trial it was objected that no evidence but what related immediately to the sale of the negroes levied on was proper, as the validity of each particular sale must depend upon its own circumstances. This objection was overruled, and the court still think, properly overruled.

The proximity of these transactions in point of time, and the result intended to be brought about (and actually brought about according to the declaration of the intestate himself) of saving some of the negroes for Mrs. Fryer, show that each sale was part of the general design, and that a knowledge of the whole was essentially necessary to a right understanding of each particular part of the transactions between Fryer and Walker.

In the sixth ground it is stated that "the claimants had no chance of showing the true nature of these transactions—they having been prepared to do so only in relation to the property levied on, and their accounts with the Court of Ordinary having been rejected by the court.

The claimants cannot complain of surprise. This was a second trial. Their title had, on the first trial, been attacked and set aside as fraudulent; and they should have been prepared to show its fairness. But they say their means of showing it was rejected by the court. The court could not have done otherwise, than reject, as clearly illegal, the testimony offered. It was the

accounts of the claimants made by themselves \*and offered in support of their own title. Such accounts, which have been allowed by the court of ordinary are prima facie evidence for administrators when called to account for their administration, but never evidence of title for them against third persons.

The fourth ground is that "The jury actually did set aside sales made by the sheriff in open market, and which were untainted by any fraud or covin whatever." It is certainly true that the jury did set aside sheriff's sales, but that they were untainted with fraud or covin, this court is not prepared to say.

The jury were instructed, that if Walker purchased those negroes held under sheriff's title, in good faith, with his own money, they could not be again subjected to the payment of Fryer's debts, whatever may have been his intention as to the ultimate disposal of them.

But that if they were purchased with money received by him from Fryer for that purpose; or with money received from the sale of Fryer's property in pursuance of the design to cover a part for Mrs. Fryer's benefit, the sale, though made by a sheriff, would not protect them from liability to executions against John Fryer.

Under these instructions, and upon the evidence before them, the jury have found against the claimants, and the court cannot undertake to say that finding was incorrect.

Upon the whole case, after an attentive consideration of it, the court, finding nothing to render it dissatisfied with the verdict, and believing it to be in accordance with and not "contrary to law, equity and justice," overrules the motion.

A new trial is refused.

### John Hogg and Mary His Wife v. Laban Odom, Administrator.

In Burke Superior Court, December, 1832.

**Deed Conveying Property to "Children of N. J."—Not Void for Uncertainty.\***—A deed conveying property to the "children of Nancy Jones," is not void for uncertainty, if it can be shown who were intended by these words, and that they were in life and capable of taking at the time the deed was executed:

**Same—After-Born Children Not Included.**—But such a deed cannot be made to include the after born children of Nancy Jones.

The complainants set up claim to certain slaves, which claim is founded on the following bill of sale:

**\*Deed to Wife and Heirs—Construction.**—A deed to one in trust for a wife and her "present heirs," is equivalent to saying for the wife and the children she now has, and the wife and such children take as tenants in common. *Chess-Carley Co. v. Purtell*, 74 Ga. 467. But a deed to a married woman and the heirs of her body, conveys a fee simple, absolute estate to her, and the children take no interest. *Whatley v. Barker*, 79 Ga. 790, 4 S. E. Rep. 387.

"State of South Carolina,  
"Edgefield District.

"Know all men by these presents, that I, Saunders Nobles, of the State of South Carolina, in the county of Edgefield, have bargained and sold in plain and open market, unto the children of Nancy Jones, at the death of Leonard Nobles three negroes and their increase, to wit, Silva, Jim and Luce, for and in consideration of the sum of three hundred pounds sterling of the State aforesaid, which said bargained negroes, together with their increase, 186 the said \*Saunders Nobles unto the children of the said Nancy Jones at the death of the said Leonard Nobles aforesaid, shall and will, against the claims of all other person or persons whatsoever, warrant and forever defend by these presents. In testimony whereof I have hereunto set my hand and seal this 25th day of December, 1786.

"Saunders Nobles."

"Present

"Benjamin Cook,

"Robert Lang,

his

"Thomas X Moseby."

mark.

The children of Nancy Jones were then five in number. About the year 1794, the complainant Mary who is also a child of Nancy Jones, was born, Leonard Nobles being then in life. While she was yet an infant, and without other guardian than her mother, there was a division of the negroes named in the bill of sale, and of their increase among the children of Nancy Jones. The complainants alleging that the complainant Mary was not a party to the proceeding which took place at the division, and was therefore not bound by it; and further, that in the division she was defrauded, by the manner of it, of her just rights, and that they have filed this bill for relief against the representatives of Dennis Nobles, who was the eldest son of Nancy Jones, and who at the death of Leonard Nobles received into his possession the said slaves and their increase, for the use of his brothers and sisters. At the trial a verdict was rendered for the complainants, and a new trial is moved for by the defendant, because the verdict is against law and against evidence.

There were several important questions much argued at the trial of the cause, which it is not necessary the court should now consider. It cannot be at all material whether the defendant or those whose estate he represents or through whom he claims title, are liable to account as implied trustees; nor if they ever were liable, whether the statute of limitations can now be invoked to their aid and protection, unless the complainant Mary originally had some right, property, or interest in the slaves which might become the subject of such trust, which the defendant denies she ever had.

1. Because the deed or bill of sale under which she claims is void for its uncertainty,

there being no grantee or bargainee named in it.

2. Because if the deed or bill of sale be not absolutely void; and if parol evidence may be admitted to show the real persons intended under the designation of Nancy Jones' children, still the complainants can take nothing under the deed, as the complainant Mary was not born until 187 eight years \*after it was executed, and could not therefore have been a party to it.

The deed purports to be for a valuable consideration, conveying a present interest, though to be enjoyed in future; in the making of which there is not alleged to have been the slightest fraud, and if it be void at all, it must be for its uncertainty alone.

This uncertainty is said to be as to the grantees or bargainees. They are designated by the name of the children of Nancy Jones. Now, though it is a rule that every grant must be certain, not only as to the thing granted, but as to the parties, yet it is also a maxim of law that nothing shall be void which may by possibility be good, and that that is sufficiently certain which may be rendered so. The deed will not therefore be suffered to fail for uncertainty, if it can be shown who were the persons meant by the words Nancy Jones' children. The bargainees or individuals known as the children of Nancy Jones, were, at the time the deed was executed, as has been stated, five in number, and who might clearly take under the deed. The complainant Mary, though a child of Nancy Jones, was not born until several years afterwards, and the question whether she too can claim any right under the deed, if answered in the negative, is conclusive of this case.

That in every conveyance there must be a grantor, a grantee, and thing granted; and that there must be a grantee who may take by force of the grant at its beginning, are familiar rules of the common law. In this deed, there are grantees, who were capable of taking at the time of its execution. No trust is raised, nor any remainder created by it for after born children. It purports to be a deed of bargain and sale founded upon a contract, in plain and open market, for a valuable consideration, passing from the bargainees to the bargainer, and vesting a present title in the bargainees, though the negroes were to be possessed at a future period; nor is it at all material to the present question, whether Leonard Nobles took a life estate in them by implication, or Saunders Nobles reserved in them an estate for Leonard Nobles' life.

The negroes sold went for their price, and they only who paid the price became entitled to them. But even if it had been a voluntary gift, and not a sale, as it was, unless the donor had used clear words to create a remainder for the after born children of Nancy Jones, this complainant could take no interest under the deed.

The case of Stroman and Wife v. Rotten-



burg, 4 Dess. 268, is a case very like the present. That was upon a deed of gift to the grand children of the donor, by his daughter Catharine, to take effect after his death, and the decree which excluded after born children was, upon appeal, unanimously affirmed. And this case is in accordance with the case of *Ayton v. Ayton*, 1 Cox's cases, 327.

188 \*It being the opinion of the court that the verdict is warranted neither by law nor evidence: It is ordered that it be set aside, and a new trial granted.

### The State v. Peter Ashley.

In Clarke Superior Court, February, 1833.

#### Criminal Law—Failure of Law to Provide Penalty.\*—

The prisoner was indicted and convicted under a law to which no penalty was annexed by the legislature: On motion in arrest of judgment, the court discharged him, and arrested all further proceedings.

This is an indictment for retailing spirituous liquors without a license from the commissioners of the town of Athens, and on which the defendant was found guilty.

On the trial the defendant produced in evidence a license to retail, from the Inferior Court of the county. The defendant now moves in arrest of judgment, and for his discharge, on the ground that the law imposes no punishment on the act of retailing without a license from the commissioners of the town of Athens.

This Bill of Indictment has been preferred and found on the third section of the statute of 1831, (pamphlet, p. 242,) which is in these words. "That no person shall be allowed to retail spirituous liquors, &c. within said town corporation, but in pursuance of a license from the commissioners aforesaid, which license they or a majority of them shall have authority to grant to applicants, upon payment of such amount as such commissioners may deem proper."

Neither this nor any other section of said statute imposes any penalty for retailing spirituous liquors, without such license from the commissioners. But the Solicitor General insists that the penalty of ten pounds, imposed by the statute of 1791, should be inflicted in this case. If there was no statute on the subject, but that of 1831, there could be no doubt of the prisoner's right to a discharge; for no punishment could be adjudged against him, unless the court should do what the legislature seems to have forgotten, by enacting a penalty.

#### \*Criminal Law—Failure of Law to Provide Penalty.—

If a statute fail to fix a penalty for an offence, none can be inflicted. *Adams v. Mayor of Albany*, 29 Ga. 56; *Gibson v. State*, 38 Ga. 571; *Hill v. State*, 53 Ga. 125. But the infliction of a penalty not authorized by law is no ground for a new trial. *Brantley v. State*, 87 Ga. 149, 13 S. E. Rep. 257.

Can the penalty in the statute of 1791, (Prince, 487,) be inflicted in this case? These two statutes are penal, and the court must be sufficiently strict in their construction to see to it, that no act of the citizens shall become criminal, or any punishment inflicted which does not come clearly within the statutes. The statute of 1791, declares it criminal for any one to retail without a license from the Inferior Court of the county, and imposes a penalty of ten pounds. Is the defendant here charged with the offence of retailing without a license from the Inferior Court? No. He has exhibited to this court such a license.

Take both statutes together, and in 189 \*neither can there be found any penalty imposed for retailing without a license from the commissioners of the town of Athens.

In the statute of 1831, under which the defendant is now prosecuted, there is no reference made to the statute of 1791 at all, and to inflict the penalty of the latter statute on an act made penal some thirty years afterwards, without any reference to the former law, is more than can be legally done.

The defendant must therefore be discharged, and all further proceedings arrested.

### Thomas Caruthers, Administrator of Andrew Caruthers, for the Use of John Stewart v. James Wardlaw.

In Gwinnett Superior Court, March Term, 1833.

**Contract—Action—Must Be Brought in Name of Party in Whom Legal Interest.**—An action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest, in such contract, is vested.

This action was brought on an instrument in the following words. "Within two months from this date, I promise to pay for Andrew Caruthers to William Mattbie, clerk of the Inferior Court of Gwinnett county, the sum of four hundred dollars, and to take a receipt therefor for the said Andrew, provided the said Andrew shall within that time make and execute to me good, indisputable warranty titles to Lot No. 145, (one hundred and forty five) in the twenty-second district, of originally Muscogee county; if titles are not made within said time, this instrument to be void. Witness my hand and seal this 10th July, 1829.

"(Signed) James Wardlaw." [Seal.]

On the trial, defendant's counsel demurred to the declaration on the ground that from plaintiffs' own showing, he could not in law maintain an action on the instrument declared on, and that the suit (if any could be maintained) should have been in the name of William Mattbie, who alone was the legal payee of said instrument.

**PER CURIAM.** The first general rule of pleading, is that the action on a contract, whether express or implied, or whether by parol or under seal, or of record, must be brought in the name of the party in whom the legal interest, in such contract, is vested.—See Chitty's Pleadings, 1 vol. 3 and 4, and the authorities there cited. The promise in the instrument declared on, is to pay to William Mattbie, &c. and not to pay Andrew Caruthers. According to this rule, then, Caruthers cannot maintain an action on this instrument. The case put in illustration of the above stated principle is stronger in favor of plaintiff than the case under consideration. It is 190 this. \*'When a bond is made to A.

to pay him or a third person a sum of money for the benefit of the latter, the action must be brought in the name of A., and the third person cannot even release the demand.' In the case put, the promise was to pay A. or a third person for the benefit of the third person; in the case under consideration, the promise is to pay Mattbie alone, and no other person. In support of this position, see Scoley and Domailee v. Mearns, 7 East, 148. That Caruthers cannot maintain this action, see Schack et al. v. Anthony, 1 Maule and Selwyn's Rep. 575.

The demurrer is sustained, and case dismissed.

N. B. The plaintiffs objected to the motion to dismiss, because if good, it ought to have been made by the rule of court at the first term. It was decided that the rule requires such grounds as would not be good in arrest of judgment, to be taken advantage of at the first term—but the ground now taken would be good in arrest of judgment, and therefore can be taken advantage of at any time.

**Matthew Smith and Abigail His Wife, William Spell and John C. Spell, Complainants, v. Thomas W. Oliver, Administrator of Jas. Oliver, Who Was Executor of William Oliver, Defendant.**

*In Chancery.*

In Seriven Superior Court, October, 1833.

**Administration—Letters of Dismission from Ordinary's Court—Whether Executor Protected by.\*—**Letters of dismission, fairly and legally obtained from the Court of Ordinary, as effectually protect executors

**\*Administrators—How Far Protected by Letters of Dismission from Court of Ordinary.**—In Broach v. Walker, 2 Ga. 428, it was held to be a good plea for a defendant sued as executor, that since the last continuance of the cause his letters testamentary had been revoked, and administration committed by the ordinary to another, to whom he had delivered over all the goods in his hands. And in Carter v. Anderson, 4 Ga. 519, citing the principal case, it was held that letters of dismission, granted by a court of ordinary, under the act of 1810, were a release

and administrators from all further liability as such, as a decree of the Court of Chancery could do.

**Statute—Constitutionality.**†—The constitutionality of the act of 1810, Prin. Dig. 168, affirmed.

This bill is filed by certain legatees of William Oliver, to compel a discovery and account of the estate of the said William Oliver, and payment of the sums of money and legacies to which the complainants may be found entitled.

The defendant, who was the administrator of James Oliver, the executor of William Oliver, has interposed a demurrer and plea; the first resting on the ground of a want of privity between the complainants and the defendant, the second upon a release and discharge granted by the Court of Ordinary to the defendant from his further liability as administrator of the estate of James Oliver. On both the defendant relies with confidence, though insisted upon by complainants' solicitor, that it has become unimportant to inquire whether or not there be good cause of demurrer, as it has been overruled by the plea. The court having heard argument and considered this case, decides it upon the plea alone, which is conclusive for the protection of the defendant, even if the demurrer should be adjudged to be overruled by the plea, or should be disallowed by the court.

In the act of 15th December, 1810, 191 for the more effectually \*securing the probate of wills, &c. (Prin. Dig. 168),

and bar both at law and equity, unless impeached for fraud.

But in Mobley v. Mobley, 9 Ga. 249, the decision in Carter v. Anderson, 4 Ga. 516, 519, was reviewed, and it was said that what was intended to be said in that case was, that the judgment of the court of ordinary, like the judgment of any other court having jurisdiction, was conclusive until reversed or vacated for irregularity; that it was to be held a valid judgment in all other courts, and could not be collaterally attacked in other courts for irregularity, but might be attacked for fraud in chancery,—in short, that a judgment of discharge by the court of ordinary, was to be held and taken as any other judgment of a court of competent jurisdiction.

This however seems to have been an unsatisfactory statement of the law, for in Loyless v. Rhodes, 9 Ga. 549, the court speaking of the decision in Mobley v. Mobley, 9 Ga. 249, took occasion to say, that while the court was made to say, by the decision in that case, that the order of a court of ordinary, dismissing the representatives of an estate, was valid and sufficient although the facts necessary, under the law, to give that tribunal jurisdiction to grant such discharge, did not appear of record, they had, in the case at bar, agreed to leave the question undecided, and base their decision upon another point. It was suggested, however, that in order to make such order of discharge available as a protection, there should be record evidence of the facts and steps necessary under the law to give that court jurisdiction, such as that a petition had been presented praying a discharge, and a proper order of citation made and published, requiring all persons concerned to appear and show cause on a day certain, etc. As a matter of



provision is made for the release from liability of executors and administrators who have faithfully and honestly discharged the trust and confidence reposed in them. Such release this defendant has obtained, and now pleads. Whether he was entitled to it, was a matter to be inquired into and adjudged by the Court of Ordinary, which is supposed to have done its duty in that regard. It is not pretended that the release was obtained by any fraudulent practices, but yet is contended that before it could have been legally obtained, certain prerequisites of the law must have been strictly complied with, such as the petition to the court, the order for citation, its publication, the examination by the court into the administration, and their judgment of its faithfulness and honesty; and that before the release pleaded can be considered by this court as valid, these prerequisites must be made to appear here.

If this court were called upon to review the proceedings of the Court of Ordinary, such scrutiny would be necessary: But it can neither be necessary nor proper in deciding upon the effects of the order or judgment of that court.

The power of the legislature to pass the act of 1810, before referred to, is not denied, though the constitutionality of the act itself is denied on another ground. The legislature then acting within the compass of its power, have provided, and wisely too, that the liabilities of executors and administrators shall not be eternal, or only barred by a tedious and expensive proceeding in equity. A more summary and less expen-

sive mode is therefore provided, which is by the judgment of the Court of Ordinary. This judgment, unreversed, is as good and effectual as the decree of a Court of Equity could be. To decide that such judgment does not constitute a good bar to farther liabilities, would be to destroy the whole beneficial effect of the act. And in this case it would be to destroy it in favor of a claim, for which, probably, this defendant never could have been held answerable to the complainants.

This act of the legislature is not repealed, as it was contended to have been, by the amendatory act of the 10th December, 1812. The provision of the act of 1810, for granting letters dismissory, is not directly repealed by the act of 1812, and the provision in the latter act in regard to refunding bonds, is perfectly consistent with that of 1810, under which the release and discharge now pleaded was obtained.

The constitutionality of the act of 1810, has been denied; but of it, the court has no doubt. "Nor shall any law or ordinance pass, containing any matter different from what is expressed in the title thereof," is the part of the constitution said to be violated by that provision of the act which relates to administrators.

Now though it be true that there 192 is nothing in the title \*which points directly to this particular provision, yet the matter or subject of the act as expressed in the title relates to the power of the Court of Ordinary over the estates of deceased persons; and although administrations be not particularly mentioned, they may well be included in the general expressions used,

fact, the order of discharge was treated as a nullity in that case because it was charged to have been procured by fraud, and because the record failed to show the facts above stated.

But in *Groce v. Field*, 13 Ga. 30-31, citing the principal case and *Carter v. Anderson*, 4 Ga. 516, but not referring to either of the cases in 9 Ga., it was held that the judgment of the court of ordinary was conclusive on the court of chancery, and that it was error to proceed to a decree against one as administrator after he had been discharged by the court of ordinary pending the suit.

And in *Jacobs v. Pou*, 18 Ga. 348, the law was thus stated: "The judgment of dismissal by the court of ordinary, in such cases, must operate as a discharge from all liability on the part of the administrator, unless the same be impeached in that court for irregularity, or in the superior court for fraud." And see also *Pass v. Pass*, 98 Ga. 791, 25 S. E. Rep. 752, where it was held upon the authority of the preceding case and the express provisions of the Ga. Code, §§ 2600, 3828, 3594, that a discharge obtained by means of a fraud practiced upon the legatees or ordinary, was void, and might be set aside on motion in the court of ordinary, or collaterally attacked as a nullity by an equitable petition in the superior court.

Of course where it appears affirmatively on the face of the proceedings that no proper notice of the application for discharge was given, the discharge is a nullity, and is not admissible in evidence to show discharge. *Head v. Bridges*, 67 Ga. 227.

And so where the administratrix was the sole distributee and heir at law, letters of dismission were held to be no bar to an action by a creditor of the intestate against her, as distributee and heir at law, to subject assets of the estate still in her hands, —that this was certainly true since the passage of the uniformity of procedure act of 1887, Code, § 2531.

And where the defendant and his counsel sat by and failed to disclose the fact of his discharge, such fact not being known to plaintiff or his counsel, and let the cause proceed to verdict, it was held that the verdict was good, and that judgment should have been entered up against him which would bind notwithstanding his discharge, and that his counsel should have been punished for contempt of court. *Weddington v. Huey*, 80 Ga. 651, 6 S. E. Rep. 281.

**+Constitutional Law—Title of Act.**—In *Howell v. State*, 71 Ga. 227, it was said: "None of the decisions made by our courts ever went further than to require that it would be sufficient 'if the title was descriptive generally of the purposes of the act, and that it was not necessary that it should particularize the several provisions contained in the body of the act.' All that was essential to its validity was, that it should not contain matter different from what is expressed in the title," —citing the principal case; *Green v. Mayor*, etc., R. M. Charl. 368; and *Cooley's Const. Lim.* 178, and note citing numerous decisions, including those of the Georgia Court.

as the provision under consideration cannot properly be said to be different from the matter expressed.

The judgment of the court must therefore be in favor of the plea.

**Walter Nunnely v. The Road Commissioners, Robert C. Gibson and Charles Bristow.**

In Taliaferro Superior Court, January, 1831.

**Certiorari—Costs—Individual Liability of Road Commissioners.**—Where a certiorari was granted and sustained against the Commissioners of the Road and there was no allegation that they acted corruptly or with design to oppress they were held not to be individually liable for costs.

In this case the plaintiff had obtained a certiorari, against the Road Commissioners, which certiorari had been sustained by the court and an execution for costs issued thereon, which had been levied upon the property of the defendants. They have filed their affidavit of illegality in which they contend that they are not liable in their individual capacity to pay the costs which have accrued upon the certiorari, and allege that they have no public funds in their hands as Road Commissioners, out of which the fi. fa. can be satisfied.

Question submitted for the decision of the Convention, is, are the defendants liable to pay the said fi. fa. out of their individual property?

By the Convention. There is no statute law upon the subject, and no principle of the common law of England, now recollected, is applicable to the case. The Commissioners of Roads are officers who render services without compensation, and therefore ought to be subjected to no inconvenience, injury or expense, for the discharge of duties which are gratuitous, unless it is shown that they have acted corruptly, or with intention to oppress. There is no allegation of that kind in this case. They are therefore in contemplation of law presumed to have acted correctly. In the absence of all legal provisions, applicable to the case, it is not the duty, nor is it within the power of the courts to subject these Commissioners to the payment of the costs in this case. If the view presented with regard to the law be correct, that of expediency strictly coincides with the law. In courts of justice, reasons, ab inconvenienti, are seldom allowed to have operation. Wherever the law can be ascertained, it is sufficient for courts of justice that, "ita lex scripta est." In the present case the law and reason are strictly coincident.

193 In this State the public roads are placed under the superintendence of the commissioners of roads. Every citizen in the State is interested in the proper repair of the public roads. If they are not kept in a proper state of repair the planter

cannot send the productions of his plantation to market and receive the reward of his industry. If the commissioners of the roads be subjected to vexation and expense in the discharge of their gratuitous services, they will become remiss and inattentive to the proper discharge of duties which are of deep interest to the community. It may be asked, how then are the costs to be paid. It is not for the judiciary department to answer this question; it is the duty of this department to apply, and expound the laws, not to make them. That high and responsible duty belongs to a different department of the government, which doubtless will provide for the case when they shall be properly informed, that there is a chasm in the legislation of the state upon this subject. Until that provision shall be made, the evil arising from the want of such provision cannot be extensive.

The affidavit of illegality must be sustained.

**Humphrey Evans v. John Lampkin and Ira Burton, Claimants.**

In Lincoln Superior Court, January, 1831.

**Evidence—Interrogatories in Former Suit—Admissibility Where Same Dismissed.**—Testimony taken by interrogatories upon a former claim (which had been dismissed) to the same property, between the same parties and upon the same question was held to be admissible. See notes infra.

**Acts of Trustee—Who May Question.**—The court held that no person but a creditor of the grantor had a right to interfere with the rights and interests of the trustee in this matter:

**Slaves—Increase—Follows Condition of Mother.**—And that the increase of the negroes followed the condition of the mother.

In this case testimony taken by interrogatories upon a former claim which had been dismissed, was tendered in evidence. It was admitted that the parties in the former claim and the property levied upon were the same as in the present case. The evidence was objected to by claimants' counsel, on the ground that evidence taken in one case could not be admitted in another, though the parties and the question should be the same. In support of the evidence, various American authorities were cited, particularly cases in Washington's Reports decided in the circuit courts of the United States. The reason uniformly given for the exclusion of such evidence, is, that a party should not be affected by evidence that he had no opportunity of cross-examining.

By the Court. This is the first time such a question has been presented in this circuit. It appears to be taken for granted that such testimony is inadmissible by the practice of this circuit. This is believed to be a mistake. If this is the first time that the question has been made, there can be no practice established. Indeed it may be assumed to be a question on which there



is no very settled or definite practice any \*where. In England, evidence at common law is generally oral, so that in that country, it cannot be expected that there is any settled and well defined practice on this subject. In some of the states, testimony at law is taken as it is in this state. In those states, testimony similar to that now offered has been held admissible. The reason assigned in all the cases, where evidence taken in former suits or legal proceedings has been repelled, shows that the evidence now offered should be received. The reason is that the party against whom it is offered, has had no opportunity of cross-examining the witness. In the present case, the claimant has had the right to cross-examine the witness. He therefore cannot be injured by it. If he believed that the witness would testify differently from what he formerly testified, he was at full liberty to re-examine the witness a second time.

Upon the best reflection which the court has been able to bestow on the question, it feels bound to decide that the testimony is admissible.

In the further progress of the case, there came out in testimony a deed of gift executed by Susannah Hammond, in which she gave several negroes to John Lampkin as trustee, and directed him to sell two of the negroes conveyed to him in trust, and pay the purchase money to two of her nieces, and two other negroes and her household furniture for the payment of her debts, and after the payment of her debts, her said trustee to have the remainder. The claimant is the administrator of Susannah Hammond, and his counsel contended that the deed of gift vested no right in Lampkin the trustee, and that claimant had a right to the property for the payment of debts.

This was opposed by counsel for plaintiff in *fi. fa.* because it was throwing the onus upon the trustee. How could he prove that there were no debts of Susannah Hammond unpaid?

It appeared also that a woman directed to be sold by the trustee for the payment of the grantor's debts, had two or three children subsequent to the execution of the deed of gift and trust, and counsel for claimant contended, that the children at least were chattels in the hands of administrator and claimant.

The Court. The first impression on the mind of the court was, that the trustee was bound to prove, that the debts of the grantor were paid, or that there were no outstanding debts of the grantor. To require him to do this is to require him to prove a negative, which cannot be done. Upon further reflection the court is of opinion that no person but a creditor of the grantor has a right to interfere with the rights and interests of the trustee in this matter.

Upon the question of the after born children, the court is of opinion that they ought to follow the condition of the mother. \*If the rule of equity which

considers that done which ought to be done, be applied to this case, there can be no doubt. If the sale as directed by the deed of trust had taken place, the children born after the sale would have been the property of the purchaser. The court is of the opinion that the children are subject to the *fi. fa.*, if the mother is.

Note. Upon the first point in the above case, to wit, the admissibility of interrogatories taken during the pendency of the first claim, which had been dismissed, the judges were equally divided in opinion.

### John M. Ginnis v. Calvin W. M. Bacon.

In Richmond Superior Court.

**Attachment—Absconding Debtor—Sufficiency of Affidavit.**—An affidavit for attachment which states that "Defendant is removing without the limits of this State, as this deponent doth verily believe," is sufficiently positive under the act of 1816.

This is a motion on arrest of judgment; and the error assigned, and for which the judgment is sought to be arrested, is that the affidavit on which the attachment rests, is not positive, but according to the belief of deponent, and therefore insufficient.

As far as the decisions of our courts are known, affidavits under the attachment acts have been required to be positive and certain, not according to belief or by way of reference. These decisions rest on the analogy of bail affidavits, and are generally correct. The affidavit in this case sets forth that "the defendant is removing without the limits of this state, as this deponent doth verily believe; that the defendant is justly indebted to the plaintiff one thousand and forty-two dollars and seventy-five cents on an acceptance to become due on the twenty-fourth day of May, in the year of our Lord eighteen hundred and twenty-eight." Here the indebtedness is positively stated in a separate part of the sentence, and to this there can be no exception. That "the defendant is removing without the limits of the state" is what the deponent states according to his belief. By looking at the act of 1816, under which the attachment was sued out, it is seen that "oath is to be made of the amount of the debt to become due, and that the debtor is removing." The same positiveness seems to be required as to both facts; but it is not in the nature of the case that the same direct and positive assertion can be made of the latter as of the former. A creditor may and must know that a debt actually exists, which can be positively sworn to; but he cannot swear positively that his "debtor is removing without the limits of this State, \*though he may see him in the act of removing, and may verily believe him to be removing beyond the limits of the State."

The case of *Hobson v. Campbell*, 1 Hen.

Blac. 245, is more analogous to this than any other case I know of. That was a rule to show cause why a common appearance should not be entered, and the bail bond given up to be cancelled, on the ground of the insufficiency of the affidavit to hold to bail. The affidavit stated the debt, which was on bond positively; but the breach of the condition of the bond was stated according to the knowledge and belief of the plaintiff. It is there said "the court felt no difficulty in declaring their opinion that the affidavit is sufficiently positive, as far as it states the knowledge and belief of the deponent; there being authorities enough to prove that a more positive statement is not required, where, from the nature of the question, the party could only have a ground of belief, and could not make a direct assertion." There is very good reason, too, why greater strictness should obtain in affidavits for bail than in those for attachment. The former asserts the liberty of the citizen, the latter but his property; the former are without, the latter with security for damages. It is the opinion of the court that the affidavit in this case is sufficient.

The motion is overruled.

### Selleck v. Twesdall.

In Richmond Superior Court.

#### Attachment—Pleading—Joinder of Actions—Statutes.

—In the same affidavit for attachment, plaintiff may set forth notes due—notes that are not due—and that he is indorser on certain other notes of defendant, which are not yet due, without subjecting himself to the consequences of a misjoinder of actions; the acts of 1779—1816 and 1820, being in effect but one act, so far as this point is concerned.

**Same—Absconding Debtor—Affidavit in Past Tense—Sufficiency.**—If plaintiff in his affidavit use the words "has absconded" they are sufficient under the act of 1799, though the word in that act is used in the present tense.

**Same—Same—Sufficiency of Affidavit—Statutes.**—But he does not entitle himself to the benefit of the act of 1816 and 1820, by simply showing in his affidavit that the defendant absconds. To obtain the benefit of these, he must state that his debtor is removing or about to remove without the limits of this State according to that of 1816; and that the principal debtor is actually removing or about to remove, or has removed without the limits of the state or county, according to that of 1820.

The affidavit upon which this writ was granted, sets forth that the plaintiff holds certain notes of the defendant now due, and demandable; certain others not yet due, but running to maturity; and that he is the indorser on certain other notes of the defendant not yet due; and that the defendant has absconded so that the ordinary process of law cannot be served upon him.

To this attachment, two exceptions are taken. First. That there is a misjoinder

of actions; the remedy by attachment for debts due, for those to become due, and for securities or liabilities having been given by separate acts require separate process.

Second. That the facts set forth in the affidavit will not sustain the writ under either of the acts giving remedy by attachment.

By the Court. As to personal actions, the whole doctrine of the misjoinder of actions depends entirely upon the difference of the original process and the fines to be paid on taking out the original, and on the form of the action rather than the subject matter of it. Thus actions for a 197 tort—arising ex delicto \*cannot be joined with those arising ex contractu, because in the first case the original was a *capias* and the fine paid was in proportion to the offence, in the second the original was a summons, and the fine paid was in proportion to the sum demanded. By the law of Georgia all actions commence by petition and process and no fine whatever being required on suing out an original, it may be well doubted whether the doctrine of misjoinder of actions obtain at all in this state, upon the legal maxim "Cessante ratione cessat ipsa lex." The court will not however rashly disregard a doctrine, and the forms of pleading which have been adopted and sanctioned by all the Judges who have presided in the courts of the state since the passage of the Judiciary act of 1799, as far as their decisions are known. Supposing then the common law on this subject of force, how does it affect the present case. The remedy by attachment is altogether a creature of the statute, and is allowed only in cases of debtor. It has a two fold object, first to supply the want of personal service where the ordinary process of law cannot be served; and secondly to secure the property of the debt to satisfy the judgment which may be rendered against him. The statute expressly declares that the proceedings subsequent to the serving of the attachment shall be the same as on original process against the body of the defendant where there is default of appearance. Could the plaintiff have joined in the same action, if commenced by petition and process, the different demands set out in this affidavit? All the demands are founded on notes which may be well joined; and the acts of 1816, and 1820, give to creditors and securities the right of commencing suit by attachment though the debt be not due and demandable at the time of suing out the attachment; and the latter act the right of proceeding to judgment before the debt shall become due. But it is argued that the acts of 1799, 1816, and 1820, are separate acts giving remedies in separate cases, and that therefore the attachments should have been separate. This argument is not sustained by the acts themselves. The act of 1816 is "in addition to and amendatory of the act of 1799." That of 1820, is in addition to and amendatory of the several acts to regulate attachments. They are



therefore considered as in effect but one act so far as the remedy is concerned; the two latter but enlarging the remedy given by the first. The greatest difficulty is as to the right of an indorser to the remedy given to securities by the act of 1820. The court considers the act remedial in its nature, and requiring a liberal construction, and that the strictness required by the act of 1799, and by that of 1820, as in addition to it is applicable to the mode of prosecuting suits under it, and not to the extent of the remedy. It is true that the word security is above used, but that is a word very general in its signification, and may well, upon a liberal construction, be made to include not only \*joint obligors and promissors, but also all others bound in any other manner for the payment of the debt; and such surety are indorsers, whose liability, though dependent on demand and notice, yet is such as to bring them within the spirit and meaning of the act. The first exception is therefore overruled.

The second exception is to the sufficiency of the facts disclosed in the affidavit to sustain the attachment under either of the acts to regulate attachments. That of 1799 points out five distinct cases in which the writ may be granted, and prescribes the mode of proceeding, and declares that all attachments issued and returned in any other manner shall be null and void. One of the cases is where the debtor absconds, so that the ordinary process of law cannot be served on him. It is contended that the affidavit changing the debtor to have absconded is not in pursuance of the act, and that the attachment must be declared null. It is true, the debtor must be shown to be actually absconding at the time application is made for the writ, but this is sufficiently shown by the words used in the affidavit "has absconded" which, though referring to a time past includes also the time present, and will sustain the attachment under the act 1799. It remains to be seen whether the act of absconding is such as to authorize the attachment according to the acts of 1816, and 1820. By the act of 1799, an extraordinary remedy is given in cases where the ordinary process of law cannot be served. By the two acts amendatory thereof, a remedy is given where none existed before, and the cases in which it is allowed are limited in the act of 1816, to where "the debtor or debtors is or are removing or about to remove without the limits of this State," and in the act of 1820, where "the principal debtor or debtors is or are removing, or is or are about to remove, or have removed without the limits of this State or any county." Here it is clear that no inability to serve the ordinary process need be shown, for no ordinary process could issue; and the writ can as well be granted in the presence of debtor or principal as in his absence; but it must be shown that he is actually removing, or is about to remove, or has removed. Neither of these

things are shown by the affidavit. The plaintiff has not therefore entitled himself to the benefit of either of the acts of 1816 or 1820, and can only be permitted to proceed with his writ for the recovery of those demands which were at the time of suing out the writ due and recoverable under act of 1799.

#### 199 \*Lud Harris & Co. v. Elihu Williams.

In Richmond Superior Court.

**Constitutional Law—Records and Judicial Proceedings of Sister State.**—The records and judicial proceedings of the courts of South Carolina, when legally authenticated, are entitled to the same faith and credit in Georgia as they have by law or usage in Carolina.

In the year 1809, the plaintiff issued an attachment against the deponent, a resident of South Carolina, for about \$1300, which was levied upon two negro men and one woman; two of these negroes, one man and the woman sold for the rise of \$900; the other negro escaped.

In the year 1821, the plaintiff commenced suit in Edgefield district, South Carolina, upon an exemplification of the judgment obtained in the Superior Court of Richmond County, Georgia. To this action the defendant pleaded nul tiel record, the statute of limitations and set-off, and the jury found for the defendant.

In the year 1827 the plaintiffs took out execution under the judgment in the Superior Court of Richmond county, Georgia, and levied it upon a negro man as the property of the defendant. Whereupon the defendant moved this court to have satisfaction entered upon the said judgment, and offered the judgment in his favor from Edgefield as proof of payment. And the question which occurs for the decision of the Honorable Court is this. Does the exemplification from the court of Edgefield afford sufficient proof that payment was the ground upon which it was obtained, to authorize this court to enter satisfaction of the Richmond judgment?

John W. Wilde, defendant's attorney.  
Jno P. King.

By the Court.—This question depends chiefly upon the construction given to the Constitution and laws of the United States.

The Constitution declares that full faith and credit shall be given in each State to the judicial proceedings of every other State. And by the act of Congress of the 26th May, 1790, it is declared that the records and judicial proceedings of the State courts (authenticated in the manner therein prescribed) shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken. Would the judgment rendered for the defendant in Edgefield be a bar to any subsequent suit on the judg-

ment against him in Richmond, if such subsequent suit were commenced in any of the courts of South Carolina? There can be no hesitation in saying it would, as that judgment was conclusive upon the subject-matter of it, between the parties. If conclusive in South Carolina, and the same faith and credit are to be given to the judgment in every court within the United States as by law it would have in South Carolina;—it follows that the judgment in Edgefield would be as conclusive and afford the same protection to the defendant in any other State where suit might be brought, and that as well in Georgia as elsewhere.

But the distinct question submitted, is, whether the judgment in Edgefield affords sufficient proof that payment was the ground upon which it was obtained to authorize the court to order an entry of satisfaction here.

The record from Edgefield shows three distinct pleas, nul tiel record, the statute of limitations, and a set-off. The verdict and judgment are general. It is, therefore, impossible for this court to know certainly from the record on which particular plea the judgment was rendered. Yet as the plea of nul tiel record would be answered by the adduction of the exemplification of the judgment in Richmond, on which alone the plaintiff could proceed, and as there was no limitation of the judgment, by our laws, it is strongly to be presumed that the case turned on the plea of set-off; and as the matter of set-off arose subsequently to the judgment in Richmond, it must be considered equivalent to payment; at all events the judgment being general, the latter plea must be included in it.

To deny the defendant the benefit of the judgment in Edgefield, would be to declare that a judgment which by the Constitution and laws of the United States is obligatory on every other court within them, has no obligation here, and would further be, to permit the plaintiff to make use of the authority of this court for the enforcement of a demand adjudged by a competent court of South Carolina to be extinguished.

Let the rule be made absolute.

**Job S. Barney, Administrator of George W. Evans v. William Doyle.**

In Richmond Superior Court.

**Lost Papers—Re-establishment and Recovery at Law.**

—By the 6th sec. of the judiciary act of 1799, the Superior Courts as courts of law have the power to establish lost papers, notes, &c., and when it is done, the copy may be sued on and recovered in the same manner as the original, and that without resort to a Court of Equity.

This was an action of assumpsit founded on the copy of a note payable to bearer and lost, which copy had been regularly established in this court by its order, and judg-

ment made in pursuance of the powers given it in the 6th sec. of the judiciary act of 1799 and the rule of court to carry it into effect.

At the trial the defendant objected to the copy being received in evidence, because it was not shown that the original was destroyed, and might at that time be in the hand of a bona fide holder, who could compel a payment to him; and because the case presented by the plaintiff was not such as could be sustained by a court of law, but belonged exclusively to a Court of Equity, where the defendant would have an adequate indemnity against the risk of a future recovery by a third person. The case relied on chiefly, was that of Rowley v. Ball, 3 Cowen's Rep. 303, and the authorities there cited.

The evidence was received and a verdict taken with leave to set it aside, and award a nonsuit if the court should, on hearing argument, consider the objections to the evidence, and to its want of jurisdiction as a court of law over this case, well taken.

I have listened with much attention to the argument offered, and the authority which supports it. They are clear and strong, and but for the provision of our own acts and the proceedings in this case under them, would be irresistible.

It is admitted that a Court of Equity might compel the payment of such a note, thought lost, or to establish a copy in lieu of the original; which however would be done on terms. Has or has not this court the same power? The 6th section of the Judiciary act of 1799, which speaks of the powers common to the Superior and Inferior Courts, gives to them two which were before peculiarly equitable. One of them is "to establish lost papers, &c. under such rules and precautions as are or may have been customary and according to law and equity." Now this cannot be assigned to the powers of this court as a Court of Equity, for it holds none of its special powers as a Court of Equity in common with any other court; they being conferred by a separate section, the 53d, where they are particularly enumerated; and for the establishment of lost papers, the Inferior Court, which is entirely a court of law, has equal powers with this Court. It must then be considered an enlargement of the powers of a court of law to embrace this subject. Has this court exercised the power? Its records and judgment show that it has, and that judgment standing unreversed, is conclusive, the subject matter of it being res adjudicata inter partes. It is said the defendant is in jeopardy, having no indemnity. This is unfortunate, and if the matter were now open, the court would protect him. But by the order of the court establishing a copy, the plaintiff has as perfect a right to a recovery as he would have if the original note were offered, or if he were in a Court of Equity in New York or in England.

The motion is overruled.



202 **\*Robert E. Brodnax v. Wade Brown and Elizabeth Brown, Executors of James Brown.**

In Burke Superior Court.

**Executors De Son Tort—Joint Pleas—Separate Trials.—**

Where defendants were sued in *assumpsit* as executors *de son tort*, and pleaded *non assumpsit*, *ne unques executor*, and that they never intermeddled, the court would not allow a separate trial of each plea.

To this declaration the defendants have pleaded *non assumpsit*, and also that they are not executors, nor have they intermeddled with the estate of James Brown. And now move for a several trial of each plea.

It is argued by defendant's counsel that "whether a man have made himself executor *de son tort* is a question not to be left to a jury, but is a conclusion of law resulting from the facts established in evidence;" and a case in 2 Term Rep. 99, cited in Toller's Law of Executors, sec. 2, ch. 2, book 1, is referred to. It is further contended that the jury under the latter plea have but to find the facts, and the court pronounces the law as applicable to the facts so found.

The plaintiff relies on the precedents and authorities found in Chitty's Treatise on Pleading, and on what has been the practice of our courts in such cases.

One of the evils of our judiciary system, and not the least, is, that principles and practice must generally be settled, if settled at all, under circumstances the least favorable to deliberate investigation, during the hurry and business of a court in which questions various and important are pressed upon the consideration of a judge in the most rapid succession. Remote, too, as he frequently is, from books, and forced to draw promptly on his memory and reason, it would indeed be surprising if errors were not frequent, and decisions various.

In pronouncing the opinion of the court in this case, I find myself under all these disadvantages, but impelled by the necessity of my situation, I do not hesitate.

It is true, as contended by defendant's counsel, that "whether a man be executor *de son tort* is a conclusion of law resulting from the facts established in evidence," which is the extent of the authority cited. But this by no means settles the order of pleading, or the practice in such cases, but merely that what shall constitute a man such executor is matter of law.

In the English courts, where special pleading is allowed, and duplicity of pleading carefully avoided, the plea of *ne unques executor* is admitted, in addition to the general issue and the plea of *plene administravit*. Fortesc. 336; Com. Dig. Pleader, E. 2, cited in a note, 2 Chitty, 450, and so are the precedents. The conclusion of the plea *ne unques executor* is to the court with a verification. So, too, is the plea \*of the statute of limitations, of *plene administravit*, of a

retainer; but these pleas, though connected with the general issue which concludes to the country, do not require or admit of a severance of issue and trial. And it is laid down in Chitty, that though the plea *ne unques executor* usually conclude to the court with a verification, it does not seem to be necessary; but that it might conclude to the country, as the subject matter of it is a denial of an allegation in the declaration. Besides it is expressly declared that though the conclusion be with a verification to the court, the plaintiff may by his replication re-assert the fact which brings the allegation in the declaration before the country, and in our practice a replication is always implied.

Our own acts, however, have left but little doubt or uncertainty on this question.

By the Judiciary act of 1799, the manner of commencing suits, which is by petition and process is clearly prescribed: and the manner of making defence is as clearly pointed out. It is declared that the answer of the defendant may contain as many several matters as he may think necessary for his defence; and the petition and answer shall be sufficient to carry the cause to the jury without other replication or course of proceeding. The explanatory act of 1818, which was designed expressly to enforce the provision of the act of 1799, leaves no doubt in the mind of the court.

The motion is overruled.

**Elisha Martin & Co. v. Henry C. Byrom.**

In Richmond Superior Court.

**Plea of Infancy—Subsequent Promise—Must Be Express—Acknowledgment Insufficient.**—A subsequent promise to avoid the plea of infancy, must be express, and deliberately made. A mere acknowledgment is not sufficient.

The grounds of this motion are that the verdict is contrary to evidence, contrary to law, and contrary to the instruction of the court.

It is an action to recover the amount of a promissory note, and infancy is the defence relied on. The proof to sustain the plea is the deposition of Malcolm Johnson, defendant's step-father. He fully sustains the plea, proving defendant's exact age as seen by the witness, recorded in the family record of births, which is now destroyed. The witness has been defendant's step-father since 1808, enjoyed the best means of knowing his age, and his credit is unimpeached and uncontradicted except by the testimony of some witnesses who swear as to the apparent age, of the defendant at the time of the contract. So uncertain and unsatisfactory was the proof of majority derived from defendant's appearance, that \*plaintiff replied a subsequent promise and affirmance of the contract by defendant when at full age. This in the opinion of the court

is the point upon which a case depends. A subsequent promise to be obligatory must be express and deliberately made. A mere acknowledgment is not sufficient. In this case the subsequent promise relied upon was made under circumstances which would seem to render it rather an offer of compromise than a free, deliberate and express promise to pay. The defendant was in arrest for this very debt, and offered to pay a part if he could be released and have time for the balance. This offer was rejected. Bail was required and given. But whether this offer or promise were or were not made by way of compromise, the time and circumstances under which it was made, show an absence of that deliberation and freedom necessary to render it valid. To support the action, it should have been made before suit brought. On all the grounds, the motion must be sustained.

It is therefore ordered that the verdict be set aside, and a new trial granted.

**Simmons Crawford, Administrator cum tes. an. of Jesse Winfrey v. William P. Beal, Administrator of Benjamin E. Winfrey.**

In Columbia Superior Court.

**Notes—Transfer after Maturity—Equities.**—A transfer of notes long after they become due will not deprive the maker of any defence to which he would have been entitled, had they continued in the hands of the payee.

**Set-Off—Claim against Decedent against Debt Contracted with Administrator\***—Mutuality.—If A. contracts a debt with B. as the administrator of C. and is sued for the same, he cannot plead as a set-off a debt due to him from C. the intestate.

**Same—Same—Next Case.**—See also the next case.

Judgment has been confessed, subject to the opinion of the court upon the plea, which is a set-off. The notes sued on were given by defendants' intestate to Thomas Colvard, administrator of James C. Walker,

**\*Personal Representatives—When Set-Off Allowed against—Debt Contracted with Personal Representative.**—A debt of the decedent owing the defendant is not a proper set-off against a debt contracted with the representative of the estate. *Crawford v. Vaughn*, Dud. 205; *Crawford v. Grubbs*, Dud. 206; *Mills v. Lumpkin*, 1 Ga. 511; Ga. Code, § 3751. And see *Antony v. Miller*, Ga. Dec. pt. 1, p. 30. The reason for this rule is well stated in the principal case.

**Same—Same—Both Debts Incurred during Life of Decedent.**—But where both debts were incurred during the life of the decedent, the defendant is entitled to set off the debt owing him against the debt which he owes the estate. *Crawford v. Grubbs*, Dud. 206; *Ray v. Dennis*, 5 Ga. 357; *Meriwether v. Bird*, 9 Ga. 597; *Whitehead v. Fitzpatrick*, 58 Ga. 348; *Russell v. Hubbard*, 76 Ga. 618; Ga. Code, § 3751.

**Same—Same—Same—Immaterial That Claim of Higher Dignity May Be Defeated.**—And it is immate-

and were transferred to this plaintiff more than four years after their maturity.

It is well settled that a transfer of notes so long after due, will not deprive the maker of any defence to which he would have been entitled had they continued in the hands of the payee. The case is then considered as if it were between Colvard the administrator of Walker and this defendant. Judgments in the Inferior Court and Justice's Court in favor of the defendant against Colvard administrator of Walker, are attempted to be set-off. It does not appear, as the exemplification of these judgments are not before the court, for what they were given, but from the argument it is presumed they were for debts due from Walker in his life time. The question which then presents itself, is this, can the defendant avoid the payment of his debt contracted with Colvard, the administrator, by showing a debt due to himself by the intestate? It is the opinion of the court that he cannot.

205 \*The plea of set-off is only good where there is an entire mutuality of

rial that such set-off may result in defeating claims of higher dignity than the debt owing to defendant, for the reason that creditors are entitled to payment only out of assets, and it is only the excess which defendant owes the estate in such case that can properly be considered as assets. The creditors can claim no greater rights than could the decedent if living. *Ray v. Dennis*, 5 Ga. 357; *Meriwether v. Bird*, 9 Ga. 597; *Russell v. Hubbard*, 76 Ga. 618; Ga. Code, §§ 3751, 5085.

**Same—Same—Same—Nature of Judgment as to Excess.**—Where the debt owing from the decedent to the defendant is the larger, the representative of the estate may plead that payment of the excess will exhaust all the assets of the estate and defeat debts of higher dignity than that owing to the defendant; the reason being that such excess constitutes assets, and as to it the defendant occupies no higher ground than any other creditor, and is only entitled to have that portion of his claim against the estate paid in its due order of administration. In such case the judgment as to the excess should not be absolute in favor of the defendant, but only *quando acciderent*. *Ray v. Dennis*, 5 Ga. 357; *Russell v. Hubbard*, 76 Ga. 618; Ga. Code, § 5085.

**Same—Same—Same—Illustrations.**—This rule, that a set-off may be allowed where the debts were both incurred during the life of the decedent, applies where the defendant, as surety for the decedent, has been compelled to pay a judgment recovered against decedent before his death; and it does not matter that defendant has only paid the judgment since the death of the decedent. The payment relates back to the date of the judgment. *Ray v. Dennis*, 5 Ga. 357.

And so where the decedent contracted with his attorney at law, that in consideration of the attorney's paying over certain collections then in his hands, without deducting his fees, he should have all his fees paid out of a certain other note and account when collected, it was held, in a suit by the administrator against the attorney for the amount of said note and account, that recovery could be had only for the balance after deducting the attorney's fees; and that it was immaterial that the



debts which is not the case here. Colvard the administrator of Walker is not indebted to the defendant, though he is bound in his character of administrator to pay the debt due from his intestate to the defendant if possessed of assets for that purpose. His liability is contingent, depending upon assets. The liability of the defendant consists of absolute promises, which being in consideration of assets, become themselves such in the hands of the administrator for the benefit of creditors and distributees. Among creditors the law has prescribed the order of payment, and it is not in the power of a creditor of inferior dignity to disturb this order or to defeat the rights of those having superior claims by obtaining possession of, and withholding the assets by any means or any pretext whatever. The 5th sec. of the act of 18th Feb. 1799, for the better protection and security of orphans and their estates, makes the debt for the payment of which these notes were by order of court transferred to the plaintiff, superior in dignity to all others, and the proceeds of the notes if in the hands of Colvard the administrator of Walker, must have been by him paid in satisfaction of it before every other debt. The plaintiff has received the notes in lieu of money to which if entitled indirectly through Colvard the administrator of Walker, he is as certainly entitled directly from the defendant.

Let judgment be entered for the plaintiff.

**Simmons Crawford, Administrator of Jesse Winfrey v. Isaac Vaughn, and the Administrator of Benjamin E. Winfrey.**

In Columbia Superior Court.

**Set-Off—Claim against Decedent against Debt Contracted with Administrator—Mutuality.**

This case comes before the court in the same manner as that of the administrator of Jesse Winfrey against the administrator of Benjamin E. Winfrey, and its facts

attorney had collected the note and account only since the death of the decedent. This case was stronger than the foregoing because of the express contract. *Whitehead v. Fitzpatrick*, 58 Ga. 348.

**Same—Same—Claim against Legatees.**—An equitable claim against the legatees of an estate cannot be pleaded in defence of an action by the administrator *de bonis non, cum testamento*, etc., for a debt due to the estate. But upon a bill filed by the creditor against the legatees and the administrator, setting forth that the legatees reside in various states, that to sue them separately would entail such an amount of expense, etc., as would amount to the whole of his claim; that the debt was contracted with the estate upon the faith of this equitable claim; and that these legatees are the only parties in interest, there being no debts of the estate, a court of chancery will decree payment to the creditor, out of the debt due the estate. *Lyon v. Howard*, 16 Ga. 481.

†See preceding case, and *foot-note*.

bring it within the principles which govern that case; for though they differ somewhat, that difference is against the plea. Here the debt to be set off is of the lowest dignity, being an open account. It is besides the debt of Walker, the intestate, due to one defendant, set off against the joint debt of both defendants contracted with Colvard his administrator.

Let judgment be entered for plaintiff.

**206 \*Simmons Crawford, Administrator of Jesse Winfrey v. Hezekiah Grubbs.**

In Columbia Superior Court.

**Set-Off—Claim against Decedent against Action by Administrator—Mutuality.**—In the two cases immediately preceding, it is laid down: That "If A contracts a debt with B. as the administrator of C. and is sued for the same, he cannot plead as a set-off of a debt due to him from the intestate."

**Same—Same—Statute.**—The case is a different one where the debt sued on was originally due to the intestate instead of his administrator; for then the debts are mutual and of course may be set-off.

**Same—Same—Set-Off by Legatee or Distributee.**—Where suit is brought by the representative of the estate against a legatee or distributee, on a debt alleged to be due the legatee or distributee may set off the amount of his legacy or distributive share against the judgment, provided the estate be solvent and in a condition to be distributed, and there exists no special reason for collecting the debt owing by him. *Swift v. Swift*, 13 Ga. 140; *Carter v. McMichael*, 20 Ga. 99; *Dorsett v. Frith*, 21 Ga. 245; *Dorsett v. Frith*, 25 Ga. 541; *Moody v. Ellerbie*, 36 Ga. 666; *Dorsey v. Simmons*, 49 Ga. 245; *Dobbs v. Prothro*, 55 Ga. 73; Ga. Code, § 3752. And see *Oglesby v. Gilmore*, 5 Ga. 56.

**Same—Same—Same—Rule Extended to Debtor Purchasing Distributive Share.**—This rule is extended also to a judgment debtor of an estate who has purchased the share of a legatee or distributee. He too may claim a set-off for the amount of such legacy or distributive share, provided the estate be solvent, and no reason exists for collecting the judgment except to pay it back again to the debtor. *Moody v. Ellerbie*, 36 Ga. 666; *Dorsey v. Simmons*, 49 Ga. 245.

**Same—Same—Set-Off by Executor De Son Tort.**—Where one married the widow of the intestate, made himself executor *de son tort*, and honestly administered the estate, selling some of the property, and paying the debts of the intestate, and incurring expense in preserving the property and in rearing the intestate's children, it was held that he was entitled to an equitable set-off for all these expenses when sued by one who took out letters of administration many years after the death of the intestate. *Dorsett v. Frith*, 21 Ga. 245; *Dorsett v. Frith*, 25 Ga. 541.

**Cross References.**—See generally, *Antony v. Miller*, Ga. Dec. pt. 1, p. 30; *Cash v. Cash*, Ga. Dec. pt. 1, p. 97, and *foot-note*; *Buckhanan v. Gamble*, Ga. Dec. pt. 1, p. 156; *Bemis v. Simpson*, Ga. Dec. pt. 2, p. 224, and *foot-note*.

‡See *Crawford v. Beal*, Dud. 204, and *foot-note*; *Crawford v. Vaughn*, Dud. 205.

There is nothing in the 5th sec. of the act of 1799, which ought to operate against this view of the subject; nothing which by fair construction will deprive any one of a legal defence, acquired without fraud, and subsisting at the death of his creditor. Prim. Dig. 160-1.

This case comes before the court in the same manner as the two preceding cases, but is accompanied by a statement of facts which presents other and different questions for its consideration.

It is admitted that the notes sued on were transferred by Thomas Colvard, administrator of James C. Walker nearly six years after due, and that at the death of Walker, he held these notes, but was at the same time indebted to defendant the sum now set off, then in notes since carried to judgment. The debts are therefore mutual, and the defendant is entitled to the benefit of the plea, if there be nothing in the order of court directing the transfer, or in the 5th sec. of the act of the 18th Feb. 1799, for the better protection of the estates of orphans upon which plaintiff relies to deprive him of it. The order of court cannot conclude the rights of the defendant, unless it be considered the judgment of the court upon the point of this defence, and unless he were a party to the judgment. By reference to the record, it does not appear that the matter of the defence has ever been adjudged by the court, or that the defendant was either a party to or cognizant of the proceedings under which the order was passed. The plaintiff had obtained a general decree in Equity against certain persons among whom was Colvard, administrator of Walker, who had been executor of the will of Jesse Winfrey, and received money as such executor, for which he had not accounted. Subsequently an order was made requiring Colvard to deliver to the plaintiff in part payment of the sum decreed against him, certain notes admitted to be in his hands, and held as the property of Walker his intestate, among which were the notes under consideration. Between the plaintiff and Colvard the order may be considered conclusive. The delivery of the notes under it was a performance of the decree by Colvard pro tanto; and the order was probably intended as an authority for the plaintiff to receive them, and his justification for so doing, should they prove unproductive. This is the whole effect of the order, and as far as appears, its whole design. It never could have been intended to deprive the makers of the notes embraced in it of any legal right.

But it is contended that though their rights may not be concluded by the order of court, they must be postponed  
207 \*in favor of the claims of plaintiff by force of the 5th sec. of the act above referred to.

This act, which gives priority to the class of debts there mentioned, should be liberally construed so as not to be directory alone to the representatives of defaulting executors, administrators and guardians, of

the order in which debts are to be paid by them, but as creating an equitable lien on the estates of such executors, administrators, and guardians superior to every other. The construction insisted on, however, goes farther. It not only creates such lien, but takes away from him who may have had dealings with executors, administrators, and guardians, who may prove defaulters, all defence, and leaves him at the mercy of their representatives, or of those entitled to the estates they may have wasted. This is not believed to be a fair construction of the act. There is nothing either in its letter or spirit which can warrant a construction that will deprive any one of a legal defence, acquired without fraud, and subsisting at the death of his creditor.

The opinion of the court being in favor of this plea, it is ordered that judgment be entered accordingly.

### Atwell's Executors v. Job S. Barney.

**Executory Devise—Indefinite Failure of Issue\*—Validity.**—An executory devise, to vest on a dying without issue generally, that is on an indefinite failure of issue, is not good because it tends to create a perpetuity.

**Same—Same—Construction\*—Intention of Testator Favored.**—But courts favoring the intention of the testator, particularly in devises of personal property, take hold of any circumstances or words of the will which limit the general expression of dying without issue and afford a ground for construing the limitation to be a dying without issue

**\*Executory Devise—Indefinite Failure of Issue.**—In *Tucker v. Adams*, 14 Ga. 548, 577, one N., by deed, gave to his daughter and her husband, for and during their existence in this world, a negro woman and her increase, the said negro woman and her increase to go at the death of the daughter, to be equally divided among the lawful heirs of the body of said daughter, as their own right and property in fee simple. It was held that under this deed, the persons who were the heirs of the body of the daughter at her death, took as *purchasers*; the court saying that very slight superadded words to the word "heirs" had been held sufficient to make that word a word of purchase, and citing (p. 577) the principal case as an instance in which the words "after her death," were held to control the words "if no lawful issue," and prevent them from being construed as creating an estate tail.

In *Hollifield v. Stell*, 17 Ga. 280, the bequest was to the testator's daughter, and in case said daughter "should die without an heir of her body," limitation over, etc. It was held that the words of this bequest, *ex vi termini*, imported an estate tail, there being nothing explanatory annexed to restrict their meaning, and therefore the daughter took an absolute fee simple under the Act of 1821. And on p. 283, the court said, that while the Georgia courts had felt constrained by the stringent terms of the Act of 1821 to bring all the cases to the test of the statute *de donis conditionalibus*, they had not felt themselves bound by the construction put upon that statute in England, where its words had been wrested from their natural and common-sense



living at the death of the party, in order to support the devise over: so the words "after her death, if no lawful issue" were construed to mean without lawful issue at the death of the deceased, and to constitute a good limitation in an executory devise.

In this case the following facts are admitted: 1st. That by the will of John Atwell, a negro woman, Beck, was left to his daughter, Elender Atwell, when she marries; if she lives single my executors to hire Beck out, and my daughter Elender to receive the benefit thereof, after her death, if no lawful issue, to be divided amongst my children. 2d. That Elender Atwell did intermarry, and the negro woman went into her possession, and was sold to the defendant, Dr. Barney. 3d. That some time after the sale Elender Atwell had issue, to wit, one child, which issue died, leaving Elender in life, who has since died, leaving no issue. 4th. The negro woman, Beck, has two children, Avis, about ten or eleven years old, and Henry, an infant about seven or eight months old. 5th. Should the court decide that the plaintiff is entitled to a recovery under the will, the negroes are to be delivered up in — days thereafter, and a reasonable hire to be allowed for the wench, to be agreed upon by two disinterested persons.

Schley & Glascock, plaintiff's attorneys.  
R. H. & J. W. Wilde, for defendant.

In the case submitted the court is required to place a construction on that clause of John Atwell's will by which 208 he disposes \*of a negro woman named Beck; on which construction the principal cause must depend.

The first inquiry in the construction of wills is into the intention of the testator. When that is discovered, the next is into the legality of that intention, and they are to be so construed as to give effect to every clause and provision thereof, if it can be done consistently with the rules of law. Whatever may have been the motives of this testator in disposing of his property, his intention as disclosed in his will is as

meaning and given an arbitrary and technical interpretation in order to favor the heir at law. In short, that the Georgia court had construed the statute *de donis* as it was written, and must continue to do so, or otherwise it would be necessary to overrule all the previous Georgia cases, from the principal case to the then recently decided case of *Williams v. Allen*, 17 Ga. 81.

In *Gray v. Gray*, 20 Ga. 804, the previous ruling, that the Georgia court would construe the statute for themselves, was upset, and it was held that the construction of the statute *de donis* must be determined by the decisions of the English courts, and that where a bequest of personality would, if it were a devise of realty, create an estate tail, under the statute as construed by the English courts, it must be held to come within the Act of 1821, and therefore as vesting an absolute estate in the first taker. The bequest in that case was to two daughters, and should both, or either "die without an heir, begotten of their bodies, then their part or

clearly not to give his daughter Elender an absolute property in the slave Beck, and the right of alienating her from his family, as it was to give her the use of the slave during her life: For Elender Atwell is not, until her marriage, even to have the possession of Beck, and after her death Beck is limited over to the other children of the testator. Whether this latter disposition of the slave is legal and such a limitation over the property as the law will allow to be good, is the question submitted for decision.

The least possible interest which Elender Atwell could have in Beck, under this will, is a life estate, and whether this is the whole of her interest depends on the meaning attached to the particular words of limitation used by the testator, "after her death if no lawful issue," for it was clearly in his power by proper words, to limit a remainder over upon this life estate by an executory devise. It is well settled that an executory devise to vest on a dying without issue generally, that is on an indefinite failure of issue, is not good, because it tends to create a perpetuity. But courts favoring the intention of the testator particularly in devises of personal property, take hold of any circumstance or words of the will which limit the general expression of dying without issue and affords a ground for construing the limitation to be a dying without issue living at the death of the party, in order to support the devise over. The words "leaving no issue" and "without leaving issue," have been construed to mean, without issue living at the death of those who first took, and that the limitation over was good as an executory devise. So the words "after her decease" have been construed to mean, immediately after the decease, and to constitute a good limitation in an executory devise; as in the cases of *Pinbury and Elkins*, 1 P. Wms. 563, and *Paine v. Stratton*, cited 2 Atkins, 647. The words of limitation in the first case are "then after her decease £80 to remain, &c." In the latter case the words

parts to be equally divided," between persons named, "and the survivor." This was held to create an estate tail converted into an absolute fee by the Act of 1821.

On page 815, the court referred to the principal case as being the earliest reported case involving facts to which the Act of 1821 would apply, and as failing to refer to that act. The principal case is again referred to on page 830 in the dissenting opinion of LUMPKIN, J., as being a contemporaneous exposition of the Act of 1821 by the judges in convention, and as being wrong in the light of the majority opinion from which he was then so strenuously dissenting.

But the ruling in *Gray v. Gray*, 20 Ga. 804, that the decision of the English courts construing devises of real property under the statute *de donis* are to control in the interpretation of that statute by the Georgia court, has come to be the established rule. See *Hertz v. Abrahams*, Adm'x, 110 Ga. 707, 36 S. E. Rep. 409. See also, in this connection, *Mayer v. Wiltberger*, Ga. Dec. pt. 2, p. 20, and *foot-note*.

are "and after her decease, &c." The case submitted for decision is almost identical with these, and if there be any difference it is too slight to except it from the principles on which they rest. The construction which is given to this clause of John Atwell's will, therefore is, that the limitation was to take effect immediately after, or at the death of Elender Atwell without lawful issue. Accordingly the limitation is good.

209 \*Charles D. Stewart v. William G. Grimes and Albert W. Jones.

In Richmond Superior Court.

**Action on Bond Conditioned—Performance of Conditions—Burden of Proof.**—In an action upon a bond conditioned to pay a debt by instalments, or to pay rent, the simple production of the bond on the part of the plaintiff is sufficient to put the defendant upon proof of the performance of the condition: And the same principle is applicable to a bond conditioned to deliver, on a given day, a deed and muniments of title.

**Practice—Waiving Right to Introduce Evidence—Changing Position after Case Argued for Plaintiff.**—If a defendant has his testimony in court, and refuses to introduce it at a proper time, resting his case on matter of law, and the benefit of a concluding argument, and after the case has been argued for plaintiff, he cannot then be permitted to change his position and introduce his testimony.

**New Trial—Newly-Discovered Evidence.**—The discovery of new and material testimony, after verdict, is a good ground for a new trial.

**Same—Appeal—Party Unable to Give Security—Trial before Special Jury.**—When a new trial is granted

\***Evidence—Waiving Right to Introduce.**—In *Haiman v. Moses*, 39 Ga. 712, it is said: "Generally, when a party permits proceedings to be had, in the progress of his case, without making any objection, the court will hold him to have waived the objection, and will not relieve him against the consequences of the proceeding to which he did not object at the proper time"—citing the following authorities, including the principal case: *Stewart v. Grimes*, Dud. 209; *Garner v. Hopgood*, Ga. Dec. pt. 2, p. 131; *Stroup v. Sullivan*, 2 Kelly 281; *Harrison v. Young*, 9 Ga. 359; *Carhart v. Wynn*, 22 Ga. 24; *Arline v. Miller*, 22 Ga. 330; *Bryan v. Gurr*, 27 Ga. 378; *Wilhelms v. Noble*, 36 Ga. 599; *Shewmake v. Jones' Ex'rs*, 37 Ga. 102.

†**Same—Same—Right to Reopen Case.**—In *Jordan v. Pollock*, 14 Ga. 159, it was held that the court below committed no error in opening the case after the plaintiff had closed, and permitting the introduction of certain deeds; that while the practice was not to be encouraged by the circuit judges, because it lead to indefinite delays and might open the door to unfair advantage, yet, in the case then before the court, there was no evidence of any such advantage having been taken as in the principal case, there cited, where the party had his testimony in court, and, as was said in argument, "gambled it for the conclusion."

‡**New Trial—Newly-Discovered Evidence.**—See *Irwin v. Morell*, Dud. 72, and *foot-note*; *Glover v. Woolsey*, Dud. 85.

on the verdict of a petit jury, and it is shown to the court that the party is unable to appeal, because he cannot give security, the court will on payment of costs, direct the case to be transferred to the appeal docket, and allow it to be tried before a special jury.

This was an action of debt on a bond conditioned for the delivery on a given day of certain deeds and muniments of title to a tract of land sold by Grimes, one of the defendants, to the plaintiff, for and in consideration of certain judgments against him in favor of Stewart and Hargraves, amounting to \$4716. Breach assigned was the non-delivery of the deeds and papers recited in the bond and damage averred to have been sustained equal to the penalty of the bond.

At the trial of this cause the principal question which arose was as to the sufficiency of the proof offered to sustain the averments in the declaration, that is to prove the breach assigned and the damage sustained by reason thereof. The only proof offered was the bond itself. It is certainly true as contended for by defendants' counsel, that the breaches assigned must be proven as every necessary averment must be, but it does not follow that this proof must be aliunde the bond. In an action on a bond conditioned for the payment of a debt by instalments, a breach must be alleged that is the non-payment, and so of a bond conditioned for the payment of rent. But the simple production of the bond is sufficient to put the defendant upon proof of his performance of the condition, else the plaintiff must be driven to the legal absurdity of proving a negative, or fail in his suit. In principle this case does not differ; for though the condition here is not for the delivery of money, it is for the delivery of certain deeds and papers at a given time, the non-delivery of which cannot be proven except by proving a negative, and from the very nature of this case the burden of proof is thrown on the defendants to prove the affirmative.

As to the damages, it is clear that they must be proven, as this is not a bond in which the damage has been liquidated. Yet it is not without some evidence on that subject. The condition is for the delivery of deeds and muniments of title to a tract of land sold by Grimes, one of the defendants, to the plaintiff. Now there may be two measures of damage in such cases. One, the consideration or price paid for the land, with interest; the other, the value of the land at the time of the breach. If the first be the rule adopted, this case is a clear one, as the price is distinctly mentioned in the bond. If the latter be the rule, then the jury had the value agreed on by the parties five months before the time of the alleged breach from which to ascertain the value at the time the condition was to be performed. And though this is not very clear proof of the actual damage, it is such as to entitle the plaintiff to have his case submitted to



the jury, whose province it is to assess the damage according to the proofs and who must have given at least nominal damages.

Surprise is insisted on as a ground for new trial. It will sometimes be considered sufficient, but not such surprise as is complained of here, which is no other than the discovery of an error in a verbal report of a case determined in another county. If a party choose to rest his cause on a point of law, and the law be decided against him, he cannot complain of surprise, though he may of the error of the court, if it be in error. And it may here be remarked that the most uncertain means of knowing either what the law is, or what it has been adjudged to be, are the verbal reports of cases made, frequently by persons not concerned in them, and who hearing but part, misconceive the whole, and misapprehend the points on which they turn, as well as the decisions of the court.

"Because the judge would not permit the defendants to introduce their evidence to the jury, before they had withdrawn, which they had an undoubted right to do," is another ground on which the defendants rest their motion. That they had an undoubted right to introduce their evidence is true, and they were called on to do so, but refused, resting their cause on a matter of law, and the benefit of a concluding argument before the jury. After the plaintiff's counsel had concluded his argument, the defendants thought proper to change their position, and to introduce their witnesses, and moved accordingly, relying on the authority of *Mercer v. Sayre and Toler*, 7 John. Repts. 306. The Supreme Court of New York placed this matter entirely at the discretion of the judge. Yet for convenience in the transaction of business in courts as well as for the advancement of justice, this discretion should be limited by some rule, and not be exercised capriciously. But the facts of the case cited are quite different from the facts in this, and the utmost latitude of discretion that court might be inclined to allow, would (it is believed) not reach a case such as this. In the New York case, both parties had introduced their evidence, the defendants' counsel had closed his argument, and plaintiffs' counsel was before the jury, when an important fact which had a material influence on the cause in favor of the defendant was for the first time discovered by him. The plaintiffs' counsel was before the jury. He might reply to the newly discovered evidence or comment on the testimony, and no possible injury could result from its introduction. In the exercise of a sound discretion, and for the advancement of justice, the evidence should have been received. It would have been received here, according to a pretty uniform practice, and if discovered after verdict, would have been

211 good \*ground for new trial. But no case has been known here, or (I presume) elsewhere, in which a defendant has been allowed to sit still, with his testimony in court, and permit the plaintiff to unfold

his cause, argue it to the jury, disclose its strength or weakness, and then instead of argument reply with his testimony at a time when possibly the plaintiff may have dismissed his witnesses, necessary to meet the new defence.

The last ground insisted on by defendants in favor of their motion is, "That they have since the trial discovered new and material testimony, viz. the admission of the plaintiff himself, that no damage had accrued or could accrue to him by reason of the alleged non-performance of the condition of the said bond." Granting new trials is an exercise of that equitable discretion which belongs to courts of law, and is necessary to enable them in many cases to render exact and complete justice. Among the various cases in which this power should be exerted, our courts recognise the discovery of evidence, which, had it been known, and could it have been used at the trial, would probably have produced a different result. For though the court will not grant a new trial to let the party into a defence of which he was apprised at the trial; yet if he were ignorant of the defence, or of the witness by whom it could be sustained, and come to the knowledge of them while the court has the control of the cause, it will not compel him to submit to an unjust verdict, nor drive him into a Court of Equity for relief; but will afford him an opportunity of making his defence by granting a new trial. In this case, the newly discovered testimony is very material. The principal question before the jury was, as to the damage sustained by the plaintiff, and their verdict is for the whole amount of the judgments recited in the bond as the consideration for which the land was sold. Now, if Grimes were the only defendant, this verdict, which remits the plaintiff to his rights as they stood before the sale of the land, might be permitted to remain. But Albert W. Jones is also a defendant, and seems to stand in the light of a security to the bond, as he does not appear to have been any way concerned in the price for which the land was sold. Then what is the extent of his obligation? Surely he is not to be considered as becoming security for the judgments of Stewart and Hargraves, or as warranting the title to the land. He only bound himself to respond to the damage plaintiff might sustain by the non-performance of the condition of the bond. And if it be true that he has sustained no damage, and this can be shown by plaintiff's own admission, the verdict as against him, at least, is neither consistent with equity nor justice. The cause was tried before a petit jury from whose verdict an appeal to a special jury is allowed by law as matter of right, on payment of costs and giving security.

212 With such verdicts, unless \*grossly and flagrantly unjust and illegal, the court will not interfere, if the defendant have the power to avail himself of his legal privilege. But the misfortune or property of a defendant in a case such as the one before the court, should not deprive him of

a special jury trial, justly considered the most effectual safe-guard of his rights. The inability of defendants to give the required security is shown to the court.

Upon the payment of costs let the rule be made absolute, and the cause transferred to the appeal docket, to be tried by a special jury.

### William J. Hobby v. Atton H. Pemberton.

In Richmond Superior Court.

**Mortgage Securing Two Notes—Foreclosure for First—Surplus Proceeds Discharged from Lien.**—If a mortgage be taken to secure the payment of two notes, becoming due at different times, and the mortgagee foreclose and sell upon the first note that becomes due, and the mortgaged property be sold for more than enough to pay the note on which foreclosure is made, the surplus in the sheriff's hands is discharged from the special lien; and if other creditors of the mortgagor obtain judgment in the ordinary course of law before the mortgagee forecloses upon the second note, the surplus shall be paid over to them according to date.

This money has been retained by the sheriff to await the judgment of the court upon the claim to it, which is contested between the plaintiff and a junior judgment creditor. The facts appear to be these. Plaintiff was mortgagee of certain real estate in Augusta, mortgaged to secure the payment of several notes. When one of them became due, he applied for and obtained a rule nisi, and in due course of law a rule absolute for foreclosure of the mortgage for the sum due; upon which judgment of foreclosure he sued out execution and caused a sale of the mortgaged premises. The proceeds of the sale exceeded the sum due by a considerable amount, which excess is the money now in dispute.

Subsequently to the date of the mortgage, judgment was rendered against the mortgagor in the ordinary course of judicial proceedings, and afterwards another of the notes secured by the mortgage becoming due, the mortgagee sued for a second rule nisi, which rule was made absolute for the sale of the same mortgaged premises already sold under his former rule. Upon this second judgment of foreclosure rendered subsequently to the sale and to the ordinary judgment, plaintiff now claims the money in the sheriff's hands.

As to the priority of lien originally held by the mortgagee there is no dispute. The question is whether his lien upon this fund has not been divested by his own act in taking his judgment of foreclosure. A mortgage is a specific lien upon the thing mortgaged. It extends to nothing else. Our statute has prescribed the way in which the interest vested by the mortgage in the mortgagee shall be realized and reduced to possession, which is by special judgment and sale under execution of the mortgaged premises. The effect of

213 this judgment and sale is not to en-

large the lien, but to transfer it from the thing mortgaged to the money for which it may sell; and to this money the mortgagee is entitled, to the extent of his debt, and no further. The excess belongs to the mortgagor. But how is the extent or amount of the debt to be known? Certainly not by the mortgage, for that is sunk and lost in the higher evidence. It must be ascertained by the judgment of the court, which is the highest possible evidence, and until reversed is conclusive upon the parties to it. How far the second rule absolute or judgment of foreclosure may affect the mortgaged premises, it is not necessary or proper now to say. It certainly, however, can affect nothing but the mortgaged premises.

The excess of money beyond the amount of the first judgment having been vested in the mortgagor, and so become subject to the claim of general judgments, can no more be reached by it than could any other money or property of the mortgagor. It is therefore ordered, that the sheriff pay over the money in dispute to the general judgment creditors of the mortgagor or to their attorneys according to the priority of lien among them.

### The State v. Benjamin Sims.

In Richmond Superior Court.

**New Trial—Verdict Manifestly Wrong\*—Statute Making Jury Judges of Law and Fact.**—By the 23d sec. 3d div. Penal Code of 1817, the jury are declared to be judges both of law and of fact, and yet if they were to pronounce a verdict grossly and manifestly wrong, the court would unquestionably grant a new trial; but where the verdict is in accordance with the justice of the case, and the punishment is at the discretion of the court, it will not be disturbed.

The nuisance charged in this indictment is obstructing the way to a spring, known as Walton's spring, in the village of Summerville, and interrupting the free use of said spring, which way and spring are alleged to be public. The nuisance was very fully and satisfactorily proven at the trial, and the only difficulty in the case was to ascertain whether it were a public or private nuisance. It was in evidence that the original proprietors of the land, in laying out the village, set apart and dedicated to public use certain streets and lanes, the ground around the spring, and the way leading to it; and that ever since, for the last twenty or thirty years, the streets and lanes, spring and way have been used and enjoyed by the public. But there was no evidence of any exercise of power or right over them by any of the public authorities

\*New Trial—Verdict Contrary to the Evidence.—See generally, *Irwin v. Morell*, Dud. 72, and *foot-note*; *Glover v. Woolsey*, Dud. 86; *Wilson v. Wright*, Dud. 103; *Knight v. Mantz*, Administrator, Ga. Dec. pt. 1, p. 22, and *foot-note*; *Bagshaw v. Dorsett*, Ga. Dec. pt. 2, p. 42, and *foot-note*.



known to the laws of the State. On the contrary it was in evidence that the streets and springs have been kept in repair with money raised by subscription from the citizens inhabiting the village, it being unincorporated.

From the most attentive consideration I could give the case at the trial, my mind was brought to the conclusion, that 214 \*though the public had long used the streets, spring and way, and derived great convenience from them, the right thereof was rather vested in the villagers as incident to their lots there than in the public; and so I expressed myself to the jury in giving them the rules by which to distinguish a public from a private nuisance. The jury however found against the defendant, and the court is now moved for a new trial, on the ground that the verdict is against law and evidence and against the charge of the court.

I have been not a little embarrassed with this case, not on account of any difficulty in the questions presented, or abstruseness of the doctrines involved, but in exercising, under the circumstances of the case, and with reference to the 23d sec. of the 3d division of the penal code of 1817, the discretion and power I have of granting new trials. The defence set up seemed to me to have failed altogether, whether the nuisance be considered public or private; and the defendant cannot be considered free from fault, for if not the whole, at least a very considerable part of the public were greatly annoyed by the act complained of. He does not therefore come before the court entirely innocent, and under circumstances which would entitle him to much indulgence and favor: though to law and justice he is entitled, and but for the provision in the penal code to which I have referred, I should not hesitate in granting a new trial. I do not mean to be understood by this, as holding that the law takes from the court the power of granting new trials, but that it has the effect of limiting and greatly abridging the discretion of the court in this regard, unless it is to be considered a dead letter in the statute book. If the jury, who are declared by the code to be "Judges both of law and fact," were to pronounce a verdict grossly and manifestly wrong, in a case where the consequences would be very serious to the accused, the court would, unquestionably, exercise its power, and grant a new trial, especially if it could not obviate in a good degree by its judgment, the consequences of the verdict. But in the case under consideration, the punishment is a fine at the discretion of the court and the jury, who are constituted the judges both of law and fact, having, after a very full and fair hearing, pronounced a verdict which seems to be in accordance at least with the justice of the case, I will not disturb it. The motion is therefore overruled.

**Woodruff and Co. v. Dean and Mahoney.**

In Richmond Superior Court.

**Inferior Courts—Discharging Person Imprisoned for**

**Debt—Must Act as a Court.\***—By 2d sec. of act of 10th December 1803, the justices of the Inferior Court have power to discharge persons imprisoned for debt under circumstances therein named, but they must do it as a court, and an order for discharge submitted to them individually for their respective signatures out of court is insufficient and void.

Verdict for plaintiffs subject to 215 the opinion of the court \*upon the following statement of facts, to wit: "Dean was committed to jail under a ca. sa. at the suit of the plaintiffs, and gave bond with Mahoney as security for the prison bounds—after he had been on the bounds a week, he made application for a discharge (under the provisions of the act requiring plaintiffs who reside out of the State or County to give security for the maintenance and jail fees of the defendant when committed to jail, or in failure thereof, the defendant to be discharged by the justices of the Inferior Court) and upon producing the jailer's certificate that security for jail fees had not been given, and a certificate from the sheriff that he believed the plaintiffs resided out of the State, an order was signed by one justice of the Inferior Court, requiring such security to be given on the day of the date of said order, or that the said Dean should be discharged—the plaintiff's attorney had no notice of these proceedings in time to object. On the next day another justice signed said order, and on the next day a third justice signed said order, and Dean having the same in his possession, quit the bounds; the said justices did not have any consultation, the said order was not, and never has been entered of record on the minutes of the Inferior Court, and during the time Dean was on the bounds he boarded at Mrs. Riley's and was no expense to the county or city. We agree that the above is a true statement of the facts in said case, this 23d June, 1829.

A. J. Miller, Plaintiff's Attorney.

J. P. King, for Defendants.

We agree to submit the case stated without argument, with privilege of appeal to either party, with the further privilege of rejecting this consent as evidence on said appeal if entered, 5th August, 1829.

J. P. King,

A. J. Miller."

**PER CURIAM.** No paper has been submitted but the above statement. It is presumed, however, that the bond sued on is in terms of the act of 22d Dec. 1820, relative

**\*Courts—Judges—Powers during Vacation.**—It is a general principle applicable to the judges of the superior courts (and to the judges of the inferior courts as well, while that court was in existence), that they can exercise no powers out of term time except such as are specially authorized by statute. See *Low v. Goldsmith*, R. M. Charl. 288; *Graddy v. Hightower*, 1 Ga. 252; *Watson v. Jones*, 1 Ga. 300; *Stephens v. Crawford*, 1 Ga. 574, 579; *Gullatt v. Thrasher*, 42 Ga. 433; *Brinkley v. Buchanan*, 55 Ga. 342; *Walker v. Turner*, 58 Ga. 115; *Rogers v. Pace*, 75 Ga. 436, 438.

to prison bounds. The condition prescribed by that act is "that if the person or persons so arrested, and committed to jail do at any time without being legally discharged, pass or leave the boundaries so laid off, &c. such passage or departure shall be taken and considered an escape and for forfeiture of the bond, &c." The discharge relied on is one by three justices of the Inferior Court made or intended to be made according to the provisions of the 2d sec. of the act of the 10th Dec. 1803, relative to insolvent debtors, and the question to be decided is whether the discharge obtained in the manner stated, be legal or not.

There is no particular form or mode of proceeding expressly pointed out in the act except in the 1st sec. which is by petition, and rule or order of court. But this is for discharge upon the surrender of effects. The power is given however to the same tribunal, the justices of the Inferior Court, and the law clearly intended that the discharge should be by the justices of the Inferior Court as a court, and not by the individual act of each member of that body. It may be said that the discharge under the second clause of the 2d sec. is intended to be prompt, and upon a summary proceeding; and this is true, but it does not therefore follow that it is to be the individual act of the justices, and not the act of the Court. The discharge of persons committed for criminal offences where no bond has been given to prosecute, and the discharge of seamen committed to jail by their captains, where no security has been given for their maintenance and jail fees, was intended also to be prompt and summary; but no one could hesitate a moment in declaring their discharge by an order issuing from the several desks of the members of the Inferior Court in the absence of the party to be discharged, and of every one concerned, and upon the mere certificate of an individual as to his belief of a fact to be illegal and altogether extrajudicial. Yet these last cases are provided for in the same section, with the case of a debtor where no security has been given for maintenance and jail fees, and the case of seamen in the very same clause where the similarity of proceeding is pointed out by this expression which cannot be mistaken "in like manner." If a person confined for an alleged criminal offence, without a bond having been given to prosecute, and a seaman confined by his captain without security being given for his maintenance and jail fees, cannot be legally discharged but by a regular proceeding and a judicial order consequent upon an investigation into the legality of his confinement, it follows, necessarily, that a debtor cannot. The proceeding of the justices in this case is considered not only loose and irregular, but the order for discharge void as an act coram non judge.

Let judgment be entered for plaintiff, with the privilege of appeal in terms of the consent.

# George Anderson v. James Primrose, Executor of Robert Fraser.

In Richmond Superior Court.

**Witnesses—Competency—Wife of Intestate Interested in Action against Executor De Son Tort.**—A. sued B. as executor de son tort of C. and offered G.'s wife to prove the intermeddling; she being an heir and distributee of C., and the effect of her testimony being to increase the residuum for distribution in exact proportion to the debt sued on and recovered, was held to be clearly incompetent as a witness.

In this action it was attempted to recover from the defendant \*as executor de son tort of Robert Fraser, the amount of a promissory note given by Fraser to the plaintiff. At the trial, Mrs. Fraser, the widow of Robert Fraser, was offered as a witness by the plaintiff, and objected to as incompetent on account of interest. The court sustained the objection, and repelled her testimony. Much evidence was given by both parties in relation to certain negroes alleged by the plaintiff to be the property of Robert Fraser, but claimed by the defendant to be his own, and the jury having rendered a verdict for the defendant, the plaintiff now moves for a new trial on the ground that he was deprived of the benefit of important evidence by the error of the court in the rejection of the testimony of Mrs. Fraser; and because the verdict was against law and evidence, and against the principles of justice, equity, and good conscience.

It is a rule too well settled to require the adduction of precedent or authority to support it, that a witness is incompetent who has a direct and immediate interest in the result of the cause. The error of the court, if indeed there was error, may be easily discovered by the application of this rule to the facts of the case, and by examining into the relation in which the rejected witness stood towards the parties in it. She was the widow and one of the heirs and distributees of Robert Fraser, and therefore immediately interested in having the estate of her deceased husband increased as much as possible; and, if that were the object, or would have been the effect of her testimony, she was clearly incompetent. She was called by a creditor of Fraser, who was seeking to have satisfaction of his debt from the defendant as executor in his own wrong. A recovery in this case and satisfaction of the debt would have increased the residuum for distribution to the precise amount of the recovery. Suppose the rightful executor or the administrator of Fraser had sued the defendant for the negroes about which this dispute arose, and Mrs. Fraser the widow had been offered as a witness by the executor or administrator; would there have been any hesitation in rejecting her testimony? certainly none. Does the change of parties change the principle? I think not. The effect in either case is to increase the residuum to be distributed, in which residuum the witness has a direct,



immediate, and certain legal interest, and is therefore clearly incompetent.

As to the other grounds I have but this remark to make, that upon a full and fair investigation of the case, the jury pronounced their verdict upon the facts submitted to them in evidence, verdict was regular and legal, and, as I believe, rendered substantial justice to the parties. I can therefore see no good reason for disturbing the verdict.

The new trial must be refused.

## 218 \*Hicks and Lord v. Edward Thomas.

In Richmond Superior Court.

**Statute Limitations—Removing Bar—Acknowledgment Made to Secure Peace or Effect Compromise—Admissibility.**—It is well settled that no advantage shall be taken of an admission made to secure one's peace, or in the way of a compromise, and if an acknowledgment and promise for this purpose be replied to a plea of the st. of Limitations, the evidence will be rejected.

**Same—Same—Same—Same.**—But if the court from the circumstances should be of opinion that the subsequent acknowledgment and promise were made from a consciousness of the truth of the indebtedness admitted, the evidence would be considered good and available.

**Open Account—Right to Interest from Date of Acknowledgment by Letter.**—An acknowledgment of an open account by letter is such a liquidation of the demand as will enable the creditor to obtain interest from the date of the acknowledgment.

This is an action of assumpsit, there being in the declaration three counts, for money paid, laid out and expended, money had and received, and on an account stated; the promises and liabilities in each count allege to have been made and incurred on the 1st October, 1826. The defendant has plead and relied on the statute of limitations.

By a consent between the parties a verdict has been taken subject to the opinion of the court on the plea "it being admitted that the defendant within four years, offered the plaintiff fifty cents in the dollar for his claim." There was no evidence before the court, and from the pleadings it is plain that the debt is not barred. But with the papers submitted is a letter from defendant to plaintiffs, dated 25th Nov. 1820, admitting a balance due from him of \$335.37; which letter, it is supposed, was to be referred to by the court in making up its opinion.

From the papers submitted, it appears that Beach & Thomas previous to the year 1820 were indebted to the plaintiffs—that in that year, and after the death of Beach the defendant admitted, in the letter referred to, the balance above stated to be due to the plaintiffs from the late firm of Beach & Thomas, and at the same time informed the plaintiffs of the embarrassment and probable insolvency of that firm, and that in 1825 the defendant offered to the plaintiffs to pay them one half of the claim.

This letter is clearly a liquidation of the debt made by the defendant after the death

of his partner, by which, and by reason of his having survived his copartner, the debt was payable by him individually. In 1825, this debt was not barred as by the act of 1809, all actions founded on notes and other acknowledgments under the hand of the party, are not barred, until the expiration of six years. At the time, therefore, when the offer to pay one half was made, there was a subsisting legal demand. This demand is expressly admitted by the defendant, which admission is accompanied by a promise to pay one half. The only way by which the defendant can avoid the consequences of this acknowledgment and promise, if they can be avoided at all, is to suppose them made in an offer or an attempt to compromise. For the acknowledgment of the debt is very express, and the promise to pay one half is equally as express; made at the time too, when there was a subsisting debt clearly not barred. It is well settled that no advantage shall be taken of an admission

made to secure one's peace, and if such were the character of this acknowledgment and promise, the evidence would be rejected. If, however, the offer or admission be not made with a view of avoiding a suit, or to buy one's peace against a doubtful claim, but from a consciousness of the truth of the fact admitted, it will not fall within the rule. In this view it is of importance to look to the motive which led to the admission. What were the motives of the defendant in this case, are to be gathered from the letter. The defendant was the surviving partner of the late firm of Beach & Thomas, which firm was probably insolvent. His partner being dead, the whole liability survived to him and the debts of the firm were to be met by his unaided future efforts. Is it not therefore fairly to be presumed, that the admission was made rather with a view to the affairs of the defendant, and his ability to meet the whole claim, than to its justness, particularly as no dispute had arisen as to the legality of the debt or the sufficiency of the proof of it, and as it was not then barred by the statute? I think it is, and that the offer cannot be considered an offer of compromise so as to deprive the plaintiffs of the benefit of it in replying to the plea of the statute of limitations.

On the subject of interest, which is also referred to, the decision of the court no doubt is entertained. This is clearly a liquidated demand within the letter and spirit of the act of 1799.

Let judgment be entered for principal and interest, with leave to defendant to appeal within four days from the adjournment of court.

Edwards for Anderson and Co. v. H.

Musgrove.

In Richmond Superior Court.

**Witnesses—Competency—Claim Cases—Admissibility of Defendants in Execution.\***—It is a general rule

\*Witnesses—Competency—Defendant in Fl. Fa.—In

in claim cases and considered the safest that can be adopted, that defendants in execution cannot be witnesses.

The ground on which this motion rests, is the rejection of Harrison Musgrove, who was offered as a witness by the claimant.

The competency of defendants in execution to testify in claim cases, has been frequently discussed in the courts of the State, and different opinions have been held by different judges; but as far as I have been able to ascertain what the decisions have been, the judges with but few exceptions have rejected defendants as incompetent. When I came to the bench, such was the practice in this circuit, under a decision of my predecessor, and at the trial of this case, I rejected the defendant upon the maxim stare decisis. Since the trial, 220 I \*have conferred with the judges, and find the same decision and practice to prevail throughout the state. As far, therefore, as precedent authority and practice can sustain the court in the rejection of the witness, it is fully sustained. How far it can be sustained upon principle, is a matter of some doubt in my mind.

The first question which suggests itself is, whether the defendant in execution be a party to the suit? The party plaintiff or actor in this proceeding is the plaintiff in execution, the party defendant is the claimant. This issue is joined between them without any reference whatever to the defendant in execution, whose death even will not affect the suit, nor can he in any way release it. He cannot then be considered a party, and rejected on that account. Yet he evidently has some relation to the suit, and must have some interest or concern in its event. His title to the property is the subject of inquiry, and its proceeds, if condemned, will be applied in discharge of his debt. He could not therefore be called to testify on the part of the plaintiff, for he would have a direct and certain interest in his success. But it is contended that though incompetent for the plaintiff, he is yet competent for the claimant, in as much as he is called to swear against his own interest, and to defeat his own rights. This is the strong argument presented by the counsel for the claimant, and if it were true that the interests of the defendant were ad-

verse to those of the claimant, and identical with those of the plaintiff he might be allowed to testify for the former. But so far from this being generally true it happens in almost every case that the defendant has an interest in the success of the claimant. By law the burden of proof is with the plaintiff, and before the claimant can be required to prove his right to the property, the onus must be shifted by proof of title in the defendant subsequently to the judgment. Whatever title the claimant has, must then be presumed to have been derived from the defendant, who has an interest in supporting that title. Thus he seems to have an interest on both sides. But what is the nature of that interest, is it such as to produce an equipoise and leave him altogether indifferent which shall prevail? Such is but rarely the case. He is in most cases hopelessly insolvent, and it is a desperate struggle between the plaintiff, whose only hope for the payment of his debt depends on the condemnation of the property, and the claimant, who holds under the defendant by a title never free from suspicion of unfairness, either on account of illegal and fraudulent preference, or of some secret trust for the defendant or his family. In such a case the preponderance of interest and feeling would seem rather to be on the side of the claimant. This very peculiar, very near, and generally interested relation in which the defendant stands to both parties, has induced the judges to adopt as a general rule his exclusion 221 \*as a witness. It is perhaps the safest rule. But the circumstances which will disqualify a witness on account of interest are of such infinite variety, and it is so difficult to form any general rule which will apply to every case that I would if a rule were now to be formed subject the defendant to the ordinary tests of competency and unless he were found to be clearly incompetent suffer him to be sworn referring all objection for bias or prejudice to his credit. Yet, as I find a general rule on the subject prevailing throughout the State, I will not depart from, or disturb that rule more especially as it appears to be a safe one.

Motion refused.

Williams v. Kelsey, 6 Ga. 365, 377, it was said: "In Edwards v. Musgrove, this question was submitted to the Judges of the Superior Courts, when sitting in Convention, and it was there held, that the defendant in execution was not a competent witness for the claimant. *Dud.* 219. That decision has been published for several years, and no attempt has been made by the Legislature to alter the rule of evidence upon this subject; hence we conclude, that the operation of this rule of evidence, as established by the Judges in Convention, and generally followed in our Courts, has been considered a safe and satisfactory rule of evidence in this State, on the trial of claim cases originating under our claim laws."

But see now Ga. Code, §§ 5267-5278, on the competency of witnesses.

## David Mealing et al. v. The City Council of Augusta.

In Richmond Superior Court.

**Prohibition—Whether Lies to City Council.\***—While the city council of Augusta confines itself within the limits of the charter to mere police regula-

**\*Prohibition—When Lies to City Council.**—A writ of prohibition will not lie to restrain town commissioners from granting a liquor license where such town, under the state law, is absolutely and unconstitutionally "dry"; the presumption being that the towns officers will abide by the law as expounded by the supreme court. *Beckham v. Howard*, 83 Ga. 86, 9 S. E. Rep. 784.



tions under its own ordinances, it cannot be considered a court subject to prohibition.

**Same—Granted Only When Suit Actually Depending.**—

Prohibition will not be granted unless the party is in danger of being injured by some suit actually depending: it is not sufficient that he merely fears that a suit may be commenced in which he might suffer damage.

It is stated in this suggestion that on the 4th of December, 1829, an act was passed by the legislature of this State for the relief of butchers, vendors of meats in the city of Augusta, rendering it unlawful for the city council to assess or lay any tax upon the regular butchers in the city, or upon their meats vended therein, by way of fees or otherwise, exceeding the sum of fifty dollars per annum for each single stall in the market house; that notwithstanding this act the city council are about to levy an extra tax other than the rent for the stalls in the market house, and to dispossess the butchers of their stalls rented for a term not yet expired, unless the tax be paid, of which they the butchers have received regular notice from the clerk of the council.

Upon this suggestion a rule was made at chambers on the 17th of February requiring the city council of Augusta to show cause on the first day of the next term why the writ of prohibition should not be granted. In pursuance of this rule they now show for cause, 1st. That the city council is not a court or judicial tribunal whose proceedings can be restrained by prohibition. 2dly. That the suggestion does not make known any suit pending before the city council or any act done by them to be restrained, but only a fear that some suit may hereafter be instituted, or some act be done from which damage may arise. 3dly. That the apprehended act is not the exercise of judicial power, or even of the quasi judicial power of the council employed in carrying into effect its bye-laws for preserving peace and good order in the city.

This brings before the court the propriety of the remedy alone, and withdraws from its consideration the merits of the controversy, the constitutionality of the act of the 4th December, \*1829, and renders this case simple and easy, though it may prolong litigation between the parties.

The Supreme Judicial authority of the State is in the Superior Courts, which have vested in them all the powers of the Chancery and Superior Courts of England. They can restrain and control all inferior jurisdictions, confining each within the proper limits and bounds prescribed by law; and can also regulate and control all public corporations. For this purpose the constitution has given the Judges of the Superior Courts power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect. This general superintendency given to the Superior Courts cannot however be exerted capri-

ciously, but it must be done legally and according to the forms of law; and for this purpose writs are given to suit the various cases which may arise, and it is as necessary that the Superior Courts in the use of these writs preserve uniformity and regularity in their own judicial proceedings, as it is that inferior jurisdictions be kept within their proper limits.

The writ of prohibition is that which was framed to restrain Inferior Courts of every kind, and keep them within the just bounds of their several jurisdictions. (1) The reason of prohibitions is said by the English Courts to be, the preservation of the right of the King's crown and courts, and for the ease and quiet of the subject, both of which are best preserved where every thing runs in the right channel, according to the original jurisdiction of every court; and where causes are prevented from being drawn "ad aliud examen," than they ought to be.

The writ, then, being to restrain courts, our first inquiry is, whether the city council of Augusta be a court? A court is a place where justice is administered according to the laws of the land. That justice be judicially administered, that is, that the tribunal administering it, be a constituent part, however minute, of the judiciary of the State, is inseparable from the idea of a court.

By the charter of Augusta, the city council has power to make all needful bye-laws, rules, and ordinances, for the good government of the city, and to enforce them. In doing this they necessarily exercise a sort of judicial power; but the causes arising under their ordinances, and examined before the council, cannot be said to be drawn ad aliud examen, for no court of the State would take any cognizance of the matter. The proceedings are not under the laws of the State, and no court of the State can be bound by these bye-laws. So long as the city council confines itself within the limits of the charter to mere police regulations under its own ordinances, it cannot be considered a court, subject to prohibition. \*It might be otherwise, should

it undertake to adjudge and administer the laws of the State, and to usurp a jurisdiction not belonging to it. But is said, the members of the city council being ex officio justices of the peace, the city council itself is therefore a judicial tribunal, and must be recognized as such by the Superior Court. It does not follow, that because each member is a justice of the peace, the city council, in its corporate capacity, may assume the jurisdiction of justice of the peace, or that it becomes thereby incident to the corporation. On the contrary, this is a power given to each member—it is bestowed on the member personally, and seems to have been carefully withheld from the corporation.

The court being of opinion that the city council of Augusta is not a court, or such

(1) Day's Comyn Dig. 7th vol. 140.

tribunal as can be reached by prohibition, it might seem to be unnecessary to advert to the second and third grounds of objection to the rule being made absolute. But it is made known by the suggestion that there exists a contract between the parties for the rent of stalls in the market-house, and the court is called upon to prevent by writ of prohibition the damage which may result from a threatened violation of contract on the part of the city council. Now it can hardly be believed that this use of the writ is seriously contended for. As to the threatened summons for delinquency, the law is clear that no man is entitled to a prohibition, unless he is in danger of being injured by some suit actually depending, and it will not be granted merely from a fear that suit will be commenced from which damage may possibly accrue.

On the third ground, the gentlemen who support the sale contend, that though the contemplated proceeding of the city council may not be strictly judicial, nor even quasi judicial, yet that prohibition will be allowed in other cases where there is danger of wrong being done; that the writ of injunction is a sort of prohibition; and that the writ of prohibition itself will in some cases be granted to stay waste. It is true that prohibition has been granted in certain cases to stay waste, but this was by virtue of statutes expressly extending the remedy to such cases. And so far from supporting the rule, this is opposed to it, as the exception thus expressly made by legislative enactment shows what the common law is.

As between prohibition and injunction, there is this very obvious and striking difference, one operates upon the court, and the judge and officers who disregard it may be punished; the other operates upon the party alone to restrain him from using the process of the court, but does not interfere with the court itself. And the aduction of this particular instance, shows the necessity of preserving the proper distinction in the use of the various writs and processes of court, which have been framed to meet every exigency which may arise in the course of legal proceedings.—They

224 are adapted to the \*judicial system of the country—have been approved by wisdom and experience, and may not safely be departed from or disregarded.

Upon all the grounds, the opinion of the court is against the rule, and believing that the case presented is not such as to entitle the party suggesting it to a prohibition. The rule is discharged.

### John Hunter v. James S. Shaffer.

In Richmond Superior Court.

**Negro Enjoying Freedom and Property in Sister State—Slave or Free—Presumption.**—Where the descendants of a negro had contracted marriage with a free white person in a neighboring state—enjoyed liberty and property for a long time, and transmitted them to her descendants, the courts in

this State presumed her free so far as to give effect to a deed made by her, until some one should assert and maintain a right to her as his slave.

The subject of this suit a negro slave, named Sam. Plaintiff's title to the slave is a deed from Judith Ann Lehiffe to him, by which Sam, together with other property is conveyed for certain purposes mentioned. The deed bears date 21st Feb. 1812, and was registered in the Secretary of State's Office, South Carolina, 7th March, 1812, and in Edgefield district on the 2d June, 1826. At the trial, Sam was proven to have been the property of Maurice Lehiffe, and after his death to have been purchased at the sale of his estate by Judith Ann Lehiffe, his widow, and that she in contemplation of a second marriage executed the deed of trust by which plaintiff claims title. It was also proven that Sam had been sold by Bowers, the second husband of Mrs. Lehiffe, and coming into the possession of Barney M. Kemin, was seized by the sheriff of Richmond county, and sold as his property, and that defendant became the purchaser with full notice of plaintiff's claim. The identity of the slave, his value and conversion by defendant were fully proven.

On the part of the defendant it was proven that Mrs. Lehiffe was the daughter of Mrs. Holmes, who was the daughter of George Galphin by a black woman, and a recovery was resisted on the ground that the deed under which the plaintiff claims is void, having been executed by the descendants of an African, presumed by law to be a slave, and incapable of holding or conveying property; of the condition of the black woman, the grand-mother of Mrs. Lehiffe, there was no evidence; but there was evidence that Mrs. Holmes and Mrs. Lehiffe were always considered free, and were the wives of free white citizens of South Carolina.

The court having charged the jury in favor of the deed and of plaintiff's right to recover, a verdict was rendered accordingly. Whereupon the defendant moves for a new trial on the following grounds.

1. "Because the deed under which 225 the plaintiff claims can \*convey no title, in as much as it was not executed by a person capable of conveying property."

2d. "Because the court erred in charging the jury that where it is proved that the African blood exists in an individual, every presumption is in favor of the liberty of that individual, and a state of slavery cannot be inferred from it."

3d. "Because the verdict is contrary to law, and the proper construction of the evidence."

These three grounds constitute in fact but one, namely, misdirection, of the Judge as to the validity of the deed, and the ability of Mrs. Lehiffe to hold and convey property: for if Mrs. Lehiffe be a person capable of holding and conveying prop-



erty, I apprehend there can be but little doubt of plaintiff's right to recover. And here it is proper to remark that the opinion of the court is incorrectly stated in the second ground. The court did not charge that where it is proved that the African blood exists in an individual, every presumption is in favor of the liberty of that individual. But the court did charge that the common law rule of presumptions in favor of life and liberty constituted a part of the law of this State, and had its full force until the act, passed 10th May, 1770, innovated upon that rule and set up a presumption against the liberty of negroes and their descendants; which latter presumption deriving its strength altogether from a statutory regulation, and the local policy of the State, could not be construed to extend to any person living beyond it. Not even to South Carolina, where Mrs. Lehigh and her mother lived, though that being a slave holding State, her policy may be supposed identical with our own; and that these persons having been always considered free there, must be considered free here, at least, for the purposes of this suit, until the contrary be shown. There is no one who has a stronger conviction than I have of the necessity which exists in our State, and in every other, where absolute slavery is known, of preserving a clear and broad distinction between the free citizen and the slave, and of preserving within the just limits prescribed by law, those of the slave race who may have obtained their liberty. Without such distinction, the rights of the master cannot be sufficiently protected, nor the public sufficiently guarded against the disorders consequent on an ill governed slave population, and the confusion of ranks and orders in society. But it is not believed that either the local regulations of this State, or the general policy of all slave holding States, are at all affected by the decision in this case. This is not a case in which any question arises as to the rights of a master over a slave, or of one alleged to be a slave claiming to be free, nor any question of local or general police. The plaintiff is a free citizen having an unquestionable right to sue. His title to the slave Sam is derived, it is true, from the descendant of a negro, but she has been ever, in the State where she lived considered free. \*Now though a slave is from the very nature of his condition incapable of ownership, being himself the absolute property of another, there never has been in this State until recently, any law to prevent free persons of color from owning property, and now the restriction is confined to real estate in certain places, and to slaves. At the date of this deed there was no restriction whatever. Nor has it been shown to the court that in South Carolina at that time or even at the present moment, there exists any law to prevent free persons of color from owning and transferring property of any sort; and this deed seems so far to have met with the sanction of the laws of South Carolina and

her public functionaries, as to have been registered in the office of the Secretary of State, and in the district where the parties lived and must have been well known. It is objected, however, that their being considered free does not make them so, in as much as freedom cannot be established by reputation. This is true to a certain extent. In all disputes between an owner and person of color claiming to be free, emancipation must be proved. So too where any question arises under police regulations, touching the freedom or slavery of a person of color. But it would be carrying this salutary rule to an unnecessary and dangerous extent to embrace within it those who claim property purchased from free persons of color universally acknowledged to be free, whose ancestors were acknowledged free in the State where they lived, and who have constantly bought and sold property as free persons. To require of those who thus hold and claim property proof of an actual emancipation of those under whom they claim, and who are never even reputed to be slaves before a right of property so held could be asserted, would be to subject them to every lawless invader who might seize upon the property, and to leave them without redress. In this case the defendant sets up no right to Sam not derived from the same source with the right of the plaintiff, acquired too with a full knowledge of the plaintiff's prior right; and it would be absurd to say that Mrs. Lehigh could make a contract of marriage with Bowers, through whom defendant claims, and could not make the previous settlement, under which the plaintiff claims. Whatever imperfection in this respect is in the title of one, exists in that of the other also, as they are both derived from the same source, pure or impure. It is not necessary to say what would be the decision of the court if Mrs. Holmes and Mrs. Lehigh had lived in this State, and the deed under which the plaintiff claims had been made under our own laws, for the fact that those persons have been considered free, and enjoyed their liberty and property for nearly half a century in a neighboring State, that they have formed contracts of marriage with free white citizens, and successively transmitted their liberty and property to their descendants, will require \*this court to presume them free, so far as to sustain their rights of property, and the rights of those claiming under them, against a wrong doer, until some one shall assert a right to them as his slaves. The new trial is refused.

**Administrators of Magruder v. The Administrators of Offutt.**

In Columbia Superior Court.

**Mortgages—Foreclosure after Death of Mortgagor\*—Personal Representative the Proper Party Defendant.**  
—The executor or administrator in the event of

\*Mortgages—Foreclosure after Death of Mortgagor—Parties Defendant.—By Ga. Code, § 2748, it is provided

the mortgagor's death before foreclosure is the proper party, and not his heirs.

**Same—Same—Same—Applies Whether Subject of Mortgage Realty or Personalty.**—And the principle is the same, under our law, whether the subject of the mortgage be real estate, or personal property; the heirs cannot be joined as defendants in the foreclosure.

In this case certain persons who represent themselves to be the heirs at law of Jesse Offutt, moved to be made parties, and to have leave to defend their rights to the estate of their deceased father. It is urged in support of this motion that the proceeding upon the foreclosure of mortgages of real estate under our statute of 1799, is a proceeding in rem, and that all persons having interest in the mortgaged premises have a right to come in and have their rights litigated. If the proceeding be indeed in rem, which is a proceeding known only to the civil law, then not only the heirs at law but every other person any way interested in the premises would have a right to be heard and have their claims investigated; and the proceeding under the statute which was intended to be plain and simple, would become the most intricate and complex of any known to the law. But the words of the statute will not, it is believed, warrant such a construction. The rule nisi is that the principal, interest and cost due on the mortgage be paid into court. Who is called on to make this payment? Not all the world, but the mortgager. On whom is the notice to be served? Not on all the world, but on the mortgager or his special agent. In the event of a dispute as to the amount due on the mortgage, who is to appear and make the objection on that account? The mortgager. But it is said the generality of the notice by publication of the rule was designed to apprise all the world of the proceeding, and that it would be absurd to require such general notice when but one individual or his legal representatives could take any advantage of it. The answer is, that such publication is not necessary, but will be allowed to supply the place of a personal service. It is contended further, that if the proceeding be considered in personam,

that: "When the mortgagor is dead, the proceedings to foreclose the mortgage on real estate may be instituted against his executor or administrator."

The heirs of the mortgagor are not necessary parties. Dixon v. Cuyler, 27 Ga. 248.

**Same—Same—Same—Where No Representative, and the Property Sold.**—Where there has been no administration on the estate of the mortgagor, and the equity of redemption has been sold, the mortgagee may proceed in equity against the purchaser and his vendees. May v. Rawson, 21 Ga. 461.

**Same—Same—Same—Foreclosure within Twelve Months after Administrator Appointed—Who May Object.**—A claimant against a mortgage *à fa.* cannot take advantage of the fact that the mortgage was foreclosed within twelve months from the granting of letters of administration upon the estate of the deceased mortgagor. Baker v. Shephard, 30 Ga. 706.

the heirs at law should be made parties, because, on the death of their ancestor, the mortgager, they have the right to redeem, and the legal estate descending to them, subject to the incumbrance of the mortgage, they have a right to contest the claim asserted by the incumbrancer, the mort-

228 gagee. This question depends \*on the construction to be given to our acts regulating the descent and distribution of estates. It is declared in the act of 23d Dec. 1789, "that real and personal estate shall always be considered, in respect to distribution, as being precisely on the same footing." By this act, estates real and personal are placed on the same footing in respect to distribution. The act of 12th Dec. 1804, is more general in its terms. The words are, "when any person holding real or personal estate shall depart this life intestate, the said estate real and personal shall be considered as altogether of the same nature and upon the same footing." This act makes no exception, whether for distribution or other purposes, but declares that they shall be altogether of the same nature and on the same footing. There can, then, it seems, be no doubt as to their perfect equality in every legal sense. Did the legislature intend by this act to elevate personal estate to an equality with real estate, or to bring down real estate to a level with personal property; that is to say, did they intend the estates thus of the same nature and on the same footing, to pass to the heirs at law or to the legal representatives, viz. the executor and administrator? This may be ascertained by a reference to other acts in *pari materia*, and by considering the words and intention of the acts already cited. The act of 1789, puts real and personal estate on the same footing in respect to distribution. Previous to this act, what kind of estates was the subject of distribution? It was personal. Into whose hands did they pass for the purpose of distribution? Into those of the legal representatives, the executor or administrator. If then both estates be alike subject to distribution, and the executor or administrator alone has the power of distributing estates, it seems to be a necessary consequence that they both pass alike into the hands of those by whom distribution is required to be made. Accordingly we find executors and administrators authorized by the act of 16th Dec. 1811, re-enacted on the 18th Dec. 1816, to sell and convey title for the whole or any part of the real estates of their testators or intestates whenever it will be for the benefit of the heirs or creditors of the estates they represent. Now it is unreasonable to suppose the legislature would make laws authorizing executors and administrators to sell and convey title to lands unless they had legally the possession of such lands, and title to convey. And it is equally as unreasonable to suppose executors and administrators vested with the higher power of aliening real estate and not possessed also of the subordinate power necessary for the management and protection of the estate for



the interest of the creditors and distributees until a sale or distribution take place. The law having thus given to executors and administrators this power, has at the same time imposed on them the duty of faithfully exercising it. They are therefore held as answerable for the rents and profits of real estate and \*for its waste and mismanagement as of personal property. The proceedings then to foreclose under our law being against the person mortgaging, and not against the thing mortgaged, the mortgager or person legally representing the mortgaged property must be the necessary and proper parties.

The motion is overruled.

### The State v. George Tassels.

In Hall Superior Court, September, 1830.

**Cherokee Indians.—Not a Sovereign Nation.**—The contention that the Cherokee Indians residing within the limits of the State of Georgia are a sovereign, independent nation, reviewed and denied.

**Same.—Act Extending Laws of State over Cherokee Country.—Constitutionality.**—The Act of 1829, extending the laws of this State over the Cherokee country, annexing the whole of said country to certain counties bordering on the same, and giving the superior courts of those counties jurisdiction of offences committed in said Cherokee country, whether by Indians or others, is constitutional and valid.

This was an indictment against the prisoner, a native Cherokee Indian, for the murder of another native Cherokee Indian, within the territory in the occupancy of the Cherokee tribe of Indians. The indictment has been found under a statute of this State, passed in the year 1829, for extending the laws of this State over the Cherokee country and for the purpose of giving the Superior Courts of certain counties jurisdiction of offences committed in the said Cherokee territory, annexes the whole of said territory to certain counties of the State bordering on the same. A part of said territory was attached to the county of Hall, and it was in the part so attached, that the offence described in the indictment was charged to have been committed. To this indictment a plea to the jurisdiction of the court was filed, and the judge presiding in Hall county has reserved the question for the opinion of the judges in convention.

Underwood, who was counsel for defendant, contended in support of the plea, that the act of 1829, of the State of Georgia, extending the criminal jurisdiction of the State over the Cherokee country was unconstitutional, and therefore void. That by various treaties negotiated between the United States and the Cherokee Indians, beginning with the treaty of Hopewell, and ending with the year 1819, the Cherokee nation had been treated with, and considered an independent sovereign State, and therefore could not be subjected to the laws of a State—that in those several treaties

the right of self-government had been expressly recognized and distinctly maintained by the Cherokee tribe or nation—that extending the criminal jurisdiction of the laws of Georgia over the Cherokee nation, was an infringement of the right of self-government secured to the Cherokee Indians by the treaties with the United States, which treaties were by the constitution of the United States, declared to be the supreme law of the land. The constitution declares all treaties made, or to be made, the supreme law of the land. The

treaty of Hopewell is of \*anterior date to the constitution, and is therefore expressly recognized by it, and consequently entitled to more weight in the decision of this question. That treaty contains an article acknowledging the right to declare war against the United States, which by counsel was relied upon as unequivocal evidence that the United States acknowledged the Cherokee Indians to be a sovereign, foreign State, possessing at least the sovereign attribute of declaring war.

Mr. Trippe, solicitor general of the western circuit, in reply, cited Kent's Commentaries, vol. 3, to show that Indian tribes had been considered inferior, dependent, and in a state of pupillage to the whites. He placed much stress upon that part of the articles of cession and agreement of 1802, between the State of Georgia and the United States, by which the United States relinquishes to the State of Georgia all her rights to the land lying east of the tract ceded by the State of Georgia to the United States. He denied the inference drawn by adverse counsel from the article in the treaty of Hopewell, which regulates the manner in which future war should be commenced between the two people.—And he contended that the treaties were void, because the general government had no right to treat with Indians within the limits of the State, but upon the single subject of commerce, that being the only power granted them in the constitution.

By the Convention of Judges. This is a very grave and important question, which probably never would have been submitted to judicial investigation, but for the political, party and fanatical feeling excited during the last session of Congress. When the Indians attending at Washington last winter, and their advocates, discovered that the decision of the two houses would be unfavorable to them, the idea of bringing the question before the Supreme Court was suggested and eagerly seized upon by the depuration of the Cherokees.

In consequence of that determination, it is presumed that the plea now under consideration has been interposed. The manner however in which this plea has been interposed ought not, and it is presumed will have no influence upon its decision. The relations which have existed between the Indian tribes of the American continent and the different European nations who have established colonies in America, and

with the colonies themselves, are to be collected from the histories and public acts of those nations, and for the space of about two hundred years. During that time, many changes of public opinion and of public conduct towards the Indian tribes have taken place; which changes are strongly marked in the records and proceedings of the different European nations who had colonial establishments in America. Those changes have, however, introduced some uncertainty as to the actual relations which ought to exist, and do actually exist, between the governments formed by European descendants and the aboriginal tribes. But the conduct of the crown of Great Britain to the Indian tribes has been less variant. The relation between this State and the Cherokee Indians depends upon the principles established by England towards the Indian tribes occupying that part of North America which that power colonized. Whatever right Great Britain possessed over the Indian tribes, is vested in the State of Georgia, and may be rightfully exercised. It is not the duty, nor is it the intention of this convention to enter into a vindication of the rights exercised by the British Crown over the Indian tribes; but if the question is considered open to investigation, no doubt is entertained that the policy adopted by the British Crown towards the Indian tribes might be vindicated by reason, sound morality and religion. But this whole question is ably elucidated in the decision of the Supreme Court, in the case of *Johnson v. McIntosh*, 8 Wheat. Repts. 543, part of which, this convention will transcribe in this decision. After stating that discovery gave to the discovering nation an exclusive right to the country discovered, as between them and other European nations, the decision proceeds—"Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. In the establishment of these relations, the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives as occupants, they asserted and claimed the ultimate dominion in themselves, and claimed and exercised as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been considered by all, to convey a title to the grantees,

subject only to the Indian right of occupancy. The history of America from its discovery to the present day, proves, we think, the universal recognition of these principles."

After giving the history of various grants by Great Britain, France and Spain, to lands in the occupancy of Indian tribes, it adds, "Thus all the nations of Europe, who have acquired territory in America, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians." Have the American States rejected or adopted this principle? The decision then proceeds to show that the United States have adopted the principle, and acted upon it as far as they have acted. The opinion adds "The United States then have unequivocally assented to that great and broad rule, by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title to occupancy, either by purchase or by conquest, and gave also a right to such a degree of sovereignty as the people would allow them to exercise." Again, on page 591, the decision proceeds—"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been held and acquired under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. The Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice. This question is not new to this court. The case of *Fletcher v. Peck*, 5 Cranch. 87, grew out of a sale made by the State of Georgia, of a large tract of country within the limits of that State, the grant of which was afterwards resumed. The action was brought by a sub-purchaser on the contract of sale, and one of the covenants in the deed was, that the State of Georgia was at the time of sale, seized in fee of the premises. The real question presented by the issue was, whether the seizin in fee was in the State of Georgia or in the United States. After stating that this controversy between the several States had been compromised, the court thought it necessary to notice the Indian title, which, although entitled to the respect of all courts until it



should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seizin in fee in the State."

In addition to the preceding authorities, tending to show that the Indian tribes found in America, when it was discovered by the Europeans, were not, and could not be considered sovereign States, two other facts resulting from the legislation of the United States, will be brought into view.—1st. The Constitution of the United States gives to Congress power to regulate commerce with foreign nations, among  
233 the several \*States, and with the Indian tribes. In exercising the first part of this grant, Congress has prescribed rules and regulations, with which foreigners must comply when they come to the ports and are within the jurisdiction of the United States. All sovereign States have exercised the same power in the same way. But when Congress exercises the latter power, viz., the power of regulating trade with the Indian tribes, the law directs how the citizens of the United States shall conduct towards the Indians, and how the Indians shall behave to them. Whence this difference of conduct under the same grant of power? Because the subjects of European kingdoms, who come into the American ports to trade, are component parts of sovereign and independent States, and the Indians, whose trade is so differently regulated, are members of communities that are not sovereign States.

2d. The Constitution of the United States gives to Congress the right of declaring war. Presidents Washington, Jefferson, Madison and Monroe, each waged war with Indian tribes; yet the statute book of the United States contains not a single declaration against an Indian tribe. Is it conceivable that the two houses of Congress would have silently acquiesced in the usurpation of their rights by the executive department, if the Indian tribes had been supposed to be the proper objects of a declaration of war? They must have been judged improper objects of a declaration of war, only because they were held not to be sovereign States. Indeed it is difficult to conceive how any person, who has a definite idea of what constitutes a sovereign State, can have come to the conclusion that the Cherokee Nation is a sovereign and independent State. By the cases of *Johnson v. M'Intosh*, and *Fletcher v. Peck*, it has been determined by the Supreme Court of the United States, that no title to land can be derived from them immediately to an individual, and that a State is seized in fee of all lands within its chartered limits, notwithstanding the land may be in the occupancy of the Indians, and that such grants are good and valid, and cannot be questioned in courts of law. Counsel in support of the plea to the jurisdiction, admitted that the Cherokee Indians could not alien or transfer their lands to any but the State of Georgia or to the United States for her use, but seemed to suppose this limitation of their sovereignty was the result of treaty

stipulations. This is a mistake. No treaty can be found, in which any Indian tribe has agreed that another government should be authorized to alien and transfer its territory. The decision, that the State of Georgia was seized in fee of the Yazoo lands, was not the result of any treaty, but the legal consequence of the right acquired by the European nations, upon their first discovery of any part of the American continent. Vattel, p. 101 says, "We do not therefore deviate from the views of nature, in confining the Indians within narrower limits. However, we \*cannot  
234 help praising the moderation of the English Puritans, who first settled in New England, who, notwithstanding their being furnished by a charter from their sovereign, purchased of the Indians the land of which they intended to take possession. This laudable example was followed by William Penn and the colony of Quakers that he conducted to Pennsylvania." From this quotation, it is manifest that Vattel held that they had a legal right to the land within their charter, without any purchase from the Indians. Other passages from the same author support the same doctrine. The State of New York, as late as the year 1822, vested in their courts exclusive criminal jurisdiction of all offences committed by Indians within their reservations; other States have followed the example in a greater or less degree, and every thing has gone on quietly; but so soon as the State of Georgia pursues the same course, a hue and cry is raised against her, and a lawyer residing near 1000 miles from her borders has been employed to controvert her rights and obstruct her laws, and who has not been ashamed to say that he has been able to find no authority which justifies a denial to the Cherokee Nation of the right of a sovereign, independent State. Yet by the decision of the Supreme Court, which cannot be unknown to that gentleman, every acre of land in the occupancy of his sovereign, independent Cherokee Nation, is vested in fee in the State of Georgia. It is presumed to be the first sovereign independent State which did not hold an acre of land in fee, but which was admitted to hold every acre of land only by occupancy, while the title in fee was held by a foreign State. The Convention, from the view which the authorities previously presented furnish, can discover no legal obstacle to the extension of the laws over the territory now in the possession of the Cherokee Indians. If any obstacle to that extension exist, it must be sought for in those treaties which have been negotiated between the Cherokee Indians and the United States. But here a preliminary question is presented. Are the Indian tribes within the limits of the United States, legal objects of the treaty making power? It has been shown in the preceding part of this decision, that they have not been considered legal objects of a declaration of war. It has also been shown that by all the departments of the government, they have not been treated as

a sovereign, independent State, in the regulation of its commerce. Can any farther evidence be required, that the Indian tribes are not the constitutional objects of the treaty making power? It is presumed not. It seems to be self-evident that communities which have been determined not to be objects of a declaration of war, cannot be the objects of the treaty making power. But it may be answered, that the President and Senate have determined that the Indian tribes are the proper objects of the treaty making power, and that treaties

235 \*have actually been made with them.

This is admitted. But it may be safely contended that a construction put by the President and Senate on that part of the Constitution, which grants the treaty making power, is not entitled to as much weight as a construction placed upon other parts of the Constitution by all the departments of the government, entirely inconsistent with that placed upon the treaty making power, by only two of the departments which had concurred in that construction.

But for the purpose of investigating the subject more fully, let it be for the present taken for granted, that the Indian tribes are the proper objects of the treaty making powers. The rights and the relations of those tribes had been unalterably fixed long before the treaty making power created by the Constitution of the United States existed, and it was not competent for that power, when rightfully exerted, to alter or change those rights and relations. The rights of the Indians to the soil upon which they lived, was that of occupancy only, the fee being vested in the State of Georgia. Any attempt to change the right of occupancy into a fee, would have invaded the seizin in fee declared to be vested in Georgia by the Supreme Court of the United States, and would have been null and void. Again, the relations existing between the Cherokee Indians and the State of Georgia were those of pupilage. No treaty between the United States and the Cherokees could change that relation, could confer upon them the power of independent self-government. If there are any clauses in any of the compacts between the United States and the Cherokee Indians (miscalled treaties) which give to those Indians the right of independent self-government, they are simply void, and cannot, and ought not to be permitted to throw any obstacle in the way of the operation of the act of Georgia, extending jurisdiction over the country in the occupancy of the Cherokee Indians. But it may be urged, that the State of Georgia having neglected for about fifty years to exercise this jurisdiction over the Cherokee Indians, is barred by the lapse of time, from exercising it now. It might be deemed a sufficient reply to this objection to cite the maxim "nullum tempus," which has been determined by the courts of this State, and as far as is known to this Convention, by all the States to apply to the State govern-

ments, with the same force as it applied to the British King. But this Convention will not rest the reply upon this maxim, because a more intelligible and satisfactory reason can be readily given. When America was first discovered, as has been shown in the decision of *Johnson v. M'Intosh*, discovery was considered equivalent to conquest. It became therefore the duty of the discovering, or conquering nation, to make some provision for the aborigines, who were a savage race, and of imbecile intellect. In ordinary conquest, one of two modes

236 \*people were amalgamated with their vanquishers, and became one people;

or they were governed as a separate but dependent State. The habits, manners, and imbecile intellect of the Indians, opposed impracticable barriers to either of these modes of procedure. They could neither sink into the common mass of their discoverers or conquerers, or be governed as a separate dependent people. They were judged incapable of complying with the obligations which the laws of civilized society imposed, or of being subjected to any code of laws which could be sanctioned by any christian community. Humanity therefore required that they should be permitted to live according to their customs and manners; and that they should be protected in their existence, under these customs and usages, as long as they chose to adhere to them. But the Cherokees now say, that they have advanced in civilization, and have formed for themselves a regular government. Admit the fact, they are there in a situation to be brought under the influence of the laws of a civilized State—of the State of Georgia. The obstacle which induced the State of Georgia to forbear the exercise of the rights which Great Britain, as the discovering nation had authority to exercise over them, and which, vested in Georgia, no longer exists, if the Cherokees or their counsel are to be believed. The State of Georgia is imperiously called upon to exercise its legitimate powers over the Cherokee territory. Indeed, it seems strange that an objection should now be made to that jurisdiction. That a government should be seized in fee of a territory, and yet have no jurisdiction over that country, is an anomaly in the science of jurisprudence; but it may be contended that, although the state of Georgia may have the jurisdiction over the Cherokee territory, yet it has no right to exercise jurisdiction over the persons of the Cherokee Indians who reside upon the territory of which the State of Georgia is seized in fee. Such distinction would present a more strange anomaly, than that of a government having no jurisdiction over territory of which it was seized in fee. This convention holds it to be well established, that where a sovereign state is seized in fee of territory, it has exclusive jurisdiction over that territory, not only on the surface and every thing that is to be found in that surface, but as Sir William Blackstone defines, a title in



fee simple to lands, that it extends not only over the surface, but "usque ad coelum," &c. Now the right of the tenant in fee could not be less extensive than that of the power granting the fee. The seizin in fee, therefore, vests not only the surface, but the bowels of the earth, and through the air about the earth, as far as the air can be appropriated to the use of man, or even "usque ad coelum" as the maxim has it. If seizin in fee vests in the tenant not only the surface, but extends to the center downwards, and to heaven upwards, what, this convention would respectfully inquire, is to limit the right of jurisdiction?

237 \*In conclusion, it may be proper to notice some of the arguments and positions assumed by counsel in support of the plea. It was contended that the article in the treaty of Hopewell which required the Indians, in case of real or supposed wrongs, to demand satisfaction for the injury, and if it was refused to give notice of intention to make war. This was considered by counsel as unequivocal evidence of the recognition by the United States of the Cherokee Indians as a sovereign State. It does not appear so to this convention. The Indian tribes in North America were as ferocious as barbarous. They had been immemorially in the habit of making secret and bloody attacks upon the white settlements. These attacks usually struck the white settlers with panic terror by the secrecy and rapidity with which they were perpetrated. To guard against a mischief so terrific and appalling, the treaty imposes upon the Cherokee Indians the obligation of giving notice of their intention to make their bloody incursions into the white settlements. It was a salutary restriction which was the origin of, at least, one approach towards the habits and usages of civilized man. To have omitted the restriction for fear of the admission which it is contended is given to the Cherokee Indians of making war upon the United States, would have been weak. For it was matter of universal notoriety, that the various Indian tribes within the United States were immemorially in the habit of making war in the manner above described, and the restriction was a salutary one, and has had the desired effect. Counsel for the Cherokee Indians contended that by the articles of treaty and cession between the State of Georgia and the United States, the former had given the latter a right to hold treaties with the Cherokee Indians, and that the State of Georgia was bound to abstain from all efforts to extinguish the Indian right to lands within her own limits. This convention conceives both positions to be erroneous.

1st. The articles of treaty and cession conferred no right upon the United States to hold treaties with the Cherokee Indians. Those articles impose upon the United States the duty of extinguishing the Indian title, but confer no political power on the federal government. If there be such a thing as a political axiom it is certainly one that the federal government can derive

no political power from a compact with an individual state. That government had at the time of entering into those articles the right of holding treaties with the Indians or it had not. If it be true, as intimated by counsel, that the title to Indian lands could be extinguished only by treaty, and the federal government had no right to make such treaties, then the federal government in entering into the articles of treaty and session took upon itself an impossible condition. But it is not true that the Indian title cannot be extinguished but by a treaty. That title can be extinguished by \*bargain and sale or by deed as well without the form of a treaty as with it. Indian treaties for extinguishing their right to their lands are in fact, though not in form, nothing but contracts for the purchase and sale of Indian lands. But secondly, the state of Georgia in imposing the obligation upon the United States to extinguish the Indian title to lands within her limits did not relinquish any right she possessed of extinguishing that right herself. Having given a valuable consideration to another power to induce that power to assume the obligation of extinguishing the Indian title, it was natural that she should rely upon the good faith of that power in discharging its engagements, and should cease for a reasonable time any direct efforts to effect the same object. But if the contracting power should act with bad faith or should from any other cause disappoint the just expectations of the state; Georgia might rightfully resume her suspended right of extinguishing the Indian title, and demand payment from the United States of whatever sum the extinguishment cost her. It may be proper before closing this opinion to state, that the United States in their practice under the constitution, consider all Indian tribes within or without the United States improper objects of a declaration of war. The Seminole Indians were resident in Florida, then a province of Spain; yet the President prosecuted a war against them, without a declaration of war. The wants of that war produced a deep sensation in the nation, and were discussed with animation in the two houses of congress; yet during the whole of that discussion, no intimation was thrown out on any side of either house calling in question the right of the President to prosecute a war with an Indian tribe, even resident out of the limits of the United States. This convention deems it a waste of time to pursue this examination. It has satisfied itself, and it is hoped the community, that independent of the provision of the state constitution claiming jurisdiction over its chartered limits, that the State of Georgia had the right in the year 1829, to extend its laws over the territory inhabited by the Cherokee Indians, and over the Indians themselves; that said act of 1829, is neither unconstitutional, nor inconsistent with the rights of the Cherokee Indians. The plea to the jurisdiction of the court submitted to this convention is therefore overruled.

239 \*John T. Daniel and C. Daniel, Administrators, v. Peter L. Daniel, Wm. Mattox and R. C. Gibson.

In Talliaferro Superior Court, July, 1832.

**Alteration of Instruments—Burden of Explaining Same.**—Where notes have always been in the possession of the plaintiffs, it is incumbent upon them to explain the erasure, appearing upon the notes being put in evidence, of the name of one of the makers thereof.

**Same—Pleading—Surprise.**—Where the defendant whose name was erased, instead of pleading non est factum, pleaded the erasure and the reasons of it, plaintiffs could not claim that they were surprised, since they were as fully apprised of his defence as if non est factum had been pleaded.

**Same—Same—Taking Advantage of Alteration.**—The erasure was a complete cancelment of the notes so far as that defendant was concerned, and needed not to be taken advantage of by plea of non est factum, as it was apparent on the face of the notes.

**Same—Evidence—Fraud of Defendant—New Agreement.**—It was competent for plaintiffs to show that the erasure had been made by the fraud or fraudulent representations of said defendant, or that his liability had been revived by subsequent agreement or arrangement.

This action was brought upon thirty three notes of hand signed with the names of the three defendants. When the notes were produced it appeared that the name of R. C. Gibson had been erased from them. It was objected that the notes upon their face were executed but by two of the defendants, and therefore were not the notes declared upon. That the erasure of the name of R. C. Gibson from the notes was a cancelment of the contract so far as respected him. To this it was replied, that the action must be brought according to

\***Alteration of Instruments—Explanation—Presumptions—Burden of Proof.**—Where there is a material alteration in a written instrument sued upon, the *prima facie* presumption is that such alteration was made before or at the time of the execution of the same, and the plaintiff is not called upon for explanation unless the paper be denied under oath. *Tedlie v. Dill*, 2 Ga. 128; *Printup v. Mitchell*, 17 Ga. 558; *Planters', etc., Bk. v. Erwin*, 31 Ga. 371; *Wheat v. Arnold*, 36 Ga. 479; *Thrasher v. Anderson*, 45 Ga. 544; *Banks v. Lee*, 73 Ga. 25; *Thompson v. Gowen*, 79 Ga. 70, 3 S. E. Rep. 910; *Westmoreland v. Westmoreland*, 92 Ga. 233, 17 S. E. Rep. 1033; *Collins v. Boring*, 96 Ga. 360, 23 S. E. Rep. 401; *Winkles v. Guenther & Co.*, 98 Ga. 472, 25 S. E. Rep. 527. See Ga. Code, §§ 3701, 3704, 5242. Otherwise where the paper does not form the basis of the action so as to require a denial under oath. In such case the party offering it in evidence must explain the alteration, unless the paper comes from the custody of the opposite party. Ga. Code, §§ 3704, 5242.

Where the plaintiff filed his bill to cancel a note on the ground that it was procured by fraud, and had been altered, it was incumbent on him to prove all his allegations. Otherwise where the defendant claims and is allowed the privilege of opening and concluding the case. *Armstrong v. Penn*, 105 Ga. 233, 31 S. E. Rep. 158.

the legal import of the contract at the time of its execution and not according to the legal effect of the instrument at the time of bringing the action. That the proper course of R. C. Gibson was to have pleaded non est factum which would have thrown the onus upon the plaintiff to show that the erasure was effected by fraud and imposition by the promissor, whose name had been erased. The court was of opinion that as the defendant's name has been erased, and as the notes had always been in the possession of the plaintiffs, it was incumbent upon them to account for and explain the erasure. And that although R. C. Gibson had not pleaded non est factum, as he had pleaded the erasure and the reasons of it, the plaintiffs were as fully apprised of his defence as they would have been, if non est factum had been pleaded. That the erasure was a complete cancelment of the notes so far as R. C. Gibson was concerned, and that it needed not to be taken advantage of by plea of non est factum, as it was apparent on the face of the notes.

The Court however intimated to the plaintiffs' counsel, if they were able to show that the erasure had been made by the fraud or fraudulent misrepresentations of R. C. Gibson, or that his liability had been revived by any subsequent agreement or arrangement, it was competent for them to show it. The plaintiffs attempted to establish such facts by evidence, but failing, submitted to a verdict.

240 \*Samuel Dardin, Indorsee, v. John G. Ogletree.

In Talliaferro Superior Court, July, 1832.

**Former Judgment—Whether May Be Shown under Plea of Payment.**—As a general rule, a defense of former judgment must be pleaded, and cannot be set up under a plea of payment; but where the notes in suit have the word "judgment" written across them, and are within justice's-court jurisdiction, the presumption of a former judgment thereby created may supersede the necessity of pleading it.

**Notes—Identification—Best Evidence.**—The identification of the notes was wholly unconnected with the docket or record of the justice's court; and the testimony of the justices who wrote "judgment" on their face, and who could identify them fully, was better evidence as to the identity of the notes than the judgment docket, which furnished only a meagre statement of dates, names, and amounts, thereby creating only a presumption that they were the notes before the court.

This action was founded on several notes of hand. When they were produced in evidence, they had the word judgment written across them. Defendant objected that it appeared upon the face of the notes that judgment had been entered upon them, and as they were within a justice's jurisdiction that judgment had been obtained upon them in a justice's court, and that if this be true the plaintiff had no right to recover



judgment upon them in this court. Plaintiff replied that if there had been a former judgment upon them, defendant ought to have pleaded it, and that a former judgment could not be taken advantage of under a plea of payment, which was the defence relied upon in this case, as appeared by the answer.

The court recognized the general principle laid down by plaintiff; but said that the evidence produced by plaintiff in this case created the presumption that a judgment had been obtained upon the notes declared upon. It was by no means certain that that presumption did not supersede the necessity of pleading it. Plaintiff then produced a certiorari to bring up proceedings had in a justice's court between the same parties. The certiorari had been sustained, judgment set aside, and a new trial ordered. Defendant's counsel then objected that plaintiffs should show what became of the new trial. Another certiorari was produced, and which had been sustained, and no new trial ordered. Plaintiff then offered one of the justices to prove the identity of the notes upon which the judgment had been entered. This testimony was objected to by defendant's counsel, on the ground that the justice's docket was higher evidence. This objection was overruled by the court, on the ground that if the docket was produced it would not furnish a copy of the notes but only a meagre statement of dates, names, and amounts, and thereby create a presumption that they were the notes now before the court. Whereas the justice who wrote judgment on their face would identify them fully, and was the best evidence that could be produced. That the identification of the notes was wholly unconnected with the docket or record of the justice's court. The justices identified the notes. The defendant then offered evidence to prove that the notes were indorsed after they became due, and that they had been paid off before indorsed, and supported his defence.

241 **\*Leroy Upshaw v. James Olliver, et Alii.**

Elbert Superior Court, July, 1832.

**Judicial Officers—Liability to Suit for Judicial Acts.\*—**  
Judicial officers are not liable to civil suits for their judicial acts.

The plaintiff proceeded and proved by witnesses the arrest and imprisonment

**\*Justices of the Peace—Notice of Suit against—Whether Statute of 24 Geo. II of Force in Georgia.—Ga. Code, § 4055, now provides: "No suit shall be brought against any justice for anything done by him in the execution of his office, until notice in writing shall have been given to him, or left at his usual place of abode, one calendar month."**

That the statute of 24 Geo. II, c. 44, § 1, requiring a like notice in such cases, was of force in Georgia prior to the enactment of the above section, see Warthen v. May, 1 Ga. 605; Collins v. Granniss, 67 Ga. 720, both citing the principal case.

stated in the declaration. It also came out in evidence that the arrest and imprisonment complained of, had been ordered by the five first named defendants sitting as a court of ordinary; and the sixth being the coroner of the county, executed the order upon the plaintiff who was high sheriff of the county. The plaintiff here closed the evidence in support of the action. Defendants' counsel then moved for a nonsuit on three grounds: viz.

1st. That the declaration does not set out the case fully, plainly and substantially. The declaration only states the arrest and imprisonment generally, without disclosing, that the order of arrest and imprisonment was given by defendants in the capacity of a court.

2d. That by the act of 24 Geo. II. thirty days' notice must be given before the commencement of any action against justices of the peace, revenue officers, &c.

3d. That no action will lie against judges of a court of record for acts judicially done by them; and cited many authorities of ancient and modern jurisprudence, and the case of Brass v. Crosby, in 3 Wilson, 188, was also relied upon. A case reported in the New York reports was read, which established the principle that judges of a court of record are not responsible at the suit of individuals for any thing done in their judicial character—that this case had been carried into the court of errors in that State, and that the decision of the Supreme Court was confirmed by a majority of that court.

Plaintiff's counsel contended that the admission of one of the defendants, that he knew the proceedings of the court were illegal, and that he would have stopped them, but that he thought them to be only for fun, which had been proven, ought at the least to sustain the action against him.

By the Court. The first ground does not appear to be well founded. The judiciary act of 1799 does not substantially innovate upon the common law in actions of this nature. If the facts of the case as they really happened, amount to a justification of the defendants, they can have the full benefit of them in their defence. The first ground is overruled. The second ground is that by the act of 24 Geo. II. thirty days' notice was necessary previous to the commencement of the action. That statute has, for more than thirty years, been in force in this State. But does it apply to this case? The statute applies to justices of the peace, and certain revenue

242 \*officers, who are not judges of a court of record, and who are liable to the suits of individuals. The present defendants, with one exception, are judges of a court of record, and the other defendant executed the order of that court, which is a sufficient justification for him. The statute then does not apply to the present case. The second ground is therefore overruled. If the defendants are not answerable in this action for the act stated in the declaration, it is because those acts were done

in their judicial character as a court of record, and this brings the third ground to our consideration.

The current of authorities from the earliest dawn of jurisprudence down to the latest reported cases, not only in the courts of Great Britain, but of the United States, shield judicial officers from civil actions and criminal prosecutions, (except by way of impeachment) for acts done in their judicial character. But it is said that if judicial officers are irresponsible for their acts, the liberty of the citizen is in imminent danger. To this it may be replied, that when judicial officers so far forget themselves as to act corruptly, or oppressively, they are subject to impeachment; and if convicted, may be not only removed from, and incapacitated to hold a judicial office, but may be made responsible to individuals for any acts of oppression by them committed per colore officii. The rights and liberties of the citizen are not then so completely under the control of an unjust judge, or oppressive court, as may have been imagined. The conduct of a judge cannot long be corrupt or oppressive, before he will be subjected to impeachment, and, upon conviction, made responsible for his misdeeds. But it is said Megarrity has clearly rendered himself responsible by his admissions. The authorities which have been produced countenance no such distinction. The reason of the exemption of judicial officers from suits at law for their judicial acts, repels the distinction set up against him. The authorities are based upon the broad ground, that judicial officers are not liable to civil suits, for their judicial acts. The court believes that the welfare and peace of the community depend upon a strict adherence to the principle which has been universally established by all civilized nations upon this subject. If Megarrity's conduct has been of a character incompatible with his office—if it has been corrupt, let him be impeached; but while he wears the ermine of justice, let it be respected. The court upon the best consideration it has been able to bestow upon this question, feels itself bound to decide that the action cannot be sustained.

In support of the principle recognized in the foregoing decision, the student is referred to the following cases. *Aire v. Sedgwick*, 2 Roll. Rep. 199; *Hammond v. Howell*, 1 Mod. 184, 2 Mod. 218, 12 Mod. 386, 1 Salk. 396; *Stauford's Pleas of the Crown*, 173; 2 Black. Repts. 1141; 1 243 \**Ld. Raym.* 454; *Phelps v. Sill*, 1 Day's Cases in Error, 315; *Yates v. Lansing*, 5 Johns. 282.

#### William Scott v. Richard Walker.

In Oglethorpe Superior Court, October, 1832.

**Alteration of Instruments—Whether Alteration Material.\*—An interlineation of the words "or bearer"**

\***Material Alteration—Interlineation of Words, "Or Bearer."**—The interlineation of the words "or

in a due bill, is a material alteration, and will vitiate the instrument, unless it is proven to have been made by the maker or by his consent.

This action was founded upon a due bill, given by the defendant, payable to George Mason. When the bill was produced in evidence the words "or bearer" were interlined, and when the bill was folded those words were very much blotted, and no other part of the bill was blotted, which rendered it manifest that the bill itself was dry when it was folded, and that the interlineation was made at a time subsequent to the execution of the due bill. Objection being made to the admissibility of the due bill in evidence in its shape; the court required the interlineation to be explained, and said if it could be proved that the interlineation was in the hand writing of the defendant, or that it had been made in his presence, and with his consent, the explanation would be complete. This was attempted, but the attempt was abortive. Plaintiff's counsel then contended that the plaintiff in this case being only bearer, could not be supposed to be cognizant of facts which had transpired before his interest in the due bill existed. It was further contended, that the bill being declared on as payable to bearer, it was incumbent on the defendant to have taken the advantage of the interlineation at the first term, and that it was now too late to object. The court observed that the interlineation of the due bill was of itself a suspicious circumstance, and ought to have put the bearer on his guard; and to have induced him to make such inquiries as to have satisfied him that the interlineation had been correctly made. That if these inquiries had been made, and had resulted in a conviction that the interlineation had been correctly made, the requisition now made of explanation could not be onerous. That oyer generally was required of sealed instruments only. That in the present case the omission to crave it, and plead the interlineation, was unimportant. That the defendant was not required in his answer to set out the evidence by which his defence was to be supported. The objection now made was to the evidence, and it was made as soon as the evidence was attempted to be introduced. Plaintiff's counsel then suggested that the interlineation did not subject the defendant to the payment of a greater sum, or at an earlier day than the due bill did, without such interlineation.

244 \*The Judge. It is admitted that the interlineation does not change the amount, or time of payment, but it changes the manner of its negotiability, which the defendant considers of very great importance to him, because it deprives him of a defence which would be successful, but for the interlineation. The due bill then has

bearer" in a promissory note or similar instrument, is generally held to be a material alteration. *McCauley v. Gordon*, 64 Ga. 224, citing the principal case; *Burch v. Pope*, 114 Ga. 336, 40 S. E. Rep. 227. See also, *Burch v. Daniel*, 101 Ga. 228, 28 S. E. Rep. 622.



been altered in a material part. It cannot be shown that it was done by defendant, or by his consent or privy. In the absence of all proof to the contrary, the presumption that it was done by the payee or bearer must prevail. The due bill is therefore rejected as evidence.

The convention concurred with the presiding judge, that the alteration was material, and vitiates the note unless explained and shown to have been made by defendant or with his consent, but were of the opinion that it ought to have been submitted to the jury under the charge of the court to that effect.

**His Excellency the Governor, &c. v. R. B. Williams, A. H. Gibson and J. B. Simpson.**

In Wilkes Superior Court, February Term, 1833.

**Duress\*—Party under Arrest Required to Execute Bond Not According to Law—Validity.**†—If a party under arrest be required to execute a bond not according to law, duress may be pleaded, and the bond or recognizance be avoided.

This scire facias was issued upon a bond or recognizance to keep the peace, executed by Robert B. Williams, principal, and the other defendants, securities. To this action the following answer was filed, viz. "And now at this term the defendants, by Brewer and Cobb, their attorneys, come into court, and for cause why judgment should not be entered against them, say, that if they ever executed any such bond as set forth hereof against them, that the same is contrary to law, and wholly void, and that the same was exacted of the defendant, Williams, while under duress. Secondly, because the defendant, R. B. Williams, could only be required by law to give bond for his appearance at the next Superior Court, and in the mean time to keep the peace, whereas he is simply required by said bond to keep the peace for twelve months, all which these defendants are ready to verify, and therefore pray the judgment of this honorable court."

By the Court. The statute regulating the subject, requires the defendant should be bound to appear at the next Superior Court after the execution of the bond or recognizance, and in the mean time to keep the peace. The bond in the present case

\***Duress—When Surety May Plead Duress of Principal.**—Duress of the principal is an available defence for the surety where he had no knowledge of the duress at the time he assumed the obligation of surety. *Patterson v. Gibson*, 81 Ga. 802, 805, 10 S. E. Rep. 9, citing the principal case. It is otherwise where he had knowledge of the duress, and acted voluntarily in the premises. *Spicer v. State*, 9 Ga. 52; *Graham v. Marks & Co.*, 98 Ga. 67, 25 S. E. Rep. 931. And see *Gibson v. Patterson*, 75 Ga. 554, where the question was left undecided, citing the principal case. See also, in this connection, *Phillips v. Solomon*, 42 Ga. 192.

†See *Justices of Inferior Court v. Administrator of Wynn*, Dud. 22, and *foot-note*.

requires the defendant to keep the peace for twelve months simply, and nothing more. This bond is taken under a penal statute, and ought to be construed strictly. The defendant, Williams, pleads that the bond was executed 245 acted of him while under duress, and therefore that it is void. Bonds executed while the party is under arrest, if they are taken according to law, cannot be set aside or avoided for duress. If this were the case, there would be almost an end of criminal law. But if a party under arrest is required to execute a bond not according to law, duress may well be pleaded to such a bond. The strictness required by the courts in this State in the construction of statutory bonds, has been much relaxed by the decision of the judges in the case of the Inferior Court of Columbia county for the use of Griffin Edmundson v. the Administrator of John Wynn(a). Among other principles settled in that case, it was adjudged and held, that where a bond taken under a statute which did not declare all bonds taken contrary to its provisions void, such conditions as were contrary to the provisions of the statute, and such only, were void. Here the only condition of the bond is contrary to the statute, and therefore void according to the decision referred to. But the case of the Governor, &c. v. James Wellborn, decided in Wilkes, is directly in point. In that case, Wellborn had been arrested upon a bench warrant and bound to appear at the next Superior Court of that county, and the justice before whom the bond or recognizance was taken, after inserting the condition of appearing and answering the indictment for assault and battery found against him, added "and in the mean time to keep the peace." A scire facias was issued against him, alleging a violation of the peace. When the case was called up, an objection was taken to the validity of the bond; for that it was not a bond to keep the peace, but to appear and answer to an indictment for assault and battery. The condition in the mean time to keep the peace was not authorized by law. Mr. Chandler, the solicitor general in support of the bond, relied upon a form in Clayton's justice, which supported the bond in the present case. As it was a case of practice, and ought to be settled uniformly through the State, the presiding judge referred it to the convention of judges, who decided that the latter condition of the bond was void, not being authorized by law, and the party being under duress and in the custody of the law. The presiding judge considered the bond void, and dismissed the case, and was sustained unanimously by the rest of the judges.

**Silas Hinton v. George Scott.**

In Coweta Superior Court, April, 1833.

**Action on Notes—Misrepresentation as to Land Sold—Partial Failure of Consideration\*—In an action of**

(a) See ante, page 22.

\*See *Jordan v. Administrators of Jordan*, Dud. 181.

debt upon notes given in purchase of land. defendant will not be permitted to plead misrepresentations of the value and quality of the land, made by vendor—nor will the plea of partial failure of consideration avail him.

This was an action of debt founded  
246 on notes given in the \*purchase of a gold lot. The defence was fraud in misrepresentation as to the real value, and a partial failure of consideration in this, to wit, that the lot was of very little or no value, as a gold lot, although represented to be a very rich one. To this, there was a demurrer raised against the plea of partial failure of consideration, and that there could be no fraud in law upon the sale of land respecting its value.

By the Court. A mere false assertion, as to value, is no ground for relief to a purchaser; because the assertion is a matter of opinion which does not imply knowledge, and in which men may differ; and this is good law in the sale of personals. Every person reposes at his peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment. 2 Kent. Com. 381, 5 Johns. Rep. 354.

In the case of Fox v. Mackreth, 2 Bro. 420, it was held by Lord Thurlow, that the purchaser would not be bound in negotiating for the purchase of an estate to disclose to the seller his knowledge of the existence of a mine on the land, of which he knew the seller was ignorant. If the estate was purchased for a sum of which the mine formed no ingredient, he held that equity would not set aside the sale, because there was no fraud in the case. Each one relies confidently and sometimes presumptuously upon his own judgment, information and skill. While the law affords protection against fraud, it does not go to the remote length of giving indemnity against the consequences of indolence and folly. 2 Kent. Com. 380, 385. It is true as a general rule, each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation. In relation to value and quality of land, both parties are presumed to be equal in information. Relief may be had against a false representation as to quantity, because that is a matter to be ascertained, not from inspection and observation, but from actual admeasurement. An action of deceit lies for fraudulently selling lands represented to lie in another State, which in fact had no existence at the time, and no such lands could be found. 13 Johns. Rep. 325, 2 Cain. Rep. 193, 1 Day, 250. In the case under consideration, the fact that the lot contained gold was a matter admitted, and still seems not to be disputed. At any rate the purchaser could easily have known the contrary if it had been true. There was a speculation in view both by the seller and the purchaser. If any representations were made of its having a rich

mine already discovered and existing at the time, and thereby putting the purchaser off his guard, or if the purchaser bought, disclaiming his own opinion, and relying upon the false statements of the vendor, and

247 thereby gave a high price, solely on his confidence in the integrity \*of the vendor, and these things had been made to appear in the proper form of action at common law, or in the proper mode of relief in equity, likely the purchaser might at least have the privilege of trying his case upon its merits. But such a defence is not admissible in this case, which has been brought to recover the consideration money. 2 Kent. Com. 368.

Upon the other ground, the defence must clearly fail. A partial failure of consideration cannot be gone into, unless that part which has failed could be as clearly and distinctly ascertained in liquidated damages as the whole amount. But here the partial failure is as to the quality, not as to the quantity of acres. In the case of Greenleaf v. Cook, 2 Wheaton, 13, such a plea was overruled on the ground that the title to the land had partially failed, and that the failure must be total. Pleas overruled, and demurrer sustained. Vide 2 Cain. Rep. 183; 2 John. Ch. Rep. 523; 2 Kent. Com. 370, 371; 2 Starkie's Ev. 280, 281; 4 Sou. Ca. Eq. Rep. 53, 58.

### Cooper v. Perry.

In Muscogee Superior Court, February, 1833.

**Slander\*—Words Innocent in Themselves—Proof of Criminal Signification.**—Words, which are doubtful or even innocent in themselves, if they be proven to have a criminal signification according to the common understanding of them will support an action of slander.

Words laid are "You are a member of the Pony Club." Demurrer. 1st. That the words are not actionable in themselves, as they do not charge a specific crime. 2d. That there being no special damage laid with a per quod, the action must fail. Replied by counsel, that the words do import, in the common vulgar acceptation, as distinct a charge of crime, as if the defendant had said plaintiff had stolen horses, and by implication they do, in effect, make out that crime.

**PER CURIAM.** The rule now is, that words are not to be construed in their most harmless sense, but they are to be understood in their most usual sense; 8 Mass. 248; 3 Serg. & Raw. 255; 1 Wash. Rep. 188; 1 Nott & M'Cord, 217, at least, as the vulgar under-

**\*Slander—In What Sense Words to Be Taken.**—See Little v. Barlow, 26 Ga. 423; Giddens v. Mirk, 4 Ga. 371, and the principal case, cited in the dissenting opinion of WARNER, J., in Pugh v. McCarty, 40 Ga. 449, to sustain the proposition, that in actions for libel or slander, words, whether printed or spoken, are to be taken in that sense that is most natural and obvious, and in which those who read or hear them will be sure to understand them.



stand and interpret them. In South Carolina, to call a white man a mulatto, is actionable. 1 Bay, 171; 1 Nott & M'Cord, 184. To constitute slander, the words must impute a precise crime, and must not impute more nor less. 3 Blk. Com. 125, note; 2 Esp. N. P. 80. So they may be actionable, according to the application or allusion to the circumstances under which they were spoken. Yet they should import some degree of guilt; as, to say a man is in jail for stealing a horse, was held 248 not actionable, \*for the person might be innocent, and the words only import his being in suspicion. 2 Esp. N. P. 80. Where the words are used with an intention to slander, though the offence which the defendant intended to lay to the plaintiff's charge, is improperly expressed, yet may the words be actionable. If they are understood in common speech as tending to defame, the court will see if the words are of such a description as import damage to the party. Gilb. Rep. 21; 2 Esp. N. P. 100, 513, marginal.

An innuendo can never be permitted to extend their meaning beyond the import of the words themselves. 2 Esp. N. P. 101. So if these words in the vulgar acceptance do not import crime, or a defamation upon their face, the innuendo cannot help them out. Although the words used do not specify crime, yet if they as certainly charge the crime of horse-stealing, according to their common acceptance, as any words that could be used, they are then actionable of themselves. 4 Bac. Abr. 486, 487; Stra. 471, 545. Not only is the sense of the words to be regarded in construing them, but the rule of construing these words which at that time prevailed. 4 Bac. Abr. 497. If words which have a slanderous signification in a certain place, are published in that place, an action lies—although it would not for publishing the same words in another place; and if the judge before whom the case is tried does not understand the meaning of such words, it may be learned from witnesses. For instance. In one part of the kingdom, to say of a man "he has strained a mare," meaning that he carnally knew a mare, is actionable, if the words be spoken in such place. 4 Bac. Abr. 497, 498. So the words "he mainsworn" were held actionable as published in a part of the kingdom where they were understood to convey a charge of perjury. Starkie on Slander, 85. Lord Mansfield says in King v. Horne, 1 Cowper, 672, it is the duty of the jury to construe plain words and clear allusions to matters of universal notoriety according to their obvious meaning, and as every body else who reads must understand them. Starkie on Slander, 52. The criminal quality of the act imputed may appear from circumstances explaining the meaning of doubtful words, or otherwise innocent words. Ib. 75. Therefore it is of no importance whether the terms used be doubtful, or apparently innocent, provided it can be shown that they could and did convey the offensive meaning which forms the ground

of complaint. Ib. 76 & 84. One view of this case, however, inclines the court to support the demurrer, and not sustain the action, which is this. Admitting these words to be true in their broadest and most criminal allusion, the party could not be convicted of any crime known to the laws, for even being a member of a pony club would not and could not subject him, irrespective of other proof. Yet if the words are proven to have a criminal signification, the action should lie.

249 \*The judges in convention decided that the proper course is to let the case go to the jury, and if the words are proven to impute the crime of horse-stealing in their common acceptance, then the action ought to be sustained, if not, it must fail.

### Poe v. Justices of the Peace.

In Carrol Superior Court, 1833.

**Negotiable Notes—Illegal Consideration\*—When May Be Inquired Into.**—A note given in compromise of a suit by sci. fa. to condemn land under the lottery law of 1825, is in violation of that statute, contrary to public policy, and void as between maker and payee; and its consideration may be inquired into in a suit between the original parties: But if indorsed before due, and without notice, in a suit by such innocent indorsee against the maker, the courts will not permit the consideration to be gone into.

**\*Negotiable Securities—Illegal Consideration—Bona Fide Holders.**—Unless it is provided otherwise by statute, no illegalities between the original parties will affect an innocent holder for value of a negotiable security, acquired without notice and before maturity, except under the statutes of gaming and usury, or where the statute which makes the contract illegal also makes the same a crime, or where the act itself is immoral and *contra bonos mores*. Meadow v. Bird, 22 Ga. 246; Johnston Bros. v. McConnell, 65 Ga. 129; Perkins v. Rowland, 69 Ga. 664; Rhodes v. Beall, 73 Ga. 643; Tompkins v. Compton, 93 Ga. 520, 21 S. E. Rep. 79; Angier v. Smith, 101 Ga. 844, 28 S. E. Rep. 167; Atlanta Sav. Bank v. Spencer, 107 Ga. 629, 33 S. E. Rep. 878; Smith v. Wood, 111 Ga. 221, 36 S. E. Rep. 649; Clarke v. Havard, 111 Ga. 245, 36 S. E. Rep. 837; Jones v. Dannenberg Co., 112 Ga. 426, 37 S. E. Rep. 729.

By statute, Ga. Code, § 3694, the defences available against *bona fide* holders are: (1) Non est factum. (2) Gambling, or immoral and illegal consideration. (3) Fraud in the procurement.

In Rhodes v. Beall, 73 Ga. 641, 644, the note was given by the maker to his creditor in consideration that the creditor would withdraw his objections filed to the final discharge of the maker in bankruptcy. This was illegal because in violation of the bankruptcy statutes of the United States. It was held that there was no reason or principle which would take the case out of the doctrine of the common law, adopted by the judges in convention in the principal case, that no illegalities between the original parties will affect an innocent indorsee, except under the statutes of gaming and usury, unless he has notice of the illegality, or takes the paper after it becomes due from one who had.

The cases in the Justice's Court, the subject of this certiorari were founded upon promissory notes in the hands of third persons before due and without notice, proven on the trial to have been given in the compromise of a scire facias for the condemnation of a lot of land. The grounds taken were these. 1. That the notes are void, because given in direct violation of an express statute of the State, which says that "no case (to wit, scire facias) after being commenced as aforesaid by scire facias, shall be settled and compromised by the informer, or otherwise disposed of, to the prejudice of the State; and in case that it is, said land shall be liable to be returned by any other informer, in manner above prescribed, and division made thereof accordingly." (Lot. Law, 1825.) 2. Also void against the policy of the State.

By the Court. There seems to be two cases in the English authorities, in which a note or bill of exchange is void, or rather in which their illegality can be inquired into, in the hands of such third persons trading for them before due and without notice, viz. those founded in gaming and usury. The statutes expressly declare them void in these cases. The same rule would apply to every case, where a statute should declare such contract void. 3 Kent Com. 51, 52. All contracts which have for their object any thing which is repugnant to justice, or against the general policy of the common law, or contrary to the express provisions of a statute, are void. So is every contract against good morals, or contrary to the laws of God, void. Com. Cont. 30, 31, 32. It is said that every contract made for, or about any matter or thing which is prohibited and made unlawful by any statute, is void, though the statute itself does not expressly declare that it shall be so, but only inflicts a penalty; because a penalty implies a prohibition. 1 Com. Cont. 36, 41; 1 Bos. & Pul. 264. Courts of justice allow such considerations when illegal, or immoral, to be inquired into; for the allowance is not for the sake of the party who raises the objection, but is grounded upon principles of public policy. \*2 Kent Com. 366; Cowp. 343; 16 John. Rep. 486.

The same relief is given in a Court of Equity against contracts immoral or illegal as at common law, even in favor of the guilty party; when the principles of public policy, or the good of others required it. 2 Kent Com. 43, 366; 3 Ves. 456; 11 Ves. 526; 13 Ves. 581. The court is clearly of opinion that the contract in this case, is against both of the provisions of the act of 1825, and the general policy of the State; and as between the original parties might be inquired into and voided.

But in Great Britain, where these doctrines prevail, the public interest and commercial prosperity of the kingdom require that the principles laid down in relation to promissory notes in the hands of innocent holders without notice, be strictly pursued; and except in the isolated cases referred to, of gaming and usury, will not permit the con-

sideration to be gone into. The same doctrine holds in the United States; and in this State, so far as these principles have been discussed, is generally recognized in our courts. "The consideration of a note, not void in its creation, (that is, not so declared by statute) and indorsed before due and without notice, cannot be inquired into, in an action by a bona fide holder against the maker." 3 Caines' Rep. 299; 9 John. Rep. 295. A case is found in 12 Johnson, 306, which seems to hold a somewhat contrary doctrine, to wit, that if void ab initio, void in whosoever hands they might go, notice or not. Yet, what are we to understand by being void ab initio, unless we understand, where they are declared so by statute? The same phraseology used in England would be so understood, and they would fall under the same decisions referred to relative to notes declared void by the statutes of gaming and usury. In this case, however, of Wiggins v. Bush, 12 John. 306, Justice Yates incidentally touches the point; it was not involved in the case, because there it was admitted the party had notice. He says "this is a defence set up against third persons who are subsequent holders for a valuable consideration and without notice, it is considered, and therefore protected. This is not so, if the notes are void ab initio, they are void in their hands. It cannot be made a question, he says, in the present case, because it does not appear a consideration was ever given for the note, and because they had sufficient notice of the manner in which it was obtained by the payee, their agent."

In the second volume of Starkie's Evidence, page 282, that learned and perspicuous author says, after collating and analyzing all the English doctrine upon this subject, "That no illegality between the original parties will affect an innocent indorsee (except under the statutes of gaming and usury) unless he had notice of the illegality, or took the bill after it became due from one who had, and refers to Doug. 251 632; 1 \*Esp. C. 389, 45; 2 Esp. C. 538; 11 East, 43; 12 John. 306; 1 Bay 113. Chief Justice Kenyon says, that the innocent indorsee of a promissory note, or bill of exchange can recover in all cases, with the exception of those founded in gaming, or usurious consideration, and in no other case, could the innocent indorsee be deprived of his remedy, and that a contrary doctrine would shake paper credit to the foundation. 4 Petersdorff Abr. 240.

But it is said, admitting all that doctrine to apply in this country, a subsequent promise was proven, in this case, by the maker to pay them, when due, to the holder, and therefore made valid. As to that principle, it is believed not to come up directly here, because the consideration cannot be gone into in the hands of an innocent and bona fide holder, not affected by notice and having traded for the notes before due. But if they were void in their creation a subsequent promise cannot make them good. 3 Cain. Rep. 213.



**Wright v. Wright.**

Wilkes, July, 1833.

**Hotchpot**—Interest of Widow in Children's Advancements.\*—The widow has no right to claim an interest in advances made to children and brought into hotch-pot: but is confined to her husband's estate at the time of his death.

The principal question in this case, is, has the widow a right to claim an interest in advances, received by children, brought into hotch-pot? If the widow is entitled to an interest in such advances, brought into hotch-pot, the portion of complainant will be diminished. Against the right of the widow, 3 Dess. 199, was relied on. The words of the statute of South Carolina, so far as this question is concerned, are very analogous to those of the act of this State, and indeed even stronger, yet it appears from the authority cited, that the widow is not entitled to any interest in advances made by an intestate. The statute 22 Charles II. is as strong in favor of the widow as the statute of this State. In England it is settled that the widow has no interest in advances made to children, no doubt rests upon the question in the courts of that Kingdom.

In favor of the widow it was contended that the statutes of South Carolina and of Great Britain gave a certain definite portion of the estate to the widow, wholly independent of the children, whereas the statute of Georgia gives her a child's part. Hence it is contended that the decisions of the courts of Great Britain and of South Carolina are entitled to no authority in the courts of this State.

By the Court. The statute of distributions in this State, passed in 1804, gives to the widow of an intestate a child's part of his estate both real and personal.  
252 The statute of \*1821, regulates the question of hotch-pot. One of the

reasons upon which the courts of South Carolina exclude the widow from all interest in the advances brought into hotch-pot, is, that the widow is not named in the provision regulating that question. That reason equally applies to the statute of this State: She is not named in the act of 1821, regulating hotch-pot. The statute of distributions of the three countries which have been brought under consideration, confine the interest of the widow to the estate which the husband held, or was entitled to at the time of his death. Can what has been advanced to the children in his life time be considered the estate of the husband, at the time of his death? It is believed that this question admits of no other than a negative reply. If this be true, the question is decided. For if such advances were not the estate of the intestate at the time of his death, then the widow can have no claim to it under the statutes of distributions.

But the widow is benefited by the act regulating hotch-pot, even if she does not participate in the property brought into hotch-pot. For if that act did not exist, children advanced would have an equal portion with those not advanced, of course the child's part of the widow is increased in proportion to the diminution of the parts of the children advanced in the life time of the intestate. There is another view of the subject which may reconcile the reflecting mind to the exclusion of the widow from all interest in advancements. If settlements have been made upon femme coverts, before or after marriage, such settlements would be no bar to her recovery of her child's part of the intestate's estate, unless the deed of settlement should contain an express declaration, that it should be in bar of such child's part.

**Williams v. Abercrombie and Horton, Administrators.**

Hancock, October, 1833.

\***Advancement to Children—Right of Widow to Have Same Brought into Hotchpot.**—The Act of 1821, providing that children who had been advanced during the life of the intestate should have no further share in the estate unless they should bring their advancements into hotchpot, made provision for children alone. Under it a widow had no right to have advancements brought into hotchpot for her benefit. See *Beavors v. Winn*, 9 Ga. 192, citing the principal case. By Act of 1854, however, it was provided that widows of intestates should be entitled to have advancements made to children brought into hotchpot for their benefit. Under this act it was held that the widow of an intestate who had intermarried with him prior to its enactment, the intestate having died subsequent to its enactment, was entitled to have advancements made to the children of a former marriage brought into hotchpot for her benefit in the distribution of the deceased husband's estate. *Boyd v. White*, 32 Ga. 530.

See now, Ga. Code, § 3477, providing for the bringing of advancements into hotchpot, and expressly stipulating that, "If there be a widow, she shall be made equal to the advanced children, as other distributees."

**Evidence—Account Books—Admissibility.**\*—An account book, to be evidence, ought to show the daily transactions of the party: otherwise it will be rejected.

This action was brought to recover money for work and labor done for the intestate by the plaintiff, and for money lent to the intestate in his life time. To support the case by evidence, a small red pocket book was produced, which among other entries contained one of 31 days' work at \$2.25 per day. Objections were made to the admissibility of this book as evidence; for that it was not a book which showed the daily transactions of the plaintiff, was manifest from the entry referred to.

By the Court. The act of Parliament upon this subject, only makes shopkeepers'

\***Account Books—Admissibility in Evidence.**—See *Martin v. Administrator of Fyffe*, Dud. 16, and foot-note; Ga. Code, § 5182.

and merchants' books evidence. Even under that statute, such evidence is of the lowest grade. Under that act, blacksmiths' and physicians' books 253 \*have been admitted to be evidence, and the books of mechanics generally, when the entries appear to be daily, or are made when the work is done, or the article delivered. The credit given to such books seems to rest upon this idea: that as the entry is made from day to day as the articles are made or delivered, there is no reason to suspect that they are made with a view to fraud or injustice, especially when it is in proof that the party is in the habit of keeping fair and correct books. But when the entries are not made from day to day as the work is done, or the article delivered, as in the present case, where the entry is for 31 days' work at \$2.25 per day, amounting to \$69.75, which, if the entries had been made as contemplated by the statute would have required 31 entries, the court cannot say that the book comes within the reason or equity of the statute; and it is therefore rejected as evidence.

### Thompson v. Arthur.

Wilkes, July, 1893.

**Attachment Bond—Obligors Residing without State—Sufficiency.\***—The bond given in pursuance of the statute regulating attachments, must be such a bond as can be enforced by the courts of this State; therefore if the obligors reside in another State, the bond is bad, and the attachment will be dismissed.

This motion is founded on the ground that the bond and security required by the statute had not been given; for that the bond and security given in this case, were given in the State of South Carolina, and both the obligors are residents and citizens of that State. In opposition to the motion, it was contended that the statute only requires that bond and security shall be given. That in this case, bond and security have been given in terms of the act. The act does not require that the security shall be a citizen, or even a resident of this State, and that therefore the statute has been literally complied with in this case.

By the Court. It is a general rule of construction, that statutes shall be construed according to the subject-matter upon which they are intended to operate. It is a reasonable presumption that the legislature of this State legislates only for persons and property, within the jurisdiction of the State. When a statute requires bond to be given for the benefit and security of a person within its jurisdiction, and subject to its laws, the legal inference is that the bond required, be such an one as can be enforced by the laws of this State. This inference receives additional force in the present case, from the provision of the statute which requires that the bond taken,

be deposited in the court in which the attachment is returnable. In the case under consideration, it is admitted, that the obligors reside without the jurisdiction of this State; therefore it cannot be enforced in the courts of this State, and is not such a bond as is required by the statute.

254 It is not denied \*that the legislature can by law authorize a bond or other security to be taken which cannot be enforced in the courts of this State, but the legislature will not be presumed to have intended to give such authority without using express words for that purpose, mere general terms will not support such a presumption. The legal presumption, in the absence of express words is, that the legislature requires bond and security to be given, which can be enforced in the State courts, and by State authority. The motion is sustained.

### Joseph Crockett v. John Routon.

In Heard Superior Court.

**Parol Evidence—Inadmissible to Contradict or Vary Record.\***—Parol evidence which denies or varies a record, is inadmissible.

**Former Recovery—Whether Bar to Subsequent Action†—Test.**—To determine whether a former recovery is a bar to a subsequent action, a good test is, whether the same evidence will support both actions.

**Same—Same.**—If the parties, the subject-matter of the suit, and the evidence, be the same, the former recovery is a bar.

#### \*Trial by Record—Admissibility of Parol Evidence.

—Trial by the record is not only in use when an issue of *nul tiel* record happens to arise for decision, but it is the only legitimate mode of trying such issue, and the parties cannot put themselves upon the country. *Stewart v. Sholl*, 99 Ga. 539, 26 S. E. Rep. 757, quoting *Stephen on Pleading*, p. 101, and citing the principal case. But by Ga. Code, § 3743, parol evidence is admissible to show that a matter apparently covered by a former judgment was really not passed upon by the court. See also, *Ezzell v. Maltbie*, 6 Ga. 495, and *Hill v. Freeman*, 7 Ga. 211.

†**Former Recovery—When a Bar to Subsequent Action.**—In *Lynch v. Jackson*, 31 Ga. 670, it was said: "The Judges in convention in *Crockett v. Routon*, *Dud.* 254, held, and we think very properly, that to determine whether a former recovery is a bar to a subsequent action, a good test is, 'whether the same evidence will support both actions.'"

In *Burke v. Lee*, 59 Ga. 165, it was said, "Sound sense, as well as the adjudications of the courts, lay down the rule that the rights of the parties must be actually considered and adjudicated before the former adjudication will bar the subsequent suit. In other words, the merits of the case between the parties must be adjudicated,"—citing the principal case and numerous other authorities. See now, Ga. Code, §§ 3741, 3742, 3744, 3903, 5094, 5095, 5233, 5348, 5372.

**Same—Same—In Cases of Nonsuit and Retraxit.**—As to the conclusiveness of judgments in cases of retraxit, nonsuit, or dismissal, see Ga. Code, § 3786, 5042, 5043, 5347.

\*See Ga. Code, § 4514.



The plaintiff on the 12th April, 1831, instituted his action on the case, against the defendant, to recover the price of a boat, which he alleges in his declaration, defendant conveyed to him on the 10th January, 1829, for the sum of \$105, and that he has paid defendant for the same said sum of money—he farther alleges that at the time of the sale of the boat to him, it was subject to judgments obtained against one William Reid, who had previously been the owner of the boat, and was levied upon by virtue of executions against said Reid, and sold as his property.

To this action, defendant pleads a former verdict and judgment between the same parties, obtained in the county of Merriwether, in bar of the plaintiff's right to recover; and in support of his plea, produced an exemplification from the Superior Court of Merriwether county, from which it appears, that on the 19th day of January, 1829, Crockett executed his note to Routon, the present defendant, for one hundred and fifty bushels of good sound merchantable corn, to be delivered at Routon's landing, which was made payable 15th February, after date. It also appears from said exemplification, that Routon, who was the payee, on the 31st August, 1829, instituted suit upon the note in his own name against Crockett, the maker and present plaintiff, in the said Superior Court of Merriwether. To this suit, Crockett, the then defendant, filed his plea, alleging among other things "that the consideration for which said promises and undertakings set forth in plaintiff's declaration were made, had totally failed, in this, that defendant made such promise and undertaking in consideration of the purchase of a boat from plaintiff, running in the Chattahoochee river, which boat was afterwards, to wit, after the date of the promise and undertaking set forth in the plaintiff's declaration, levied upon and sold under an execution against one William Reid, as the property of said Reid, and this defendant

255 \*has by said sale been deprived and dispossessed of the right, title, possession and interest to, and profit arising from said boat, so conveyed by plaintiff to defendant, of all which this defendant puts himself upon the country, &c." Upon the trial of this issue on the appeal, the jury found a verdict in favor of the plaintiff for one hundred and five dollars. On the trial of the case in Heard Court, the defendant's counsel moved the court to sustain his plea in bar, upon the ground, that the same subject matter of the plaintiff's alleged cause of action, had once been adjudicated, as appeared from the exemplification of the record from Merriwether, which had been produced, and by which plaintiff was estopped from farther proceeding here. To this plaintiff's counsel replied, that the judge before whom the cause in the county of Merriwether was tried, charged the jury who tried it, that the evidence on the part of defendant in that action, only amounted

to a partial failure of consideration, and according to law, the jury ought not to consider it, but should find for plaintiff the amount of the note sued on, and proposed to make proof of these facts. The court doubted whether it was competent for the plaintiff to make such proof of parol testimony, inasmuch as the record was the best evidence as to what facts were put in issue on the trial, and as the plea alleged a total failure of consideration, and remained entire. The court, however, upon the statement of counsel that this testimony had been admitted on the former trial, and entertaining some doubt upon the subject, admitted the testimony with the express declaration, that if the jury found for the plaintiff, defendant's counsel should have a rule to show cause why the verdict should not be set aside. The jury found a verdict for plaintiff of \$105 with costs, and defendant's counsel accordingly moved a rule to set aside the verdict, on the ground "that the court erred in overruling the plea in bar, and permitting parol evidence to be received to deny and vary the record of the case pleaded in bar."

The consideration of this question naturally leads us to inquire into the object and effect of a judicial record. "A judicial record is that which contains the acts and judicial proceedings of a court of record—enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question; for it is a settled rule and maxim, that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary." 3 Blk. Com. 25. Sir Edward Coke observes, "a record or enrolment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury or otherwise, but only by itself." 1 In. 117, cited 3 Blk. Com.

256 331. Thus we are to understand \*that the judicial records of the courts are considered of such authority, that no evidence is allowed to contradict them. "If a verdict finding several issues were to be produced in evidence, the opposite party would not be allowed to show that no evidence was offered on one of the issues, and that the finding of the jury was indorsed on the postea by mistake." Reed v. Jackson, 1 East, 355, cited 1 Phil. on Ev. 238. The court determines the general rule to be as laid down by the authorities upon this subject, that the merits of a question which has been directly adjudged by a court of competent jurisdiction, cannot be tried over again between the same parties, in any shape whatever. The rule is believed to be founded in good reason and sound policy. Let us see how far it is applicable to the present case. The former action was between the same parties, and the record shows that the same subject matter of the present action was then put in

issue between them—the judgment on that issue was anterior to the commencement of the suit at bar—the merits of the sale of the boat from Routon to Crockett formed the subject matter of judicial investigation by a competent tribunal on the former trial. In the case of *Kitchen v. Campbell*, 3 Wils. 304, cited 2 John. Rep. 230, it was determined “that the test to know whether a verdict and judgment in a former action is a bar, is whether the same evidence will support both actions.” According to this test, no doubt can exist but that the same evidence which would have enabled the defendant in the former action to sustain his plea of a total failure of consideration, would also enable him to maintain his action against the present defendant. In fact the averment in the present declaration is in substance the same as the plea to the former action. It has been laid down by high authority “that the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea or bar, and as

evidence conclusive between the same parties upon the same matter directly in question in another court.” 1 Starkie Ev. 190. It is not necessary that the fact to be proved by the record should have been solely and specifically put in issue on the former trial, it is sufficient if it was a fact essential to the finding of that verdict. 1 Stark. Ev. 200. See the case of *Jones v. Scriven*, 8 John. Rep. marginal, page 453, also see 2 John. 210; 11 John. 530. How far the court would have been justifiable in admitting testimony to show that the defendant introduced no evidence in support of his plea, on the former trial, it gives no opinion. If the plea was not legally supported, the defendant should have stricken it out, or have withdrawn it, but as he suffered it to remain, and introduced testimony to the jury in support of it, he must abide the legal consequences thereof. Let the verdict be set aside, and a new trial be granted.





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3. If plaintiff in his affidavit use the words "has absconded," they are sufficient under the act of 1799, though the words in that act are used in the present tense. Ib.

4. A plaintiff who makes an affidavit for an attachment does not entitle himself to the benefit of the act of 1816 and 1820, by simply showing in his affidavit that the defendant absconds. To obtain the benefit of these statutes, he must state that his debtor is removing or is about to remove without the limits of this State, according to the act of 1816: and that the principal debtor is actually removing or about to remove, or has removed without the limits of the State or County, according to that of 1820. Ib.

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1. The obligor of a bond can in no case be permitted to take advantage of the omission of conditions, where the omission is beneficial to himself. And where the conditions omitted are onerous to the obligor, they shall not be permitted to charge him.

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2. Where a statute prescribing the condition of a bond to be given by an officer, agent, trustee or other person, enumerates particular duties, and also contains general words which include his whole duty, the obligor is not discharged from his general obligation by an omission of such particular enumeration. Ib.

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2. After dissolution of copartnership, and until the statute of limitations shall have attached to the demand, each partner has the power to bind his copartner by promises which shall avoid the statute; but the promise, to be sufficient, must be express, or there must be an acknowledgment so direct and explicit, as to be equivalent to a promise.

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3. The authority of one partner to make contracts which bind the whole, arises from the confidential nature of the partnership relation.

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4. When a partnership relation ceases, the authority which grows out of it, and is dependent upon it, also terminates; except so far as a continuing authority touching the unsettled business of the firm, is expressly delegated or is necessarily implied for the benefit of all parties. Ib.

5. After the dissolution of a copartnership, one partner cannot, by a new promise, revive, against his copartners, a debt from the obligation of which they have all once been legally absolved; and therefore an acknowledgment of a debt, or a promise to pay it, made by one partner, after the dissolution of the firm, and after the debt has been barred by the statute of limitations, will not revive the debt against the former partners. Ib.

6. But according to "precedent and authority" the admission of a debt by one partner after dissolution and before the statute has interposed its bar, will be binding upon the other partners, so far as to constitute a new point from which the statute shall commence running. Ib.

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1. The recording or not recording a deed concerns no one, except those who derive title from the same feoffor by a deed of subsequent date.

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2. Deeds more than 30 years old need not be proved where possession accompanies the deed from its execution. The act of 1785, does not innovate upon the English law respecting ancient deeds. Ib.

3. Recording gives no preference to deeds, unless it is done within the time prescribed by the statute. Between deeds standing upon the same footing in other respects, the oldest is to be preferred.

Doe ex dem. Hammond v. Roe and Reddin tenant, 177

4. A deed conveying property to the



"children of Nancy Jones," is not void for uncertainty, if it can be shown who were intended by these words, and that they were in life and capable of taking at the time the deed was executed, but such a deed cannot be made to include after-born children of Nancy Jones.

Hogg and wife *v.* Odom, 186

5. Where the descendants of a negro had contracted marriage with a free white person in a neighboring State—enjoyed liberty and property for a long time, and transmitted them to her descendants, the courts in this State presumed her free so far as to give effect to a deed made by her until some one should assert and maintain a right to her as his slave.

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Hale *v.* Burton, 105

2. A distress-warrant for rent is a remedy which none but a landlord can have; and as soon as the relation of landlord and tenant ceases, the remedy ceases with it. Ib.

3. A distress-warrant may be levied on the tenant's property, wherever it can be found in the county, and the authority to levy is not confined to the demised premises. Ib.

#### DIVORCE.

See Alimony.

#### DOWER.

1. The husband by alienation cannot divest the estate which the law casts on the wife, nor can it be done by public sale under an execution.

Wakeman and Wife *v.* Roache, 123

2. A widow had no right to claim an interest in advances made to children and brought into hotch pot; but is confined to her husband's estate at the time of his death.

Wright *v.* Wright, 251

#### DURESS.

See Bond, 7.

#### EQUITABLE INTEREST.

An equitable interest is not subject to a seizure and sale by a sheriff.

Colvard *v.* Cox Adm'r of Crawford, 99  
See Execution, 4.

#### EQUITY.

1. The equity the court affords a person en-

titled to real estate by devise, to have the encumbrances on it discharged as a debt out of the personal estate, goes no farther than as between the heir or devisee of the estate, and the residuary legatee: it cannot \*interfere with the disposition of other parts, as specific or general legacies, much less with the interest of creditors.

M'Lellan et al. *v.* Wallace et al., 128

2. Where a party has two funds liable to his claim, a person holding an interest in one only, has a right, in equity, to compel the former resort to the other, if that is necessary for the satisfaction of both; but this rule has no application in a question of right between two different sets of heirs to one excluded from the real estate by being an alien, but interested in the personal, and a creditor pursuing his lien upon the real estate. Ib.

See Appeal.

Bequest, 1, 2.

Vendor.

#### EVIDENCE.

1. A merchant's and shop-keeper's books are evidence to prove the sale and delivery of goods, when it is shown that the books offered are of original entry—are in his hand writing—that he keeps fair books—has had dealings with the person charged, and that he kept no clerk: or if he kept a clerk who is dead.

Martin *v.* Administrator of Fyffe, 17

2. Where merchant's books are introduced as evidence, they are open to remark from the court, and to the strictest scrutiny by the jury, and if there be the least suspicion of fraud or unfair dealing, they will be disregarded. Ib.

3. Notice must be given to produce an original paper proved to be in the possession of the adverse party, before secondary evidence can be received of its contents.

Bank of South Carolina *v.* Brown, 64

4. The whole of a document or writing offered as evidence, must be read if required, otherwise there can be no certainty as to the sense and meaning of the entire document. Ib.

5. Where secondary evidence is let in, it is subject to the same rules which regulate the admission of primary evidence. Ib.

6. The impossibility of furnishing better evidence will not authorize the admission of that which is intrinsically defective and dangerous. Ib.

7. It is not the conclusion at which a witness may arrive, which constitutes evidence in a cause; he must state facts, and let the jury draw their own conclusions. Ib.

8. In an action against an administrator for money had and received by his intestate (which money was won at cards) it was held necessary to prove that the intestate actually received the money in question; and proof that he was in partnership with others who gambled, won and received, it was held insufficient.

Bank of Georgia *v.* Clarke,

83

9. Upon proof that the clerk of the Court of Ordinary had been ordered by that Court never to permit an original paper to be taken out of his office, a certified copy was allowed in evidence; and the Court said there was no law requiring the copy to be under seal.

*Roe and Others v. Doe ex dem. Neal*, 168

10. Hearsay evidence is not admissible to prove age. *Ib.*

11. An administrator's accounts which have been allowed by the court of ordinary are prima facie evidence for the administrator; when called upon to account for his administrations; but never evidence of title for an administrator against third persons.

*Cumming v. Fryer*, 183

12. Testimony taken by interrogatories upon a former claim (which had been dismissed) to the same property, between the same parties, and upon the same question, was held to be admissible.

*Evans v. Lampkin et al.*, 193

13. It is well settled that no advantage shall be taken of admissions made to secure one's peace, or in the way of a compromise; and if an acknowledgment and promise for this purpose, be replied to a plea of the statute of Limitations, the evidence will be rejected.

*Hicks and Lord v. Thomas*, 218

14. But if the court, from the circumstances, should be of opinion, that the subsequent acknowledgment and promise were made, from the consciousness of the truth of the indebtedness the evidence would be considered good and available. *Ib.*

15. An account book to be evidence, ought to shew the daily transactions of the party; otherwise it will be rejected.

*Williams v. Abercrombie et al.*, 252

16. Parol evidence which denies or varies a record is inadmissible.

*Crockett v. Routon*, 255

See Bonds, 6, 7.

Former Recovery.

New Trial, 4, 5, 8.

Nolle Prosequi.

Promissory Notes, 3, 6.

Record, 1.

## EXECUTION.

1. If A. be present when an execution is levied on his property as the property of B., and does not object to the levy, or claim title in himself, a presumption arises that he has none; but if A. should afterwards interpose his claim according to our statute, and should produce clear and satisfactory evidence of his title, he will recover his property.

*Irwin v. Morell*, 74

2. And if A. should not interpose his claim under the statute, but, on the day of sale should publicly forbid the sale, and assert his title in the hearing of the by-standers, he might afterwards institute an action against the purchaser, who could not defend himself against a clear title, by proving that the plaintiff, at the time of the levy made no objection. *Ib.*

3. But if claimant fail to assert his right, both at the time of levy and sale, having \*an opportunity of doing so, it will be regarded as a fraud upon the purchaser, or such gross laches as will bar any future claim. *Ib.*

4. A verbal transfer of a fi. fa. for a valuable consideration, is an equitable transfer of the interest; but the actual delivery and consideration must be proved.

*Mills v. Mercer and wife*, 160

See Dower, 1.

Judgment, 1.

Statutes, construction of, 4.

Taxes.

## EXECUTOR AND ADMINISTRATOR.

1. The officers of court cannot issue execution for their costs, against an executor or administrator who has obtained judgment against a defendant that proves to be insolvent.

*Janes v. Robinson*, 1

2. The practice of entering up judgment de bonis testatoris, et si non, de bonis propriis, is contrary to law: and if such judgment cannot be entered up against an executor or administrator, for a debt due by the estate they represent, still less can they be made liable for the costs of a suit, brought by them in their representative capacity, where they had obtained a verdict. *Ib.*

3. The exception in favor of judgments, mortgages, and executions, contained in the act of 1792, prescribing the priority to be observed by executors and administrators in payment of debts due by the estates of their testators or intestates, applies only to such executions, judgments, and mortgages as existed in the life-time of the testator or intestate, and had created a lien upon their estates.

*Bomgaux v. Bevan*, 110

4. If there be bond debts, and the executor, &c. be sued upon a simple contract debt, he may neither pay it nor suffer the plaintiff to recover in his action; for if he do, and he have not assets besides to satisfy the debts due on bonds, he must satisfy so much out of his own estate as he has so paid, or suffered to be recovered from him: for, in case of an action brought, it is his duty to set forth in the pleadings, the debts due upon specialties, in bar of such action. *Ib.*

5. The nature of the debts at the time of the testator's or intestate's death is to regulate the priority of their payment, by the executor or administrator; and no preference can be created, either by greater diligence on the part of the creditor, or by the acts of the executor or administrator himself. *Ib.*

6. Although a son, under his father's will, may have an interest in the crop growing upon land devised, for the support of himself, his mother and other children; if his mother die, and he seizes upon the crop without being appointed executor or administrator of his mother, his interest in the crop will not shield him from liability as executor de son tort.

*Semmes v. Porter*, 167



7. The Executor or Administrator, and not the heir, is the proper party to be made defendant in foreclosure, in the event of the mortgagor's death before foreclosure.

Adm'rs of Magruder v. Adm'rs of Offutt, 227

8. And the principle is the same under our law, whether the subject of the mortgage be real estate or personal property; the heirs cannot be joined as defendants in the foreclosure. Ib.

See Bequest, 1, 2.

Equity, 1, 2.

Evidence, 8, 11.

Husband and Wife, 1.

Letter of Dismission from Courts of Ordinary, Statute of Limitations, 4.

Vendor, 1.

### EXECUTOR DE SON TORT.

See Executor and Administrator, 6.

Pleadings, 2.

### EXECUTORY DEVISE.

See Wills.

### FALSE REPRESENTATIONS.

See Nolle Prosequi.

### FORMER RECOVERY.

1. To determine whether a former recovery is a bar to a subsequent action, a good test is, whether the same evidence will support both actions.

Crockett v. Routon, 255

2. If the parties, the subject matter of the suit, and the evidence be the same, the former recovery is a bar. Ib.

### FRAUDS.

See Title to Property, 1.

Execution, 3.

### GAMBLING.

See Release, 1.

Evidence, 8.

### HABEAS CORPUS.

1. On a writ of habeas corpus, the court will discharge, admit to bail, or remand, according to the circumstances of the case; but it will not try any rights to property. And if the writ be to bring up infants, the court, though bound, ex debito justitiæ, to free them from all illegal restraint, it is not bound to deliver them over to any body, or to give them any privilege.

State v. Fraser, 43

2. In cases of habeas corpus ad subjiciendum, the person imprisoned or illegally detained, may petition for the writ, or any other person may do it for him.

State v. Philpot, 46

263 \*3. The omission of the name of the person imprisoned, is not an irregularity, if enough appear to indicate the person intended. Ib.

4. The petition for this writ ought to be supported by affidavit; but in cases of great

emergency, the writ will be allowed to issue without it. Ib.

5. The benefits of this writ belong to all free persons, of every country, and of every complexion; but not to a slave. Ib.

6. An evasion and insufficient return to the writ of habeas corpus is a contempt of court, and, if obstinately persisted in, the court will punish the offender by imprisonment, until he yields obedience to the writ, or shows that it is impossible to do so. Ib.

See Irregularity.

### HEALTH.

See Municipal Regulations.

### HUSBAND AND WIFE.

1. When a man marries a woman holding property in her own right, he is entitled to that property, if he reduce it to possession in the life time of the woman: But if he does not, and dies, the property survives to the wife, and does not vest in his executor or administrator.

Early v. Sherwood, 7

2. And if property be given to the wife during coverture, it vests absolutely in the husband, and need not be by him reduced to possession in the life-time of the wife. Ib.

See Alimony.

### ILLEGALITY.

See Judgment.

### INDICTMENT.

See Arrest of Judgment.

Nolle Prosequi.

### INFANCY.

A subsequent promise to avoid the plea of infancy, must be express, and deliberately made. A mere acknowledgment is not sufficient.

Martin & Co. v. Byrom, 203

See Adverse Possession.

Habeas Corpus, 1.

Title to Property.

### INFERIOR COURTS.

1. The Inferior Court is not a corporation, and cannot be sued as such.

Forsythe v. Justices of Inferior Court, 40

2. By the 2d sec. of the act of 10th December, 1803, the Justices of the Inferior Court have power to discharge persons imprisoned for debt, under circumstances therein named; but they must do it as a court; An order for discharge submitted to them individually, for their respective signatures out of court, is insufficient and void.

Woodruff & Co. v. Dean and Mahoney, 215

See New Trial, 2.

### INTEREST.

An acknowledgment of an open account by letter, is such a liquidation of the demand

as will enable the creditor to obtain interest from the date of acknowledgment.

Hicks and Lord *v.* Thomas, 218

INTERPOSING CLAIM TO PROPERTY.

1. Though it is for the benefit of society that claims to property levied on, should be interposed and settled before the same is subjected to sale by the sheriff, yet the law regulating claims is merely permissive, not mandatory.

Roe and others *v.* Doe ex dem. Neal, 168

2. In cases of claim to land, the courts have always required proof of the possession of the defendant in execution, at the date of the judgment or subsequent to it; and though possession is the weakest evidence of title, it is held sufficient to put the claimant to the production of his title. Ib.

See Title to Property, 1.

IRREGULARITY.

Irregularity in the writ of habeas corpus must be taken advantage of in due time, or the party affected by it will lose his opportunity of doing it entirely.

State *v.* Philpot, 47

See Habeas Corpus, 3, 4.

JUDGMENT.

Judgment cannot be entered upon a recognition, until the sureties have been required by scire facias to show cause why judgment should not be entered against them. And if judgment be so entered and execution issues, it may be taken advantage of by affidavit of illegality.

Gilmer *v.* Blackwell et al., 6

See Executor and Administrator, 2, 3.

Statutes, Construction of, 4.

Vendor, 1.

JURIES.

1. In criminal cases, if juries mistake law and fact, or draw improper conclusions from given facts, to prevent injustice, this court will, sometimes, grant a new trial, even where there has been no corrupt or improper conduct on the part of the jury.

State *v.* Simmons, 27

2. If a jury be guilty of gross misconduct, the court will not hesitate to grant a new trial.

State *v.* Sherbourne, 28

264 \*3. The fact that one of the jury who tried a cause on appeal, was security on the appeal, though good cause of challenge is not of itself sufficient ground of new trial. But if it were shown that the juror acted under improper motives and principles, a new trial would be granted.

Glover *v.* Woolsey et al., 85

4. Neglect to challenge a juror before he is sworn, is a waiver of objection to him. Ib.

5. Where two parties claim title from the same grantee, the identity of the grantor is matter of fact to be tried by a jury.

Doe ex dem. Hammond *v.* Roe and

Reddin, tenant, 177

6. If on trial of a claim the jury be satisfied that the claimant purchased the property with the money of the defendant in f. fa., they ought to declare the sale void against creditors, even though it should have been made by a sheriff in market overt.

Cumming *v.* Fryer, 183

See Appeal, 1.

Distress Warrant, 1.

New Trial, 1, 7.

Verdict, 4.

JURISDICTION OF COURTS.

1. In a court whose jurisdiction is limited to a particular amount, a set-off which exceeds such amount cannot be pleaded.

Reed *v.* Cormick, 20

2. The 5th sec. of the act of 1799, entitled an act to regulate the pilotage of vessels to and from the several ports of this State, and which vests the commissioners of pilotage with power, to decide, adjust and regulate any damage, dispute, complaint or difference, arising against or between master and pilot, for pilotage, or any other matter relating to the business of a pilot, does not deprive the Justice's Court of jurisdiction over a demand for pilotage, where such demand does not exceed thirty dollars.

Taylor *v.* Thomas, 59

3. By the 6th sec. of the judiciary act of 1799, the Superior Courts as courts of law have the power to establish lost papers, notes, &c.; and when it is done, the copy may be sued on and recovered, in the same manner as the original, and that without resort to a Court of Equity.

Barney, Administrator of Evans, *v.*

Doyle, 201

See Amendment, 1.

Statutes, construction of, 6.

JUSTICES' COURTS.

See Jurisdiction of courts, 2.

LANDLORD AND TENANT.

See Distress Warrant, 1, 2, 3.

LEGACY.

1. Although as a general rule it is true, that the gift of the interest vests the body of a legacy, yet in such cases the gift of the interest must be unconditional, and placed under the immediate control of the legatee.

Roberts, Adm'r *v.* Carr, Ex'r, 178

2. The words "I give unto my brother J. G. the sum of \$1000, to be vested in bank stock, and the net proceeds to be annually drawn and paid to him by my executor during the lifetime of the said J. G." were held to be such a gift of the mere interest as not to vest the body of the legacy. Ib.

See Bequest.

Wills.

LETTERS OF DISMISSION FROM COURTS OF ORDINARY.

Letters of dismission fairly and legally



obtained from the Court of Ordinary, as effectually protect executors and administrators from all further liability as such, as a decree of the Court of Chancery could do.

Smith and wife *v.* Oliver, Adm'r, 190

LIMITATION.

See Bequest, 1.  
Wills, 2, 3.

MALICIOUS PROSECUTION.

To support an action for malicious prosecution, it is not necessary to prove an arrest.

Stapp *v.* Partlow, 176

MANDAMUS.

1. The Mandamus is an established remedy to oblige Inferior Courts and magistrates to do that justice which, without such writ, they are in duty and by virtue of their office bound to do.

Forsyth *v.* Justices of Inferior Court, 38

2. To sustain an application for mandamus, it is not only necessary that the relator should have a legal right to the thing commanded; but he must also be without a legal remedy.

Ib.

MEASURE OF DAMAGES.

1. In an action on a bond for titles, the measure of damages is the value of the land at the time of the breach.

Newsom *v.* Harris, 180

MERCHANTS' ACCOUNTS.

See Statute of Limitations, 1.

MERCHANTS' BOOKS.

See Evidence, 1, 2.

MONTHS.

Where the term "months" is used in a statute, without defining what kind of months, the courts adjudge that lunar months are intended.

Redmond *v.* Glover, 107

265 \*MORTGAGE.

If a mortgage be taken to secure the payment of two notes becoming due at different times, and the mortgagee foreclose and sell upon the first note that becomes due, and the mortgaged property be sold for more than enough to pay the note on which the foreclosure is made, the surplus in the sheriff's hands is discharged from the special lien; and if other creditors of the mortgagor obtain judgment in the ordinary course of law, before the mortgagee forecloses upon the second note, the surplus shall be paid over to them according to date.

Hobby *v.* Pemberton, 212

See Executors and Administrators, 3, 7, 8.

MUNICIPAL REGULATIONS.

The city council of Augusta have the power to establish and enforce such by-laws, rules, and ordinances, respecting the harbor

and wharves, and every regulation that shall appear to them requisite for the security, welfare and convenience of the city; provided they be not repugnant to the constitution and laws of the land.

Dubois *v.* The City Council of Augusta, 31

NEW PROMISE.

See Copartnership, 2, 5, 6, 7.

NEW TRIAL.

1. In a case which turned entirely upon a matter of fact, where the evidence was contradictory, and the special jury had decided, and there were no suspicions of fraud or corruption against the jury, the court refused to grant a new trial.

Flournoy *v.* Coxe, 6

2. Where an Inferior Court whose jurisdiction is limited to a particular amount, allowed a defendant to plead a set-off, that exceeded such amount, on motion, a new trial will be granted.

Reed *v.* Cornich, 20

3. When a verdict is glaringly against the weight of evidence, and must, inevitably, work injustice, a new trial may be granted.

Irwin *v.* Morell, 74

4. A new trial will not be granted upon the discovery of new testimony which is merely cumulative.—Though this rule has not been held inflexible, the courts will observe great caution in relaxing it.

Ib.

5. The court reluctantly granted a new trial upon the ground of newly discovered testimony which was not merely cumulative, in connexion with certain auxiliary circumstances attendant upon the case, it not having been satisfactorily shown that due diligence was used to obtain it sooner.

Ib.

6. The granting of a new trial or refusing it, must depend upon the legal discretion of the court, guided by the nature and circumstances of the particular case.

Ib.

7. Where there was good cause of challenge to a juror, unknown to the party at the trial, a new trial may be granted: But the party will not be permitted to take advantage of an ignorance which is the result of gross neglect.

Glover *v.* Woolsey & Co., 85

8. New discovered evidence is a ground for new trial, but it must be such as is so material, that it would be likely to change the verdict, or such as to show that justice had not been done; and it must be such as the movant could not have obtained by diligent inquiry.

Ib.

9. If a jury give insufficient damages, it is sometimes a good ground for granting a new trial.

Newsom *v.* Harris, 180

10. The discovery of new and material testimony after verdict is a good ground for a new trial.

Stewart *v.* Grimes et al., 209

See Declaration, 2.

Juries, 1, 2, 3.

Verdict, 1.

## NON-RESIDENCE.

See Residence.

## NOLLE PROSEQUI.

On indictment for swindling, the proof was, that defendant had by false representations induced the prosecutor to purchase and pay for a tract of land which defendant had already sold and conveyed to another: On motion to enter nol. pros. for defect of proof, prosecutor not having tested his title by action of ejectment, the court overruled the motion.

State *v.* Dozier, 155

## NOTARY.

See Release, 1.

## NOTICE.

1. Notice must be given to produce an original paper proved to be in the possession of the adverse party, before secondary evidence can be received of its contents.

Bank of South Carolina *v.* Brown, 63

2. The only exception to the above rule is, where, from the nature of the proceedings, the defendant must know that the plaintiff intends to charge him with the possession of the instrument; as in an action of trover for a bond.

Ib.

## OFFICERS OF COURT.

Judicial officers are not liable to civil suits for their judicial acts.

Upshaw *v.* Oliver et al., 241

## PILOTAGE.

See Jurisdiction of Courts, 2.

266

## \*PLEADINGS.

1. In an action of debt upon notes given in purchase of land, defendant will not be permitted to plead misrepresentations of the value and quality of the land, made by vendor: nor will the plea of partial failure of consideration avail him.

Hinton *v.* Scott, 246

2. Where defendants were sued in assumption as executors de son tort and pleaded non assumpsit, ne unques executor, and that they never intermeddled, the court would not allow a separate trial of each plea.

Brodnax *v.* Brown et al. Ex'rs, 202

See Amendment, 1, 2.

Bond, 7.

Executor and Administrator, 7, 8.

Principal and Agent.

Promissory Notes, 8.

Release, 1.

Set-off, 1, 2.

Residence, 2, 3.

## PRACTICE.

If a defendant has his testimony in court, and refuse to introduce it at a proper time, resting his case upon matter of law, and the benefit of a concluding argument, after the case has been argued for plaintiff, he cannot then be permitted to change his position and introduce his testimony.

Stewart *v.* Grimes et al., 209

## PRIORITY OF DEBTS.

See Executors and Administrators, 3, 4, 5.  
Mortgage.  
Taxes.

## PROHIBITION.

Prohibition will not be granted unless the party is in danger of being injured by some suit actually depending; it is not sufficient that he merely fears that a suit may be commenced, in which he might suffer damage.

Mealing et al. *v.* City Council of Augusta, 221

## PROMISSORY NOTES.

1. Where a statute required a bond with security to be taken for the rent of a public bridge, and in lieu thereof a promissory note was taken—on suit brought to recover the amount of such note,—*held*, that the statute was substantially complied with, and that the note was not void.

Central Bank *v.* Kendrick, 67

2. The legislature of Georgia, in making promissory notes negotiable, whether given for money or other thing, ipso facto made them exempt from the necessity of proving consideration.

Daniel *v.* Andrews, 157

3. The execution of a promissory note is evidence in law of a full settlement of all accounts up to the date thereof, except such as are specially excepted at the time.

Mills *v.* Mercer, 160

4. The court refused to decide that a note given in consideration of forbearance to sue, is void for want of consideration; but where the cause of action forborne, is clearly illegal and void, a note given in consideration of forbearance, is tainted with the nature of that cause of action.

Slack *v.* Moss, 161

5. The maker of a promissory note cannot be sued with the indorser out of his county.

Morris *v.* McClain, et al., 172

6. To an action upon a note the defendant will not be allowed to prove a partial failure of consideration.

Jordan *v.* Adm'r of Jordan, 181

7. A purchaser of special interest in land, who gives his note for the purchase money, and is in quiet possession of the land, shall not be protected from the payment of the note, from a mere apprehension of being disturbed at some future time.

Ib,

8. A transfer of notes long after they become due, will not deprive the maker of any defence to which he would have been entitled had they continued in the hands of the payee.

Crawford, Adm'r cum tes. an. *v.* Beal et al., 204

9. An interlineation of the words "or bearer" in a due bill, is a material alteration, and will vitiate the instrument, unless it is proven to have been made by the maker or by his consent.

Scott *v.* Walker, 244

10. A note given in compromise of a suit by fi. fa. to condemn land under the lottery



law of 1825 is in violation of that statute, contrary to public policy, and void as between maker and payee; and its consideration may be inquired into in a suit between the original parties.

Poe v. Justices of the Peace, 249

11. But if such note be indorsed before due, and without notice, in a suit by such innocent indorsee against the maker, the courts will not permit the consideration to be inquired into. Ib.

See Bonds, 3.  
Receipt, 1.

#### PURCHASE MONEY.

The purchase money is not an original charge upon the landed estate, but only an equity to resort to, in case the personal estate should prove deficient.

Harden et al. v. Miller, 121

#### RECEIPT.

1. A., indorsee of a negotiable note given by B., placed the same in the hands of an attorney for collection: B., as collateral security for the payment of said note, placed in the hands of A.'s attorney, a larger amount of notes and other evidences of debt against third persons, taking a receipt therefor from A.'s attorney, in which the attorney stipulates, as soon as he collected sufficient to pay B.'s note, to deliver the same to B., \*and pay him any balance there might be remaining: held, that the evidences of debt were not taken in satisfaction of B.'s note;—and that such receipt did not amount to an agreement by A.'s attorney, not to sue B. till the securities mentioned therein could be collected.

Pennington v. Watson, et al., 98

#### RECORD.

1. A garbled or imperfect record will not be received in evidence by the courts.

Hale v. Burton, 105

2. The records and judicial proceedings of the courts of South Carolina, when legally authenticated, are entitled to the same faith and credit in Georgia as they have by law or usage in Carolina.

Harris & Co. v. Williams, 199

#### RELEASE.

Where an agent had lost the money of his principal at faro, and an action for money had and received, was brought by the principal, it was held that the agent was not a competent witness until released. And to enable the court to decide upon the competency of the agent as a witness, the release need only be officially attested by notaries; it is not necessary they should prove it as witnesses.

Allen v. Lacy et al., 81

#### RENT.

See Distress Warrants.

#### REPLEVIN.

See Distress Warrants.

#### RESIDENCE.

1. To constitute a legal residence there must be the concurrence of an actual residence, and an intention to remain, which is matter of fact for a jury to decide, not alone from express words (which might not at all times be proper testimony) but from attendant circumstances showing an animus manendi.

Lamar v. Mahony, 93

2. Non-residence must be pleaded, and cannot be taken advantage of, on motion in arrest of judgment before the superior courts of the State of Georgia.

Slaughter et al. v. Thompkins, 117

3. Defendants in such cases by appearing and filing issuable pleas, waive their right to be sued in the county where they reside. Ib.

#### ROAD COMMISSIONERS.

See Costs, 3.

#### SCIRE FACIAS.

See Judgment.

#### SET-OFF.

1. If A. contracts a debt with B. as the administrator of C., and is sued for the same, he cannot plead as a set-off a debt due to him from C., the intestate.

Crawford, adm'r, cum tes. an. v. Beal et al., 204

2. But where the debt sued on was originally due to the intestate instead of his administrator, the debts are mutual and may be pleaded as a set-off.

Crawford, adm'r v. Grubbs, 206

See Jurisdiction of Courts, 1.  
New Trial, 2.

#### SHERIFF.

A sheriff can sell nothing but goods and chattels, lands and tenements; a right to receive a distribution share is neither.

Colvard v. Cox, Adm'r of Crawford, 99

See Equitable Interest, 1.  
Interposing Claim, 1.  
Mortgage.  
Taxes.  
Verdict, 4.

#### SLANDER.

Words which are doubtful or even innocent in themselves, if they be proven to have a criminal signification according to the common understanding of them, will support an action of slander.

Cooper v. Perry, 247

#### SLAVES.

See Constable.  
Deeds, 5.  
Habeas Corpus, 5.  
Writ of Ravishment of Ward.

#### SPECIAL JURY.

See Appeal.

#### STATUTES, CONSTRUCTION OF.

1. Where a statute prescribing a bond, de-

clares all bonds not taken in pursuance to it void, the statute must be strictly pursued, as bonds which do not conform to it are void by express enactment. But where the statute contains no such provision, the conditions of bonds taken under it which are contrary to the statute, are alone void; as also are onerous conditions beyond the statute.

Justices of Inferior Court *v. Wynn*, 23

2. Statutes giving summary remedy out of the ordinary course of proceeding, must be construed strictly, and confined to cases clearly contemplated by them.

Hale *v. Burton*, 105

3. The construction put upon the statute of 22d Dec. 1823, in relation to dormant judgments is, that when seven years have elapsed without any entry on the fi. fa. showing diligence on the part of the plaintiff or owner, the judgment is void.

Stone *v. Head* and others, 166

268 \*4. Statutes against fraud when they operate against offence, are to be liberally construed so as to avoid the fraudulent transaction.

Cumming *v. Fryer*, 183

5. The constitutionality of the Statute of 15th Dec. 1810, for the more effectually securing the probate of wills, &c., affirmed in the case of

Smith and Wife *v. Oliver*, Adm'r, 190

6. There is nothing in the 5th section of the statute of 1799, which by fair construction will deprive any one of a legal defence, acquired without fraud, and subsisting at the time of the decease of his creditor.

Crawford, Adm'r, *v. Grubbs*, 206

7. The statute of 1829, extending the laws of the State of Georgia over the Cherokee Country, commented upon, and its constitutionality affirmed in the case of the

State *v. Tassels*, 230

See Affidavit for Attachment, 1, 3, 4.

Amendment.

Bond, 2, 3, 4, 9.

Deeds, 2, 3.

Execution, 1.

Executor and Administrator, 3.

Inferior Courts, 2.

Months.

Promissory Notes, 1.

## STATUTE OF FRAUDS.

1. Treasury checks are neither goods, wares, or merchandise, within the meaning of the 17th sec. of the statute of frauds.

Beers et al. *v. Crowell*, 29

## STATUTE OF LIMITATIONS.

1. The exception in favor of merchants' accounts in the 5th sec. of the Statute of Limitations of 1767, is not repealed by the act of Limitation of 1809.

Fellows *v. Guimarin* et al., 101

2. The Statute of Limitations of 1767, is no bar to an application for the assignment of dower.

Wakeman et ux. *v. Roach*, 123

3. A debt when once barred by the Statute of Limitations, can be revived, only by a new promise, express or implied, and for which the old debt forms the consideration.

Brewster *v. Hardeman*, et al., 139

4. An administrator cannot compute the year of his exemption from suit, in support of the plea of the statute of limitations.

Jordan *v. Adm'r of Jordan*, 182

5. The general rule that when the statute of limitations once attaches, it will continue to run, must yield to the statutory inhibition against the plaintiff's right to sue. Ib.

See Copartnership, 5, 6.

## SWINDLING.

See Nolle Prosequi.

## TAXES.

1. An execution for taxes takes precedence of fi. fas. of older date in favor of individuals.

State *v. Pemberton*, et al., 15

2. No special power of taxing banks in their corporate capacity, has been given to the Mayor and Aldermen of Savannah by the act of 1825, and no such power can be implied from the general taxing powers conferred by that act.

Bank of Georgia *v. The Mayor and Aldermen of Savannah*, 130

3. The city may tax bank stock in the hands of the holders living in the city, for it is personal property and liable to tax under the act above referred to. Ib.

4. The general powers to tax conferred on towns and cities, ought not to be so construed as to subject the property of a corporation to be twice taxed; unless by express words of a statute or necessary implication. Ib.

## TESTATOR.

A testator may limit the extent of power conferred by him, and prescribe the particular manner of executing it, and the agent is as little able to vary the manner, as to transcend the limit, for in either case he would be found usurping, instead of executing authority.

Mackay et al. *v. Moore*, Ex'r, of Wilson et al., 95

## TITLE TO PROPERTY.

Where a person, knowing that he has title to property, stands by and suffers another to mortgage or sell it without asserting his title, or making it known to the mortgagee or purchaser, he cannot afterwards set up his claim. And in such a case even infancy will be no protection, provided the minor had arrived at those years of discretion, when a fraudulent intent could be reasonably ascribed to him.

Irwin *v. Morell*, 74

See Execution, 1, 2, 3.

Interposing Claim.

Juries, 6.

## TREASURY CHECKS.

See Statute of Frauds, 1.



## TROVER.

1. A. sold B. a carriage and harness for which A. gave B. a bill of sale; the property was not delivered at the time of sale, but A. promised to deliver it, and in pursuance of such promise, carried it to the river with a view to put it on a boat to be carried to Augusta and delivered to B.; which however was never done, nor his promise further complied with; B. called on A. for the delivery of the property, which A. refused; B. knew where the property was, and might have taken it when he pleased: *held* that there was not such an actual or constructive conversion by A., as to entitle B. to maintain trover against him.

Roll v. Black, 18

2. Where negroes had been given to minor children, and the father sold them to A., and an action of trover to recover their value was brought against A.; *held*, that the sale by the father was void, and that the

269 \*action would lie.  
Wilson et al. v. Wright, 102

## TRUSTEE.

Where A. executed a deed of gift in which certain goods and personal chattels were conveyed to B. in trust for the payment of A.'s debts with the remainder to B., the court held that no person but a creditor of the grantor could interfere with the rights and interest of the trustee.

Evans v. Lampkin and another, 193

## VENDOR.

A vendor of real estate is not obliged to obtain judgment and a return on his execution before applying to a court of equity to obtain from an administrator an account of the personal estate of the intestate, and a decree of payment in case of assets, or otherwise, a lien upon the land sold.

Harden et al. v. Miller's Adm'r, 121

## VERDICT.

1. Where a verdict has no foundation in the evidence, a new trial will be granted; but where there has been evidence on both sides, it being the peculiar province of the jury to determine the relative weight of conflicting evidence, the court, although it may differ with the jury on the point of preponderance, will not disturb the verdict.

Irwin v. Morell, 74

2. Where no rule of law has been violated, and the jury acted within their appropriate sphere, the court will not disturb their verdict, unless in extraordinary cases.

Wilson et al. v. Wright, 102

3. Where there have been two concurring verdicts, unless there have been something grossly and manifestly wrong and unjust in them, they should not be disturbed by the court.

Cumming v. Fryer, 183

4. By the 23d sec. 3d div. Penal Code, 1817, the jury are declared to be judges both of law and of fact; and yet if they were to pronounce a verdict grossly and manifestly

wrong, the court would, unquestionably, grant a new trial; but where the verdict is in accordance with the justice of the case, and the punishment is at the discretion of the court, the verdict will not be disturbed.

State v. Simms, 214

See New Trial, 3.

## WARRANTY.

A sale of special interest in land does not amount to a warranty of title; and if the relinquishment to the purchaser simply recites the promise of a third person to make title, this will not constitute a warranty.

Jordan v. Adm'r of Jordan, 181

## WILLS.

1. If a person, making his will, direct that "if any of his slaves should desire to go to the African Colony, they should be permitted to go, and their expenses to the port of embarkation should be paid," such will is not void under the act of 1818; not is it inconsistent with the policy of our laws; but ought to be executed.

Jordan v. Heirs of Bradley, 170

2. An executory devise, to vest on a dying without issue generally, that is on an indefinite failure of issue, is not good, because it tends to create a perpetuity.

Atwell's Ex'rs v. Barney, 207

3. But courts, favoring the intention of the testator, particularly in devises of personal property, take hold of any circumstance or words of the will which limit the general expression of "dying without issue," and afford a ground for construing the limitation to be a dying without issue living at the death of the party, in order to support the devise over: so the words "after her death if no lawful issue," were construed to mean without lawful issue at the death of the deceased, and to constitute a good limitation in an executory devise. Ib.

See Bequest, 1, 2.

Legacy, 1, 2.

Testator, 1.

## WITNESS.

1. It is competent for a witness to refresh his memory, by resorting to a memorandum which he had made of a fact, and if he can, then speak to the fact from his own recollection, it will be good evidence; but if after seeing the memorandum he cannot recollect the fact, the original memorandum itself must be produced.

Bank of South Carolina v. Brown, 62

2. Where a person is manifestly interested in the event of a suit he is incompetent as a witness.

Miller v. Hale et al., Executors of Burton, 119

3. The payee of a promissory note is a competent witness to prove its consideration under some circumstances.

Slack v. Moss, 161

4. A. sued B. as executor de son tort of C. and offered C.'s wife to prove the intermed-

ding, she being an heir and distributee of C. and the effect of her testimony being to increase the residuum for distribution, in exact proportion to the debt sued on and sought to be recovered; the court held C.'s wife to be clearly incompetent as a witness.

Anderson v. Primrose, Executor, 217

5. It is a general rule in claim cases, and considered the safest that can be adopted, that defendants in execution cannot be witnesses.

Edwards for Anderson and Co. v. 220

Musgrove,

See Release, 1.

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\*WORDS OF LIMITATION.

See Bequest, 1.

WRIT OF PARTITION.

See Husband and Wife.

WRIT OF RAVISHMENT OF WARD.

This writ under the statute 1790, was given to try the right of freedom against the claim of perpetual service, and nothing more. It will extend to no other case of the detention of free persons of color, however illegal.

State v. Philpot,

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DECISIONS  
OF  
THE SUPERIOR COURTS  
OF THE  
STATE OF GEORGIA.

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PUBLISHED IN COMPLIANCE WITH THE ACT  
OF DECEMBER 10, 1841.

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PART I.

CONTAINING DECISIONS RENDERED DURING THE YEAR 1842.





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# DECISIONS OF THE Superior Courts of Georgia.

## RICHMOND SUPERIOR COURT.

**James Gardner, Jr., Adm'r &c. of James Spann, Dec'd, v. Henry H. Cumming and Antoine Picquet, Executors, &c. of John Fox, Dec'd.**

In Equity—January Term, 1842.

1. **New Trial—Motion for—When Court Will Not Hear.**—The Court will not hear a motion for a new trial at the next term after Judgment is rendered, if the Judgment was entered and recorded, unless there was some action of the Court to stay the proceedings, although the counsel gave notice of the application and the grounds.
2. **Limitations—Death of Partner—When Statute Commences to Run in Favor of Survivor.**—When, during the existence of a partnership, one of the partners dies, the Statute of Limitations does not commence running in favor of the surviving partner, until there is an administration on the estate of the deceased partner.
3. **Surviving Partner—Control of Partnership Effects—Liability to Personal Representative.**—A surviving partner is entitled to the control of the partnership effects, for the payment of debts, and for the residue, he is responsible, not to the widow or children of the deceased partner, with whom there is no privity, but to the executor or administrator, who alone can demand his part of the partnership effects, after the payment of debts.
4. **Same—Liability—Equitable Bar—Analogy to Statute of Limitations.**—In such case, the Equitable bar is analogous to the Statute of Limitations, and does not commence running until there is an administration.
5. **Evidence—Grant of Administration—Presumption from Receipt of Register's Fee.**—After a lapse of 20 years it will not be presumed from the mere receipt of the Register of Probates for his fees, that there was an administration on an intestate's estate, when the Records, which appear to have been well preserved, furnish no evidence that administration was granted.
6. **Same—Settlement of Partnership Affairs—Admissibility of Books.**—Under an allegation of a Bill in Chancery, by the administrator of a deceased partner against the executor of the surviving partner, "that the surviving partner used the co-partnership funds in merchandizing," his books are admissible in evidence to shew the profits he made.
7. **Partnership—Liability of Surviving Partner.**—A surviving partner is liable to the representative of his deceased partner for a moiety of the profits of the co-partnership effects used in trade; or if he employs them and makes interest, for the interest on his share, deducting necessary expenses.
8. **Jurors—Affidavit to Impeach Verdict.**—The affidavit of a Juror in a civil case, cannot be received to

shew what transpired in the Jury room, for the purpose of impeaching a verdict returned by him under oath, and to which he must have assented.

In the above stated case, the complainant has obtained two verdicts by Special Juries, against the defendants. The last verdict for a less amount than the first. The last verdict was obtained at June term, 1841; and at or near the end of that term, on the 7th day of July, service of a notice for a new trial was acknowledged by the complainant's counsel upon the grounds therein stated, and which are set forth in this decision, in which the defendants move for a new trial, complaining of the errors of both Court and Jury; and during that term the defendants moved the Court for a new trial on the grounds referred to above, and for a supersedeas: The complainant's counsel declared themselves ready to argue the grounds. The defendants' counsel then enquired of the Court, whether it would decide upon the grounds during this term. The Court answered, that it would do in this case like all other cases, and if there were any good reasons shewn why the Court should not make its decision at this term, it would continue it; but if no such grounds were shewn, the Court would proceed and decide upon the grounds of the motion: upon which information the defendants' counsel stated that they withdrew their motion for a supersedeas and filing the grounds; but said that they did not withdraw their notice to the complainant of their grounds, at the same term when the verdict was rendered. The Court was moved for its final decree in the cause, which the Court signed and ordered to be recorded with the other proceedings in the cause, and upon which decree the Clerk issued an execution according to the rules of Court in such case made and provided. The finding of the Jury being for a certain sum—at the next term after the decree was signed (January term, 1842) the counsel for defendants handed to the Court the grounds presented to the Court and withdrawn at the June term previous, and asked of the Court to be heard on them, and a day was appointed on which the Court would hear counsel for and against the motion.

The complainant's counsel resisted the motion upon the ground that it came too late, and that the Court had no judicial power at this term to entertain the motion, or discuss its merits. The defendants insisted that they were still in time to be heard, and that the Court had the power



to entertain the motion and grant a new trial.

The Court decided that it would hear all the objections and arguments for and against the power of the Court now to entertain the motion, as well as the reasons for and against granting a new trial; and if the Court should decide that it could now entertain the motion, it would proceed and examine the same. The Court has examined the subject, and by reference to the law finds it to be as follows:—By the Judiciary Act of 1799, (Prince's D. 432,) it is provided, "That the Superior Courts shall have power to correct errors and grant new trials in any cause depending in any of the said Superior Courts, in such manner and under such rules and regulations as they may establish, and according to Law and usages and customs of Courts."

The question under this Law, is—What are the usages and customs of Courts in granting new trials? By a reference to the Laws of England, (Tidd's Practice, 813,) it is the practice of the successful party to serve the failing party with a notice that he will move the Court to sign judgment, and if no sufficient cause be shewn within four days, the party enters his judgment; and at page 819 of Tidd's Practice, he says—The motion for a new trial must be made within four days, exclusive, after the entry of a rule for judgment; and if it be not made within that time, the party complaining cannot afterwards be heard on the subject of a new trial, and that there is no difference in this respect between civil and criminal cases. Douglass, 171, 5 T. Rep., 426: and by the Judiciary Act of 1799, Prince's D. 436, judgment may be signed by the party in whose favor it is given, at any time within four days after the adjournment of the Court: by which provision it would appear, that the Legislature intended to give to the party against whom a verdict is rendered, the whole of the term at which the verdict is rendered, to move the

4 \*Court for a new trial, and obtain a supersedeas, so as to prevent the entering up of final judgment, and the issuing of an execution thereon; and I suppose, that the practice of serving a four day rule to sign judgment is unnecessary, as the party in whose favour the verdict was rendered might sign the same within the four days after the term at which it was rendered, unless prevented by some action of the Court during that term; for so long as the proceedings remain in fieri, and the term has not ended, they remain subject to the order of the Court—but after the term has ended, and the Judge signed the minutes of the Court, the term is ended, and the party as matter of right may sign his judgment in the Clerk's office at any time within four days after the adjournment of the Court, for the amount of such verdict, and all legal costs; and no execution shall issue, until judgment be so signed by the party, or his attorney, (Prince's D. 426)—and by the Act of 1799, (page 428,) it is

made the duty of the Clerks of the several Courts in this State, to copy into a book of record all the proceedings in all civil causes in the said Courts respectively, which entry of record shall be made within forty days after the determination of any cause. And from this provision it appears that said proceedings must be made matter of record, and no longer remain in fieri. After the forty days, (this being the time allowed to the Clerk to put them on record,) and after a final judgment is entered, and the same is recorded, and which the Clerk may do at any time after the four days after Court—What power has the Court over its judgment thus entered and recorded? Will a mere notice by a party, against whom a verdict has been rendered, to the party in whose favour it is rendered, have the effect of staying the Clerk from making it matter of record, or of issuing an execution on such judgment, and delivering the same to the Sheriff to be executed?

The 61st Rule of Court, made by the Judges in Convention, is conclusive on this subject. That rule provides, "that a motion for a new trial shall not operate as a supersedeas, unless an order to that effect be entered on the minutes of the Court, and in every application for a new trial, a brief of the testimony in the cause shall be filed by the party applying for such new trial, under the revision and approval of the Court." It will appear from the foregoing references to the Laws, and Rule of Court, that the usages and customs of Courts in granting new trials, under the section of the Judiciary Act of 1799, before referred to, are as follows:

5 \*When a final verdict is rendered, in a cause upon appeal, by a Special Jury, the party dissatisfied with the verdict, and wishing a new trial, must make a motion in Court, (at the term when the verdict is rendered,) by first serving the opposite party with a notice of such grounds; and then, on or before the adjournment of the Court, obtain an order of the Court, that the grounds be filed with the Clerk, and that such filing of the grounds operate as a supersedeas to any farther proceeding in the cause. And a brief of the testimony must be filed by the party applying for such new trial under the revision and approval of the Court.

Now let us refer to the facts hereinbefore set forth, and let us see whether these requisitions of the Law and Practice of Courts have been complied with, so as to enable this Court, at this time, to entertain this motion and examine and decide upon the several grounds taken for a new trial, from the facts before set forth. It appears that at the term when the verdict on the appeal trial was rendered, the defendants made out their grounds for a new trial, and the complainant's counsel acknowledged service of the notice; after which the defendants moved the Court for leave to file the grounds for a new trial, and that they act as a supersedeas to all further proceedings in the cause. Upon which the

complainant's counsel declared themselves ready to argue the motion; and after some enquiry by the counsel of defendants from the Court, as before stated, the defendants' counsel withdrew their motion before the Court for filing their grounds for a new trial and a supersedeas, but stated that they did not withdraw their notice to the complainants' counsel of the grounds for a new trial. The Court replied, that it was with the defendants, either to make or withdraw their motion, as they might decide, and no further action was had in the cause. The final decree of the Court was entered on the verdict of the Special Jury, under the rules of Court, for the sum found by them, and decreed to be collected, by issuing an execution for the sum so found. The Court adjourned, sine die, and an execution did issue, after the four days allowed by law had expired, and the proceedings in the cause, with the decree, ordered to be recorded. And at the succeeding term, (January term, 1842,) to which the execution was made returnable, the motion for a new trial is now made upon the grounds which were withdrawn from the Court at

6 the term before, when the verdict was rendered, which \*brings up the question—Can the Court, under the facts before stated, now entertain this motion, and decide upon the grounds now urged? Or, do the defendants now come too late with their motion for the Court to consider the same? The Court has already referred to the Common Law Rule, as laid down by Mr. Tidd, in his practice, as well as to the Judiciary Act of 1799, and the Rule of Court made by the Judges, to shew what is the Law and usages of Courts, in granting new trials. The court will now refer to the decisions upon this subject, made by the Judges of the Middle Circuit. The first case of which we have any written decision, is the case in Columbia Superior Court, (September term, 1827,) made by Judge William Schley, in the case of John Culbreath v. Archibald Haggie, et alias, in the matter of Mary McNeel's last will. The principle upon which that case was decided, is identical with this case. In that case, the party wished the Court to correct its error in Law, some years after its final judgment was pronounced and recorded. Here, the defendants ask the Court to correct their error, both in Law and fact, six months after its final decree is made and recorded. In the case referred to, Judge Schley took time to examine the Law, and decided, that he could not re-examine a matter which had been decided, and the final judgment of the Court pronounced and recorded. And he uses this language: "That the Superior Court may correct its own errors in Law, on motion, so long as the case is in fieri, and undetermined; but after final judgment is pronounced and recorded, and the term passed without leave granted by the Court to take a rule to set aside the judgment, it is then too late for the Court to interfere, because, according to the Common Law, a Court cannot reverse

its own judgments, when once they have been pronounced and recorded, for the cause is then at an end, and no longer before the Court."

The next was a case in Burke Superior Court—Nusom v. Munroe. The defendant succeeded, and at the next term Col. Gamble gave notice and moved for a new trial. I there decided that he came too late, and refused to entertain the motion.

The next case was one in Jefferson Superior Court, of Cooner v. Gregory, in which the defendant obtained a verdict, and during the term of the plaintiff's counsel, Crawford and Schley, gave notice to Col.

7 Gamble, the defendant's counsel, that they should move the \*Court for a new trial upon the grounds stated, and the motion for a new trial was partially argued, but no decision had, nor any rule of the Court was obtained to shew cause or stay the judgment, and at the succeeding term the motion was renewed, but resisted by Col. Gamble upon the grounds taken in Burke Court against him; and it appearing that no order of the Court had been entered to stay further proceedings, and the judgment of the Court being recorded, and the term ended, the Court refused to entertain the motion.

Therefore, upon a full review of the facts, the Law, the Rules of Court, and the concurring decisions of the Judges of the Middle Circuit, and usages and practice of Courts, this Court is of opinion, and hereby decides, that the motion for a new trial upon the grounds stated, comes too late, and that it is not within the judicial power of this Court, and at this term, to entertain the motion of a new trial, after its final decree has been pronounced and recorded, and the term passed by, without any action of the Court to stay the proceedings, at the term when the decree was finally pronounced.

But as this case has been fully and ably argued upon its merits by the counsel on both sides, and as the principles involved are of much importance, and frequently occur in practice, the Court would be wanting in courtesy, if not in duty, not to express its opinion upon all the grounds taken for a new trial.

And in order to this, the Court will first state the facts which were in evidence, and were in substance, as follows:—John Fox, during the war, was one of the Loyalists, and James Spann, his brother-in-law, was one called a Whig, and after the war ended, John Fox returned to the State of Georgia, and he and his brother-in-law, James Spann, went into merchandizing in the city of Augusta, under the name of James Spann & Co., in the year 1792 or 3, and continued their partnership, till the death of James Spann, which was about the year 1794, making about two or three years in which the business was carried on: but what amount of capital each furnished does not appear. And after the death of James Spann, John Fox (as surviving partner) continued the business without any change



in the books, or any settlement of the partnership concern. Nor did the books of the firm shew, that any change of the business had been \*made after the death of James Spann, except a letter, written by John Fox, to one of his mercantile correspondents, in 1795, that he should in future direct his letters to John Fox & Co. After the death of James Spann, Mrs. Spann (the widow) continued to reside in Augusta, and her brother, John Fox, and his Clerks, boarded with her; and after two years, she removed from Augusta to South Carolina, and resided for many years on a plantation of John Fox's. James Spann, at his death, left four children—a son and three daughters—who, after their removal, continued to reside in Carolina; but in the year 1810, James Spann (the son, and youngest child) returned to Augusta, and resided there for some years. At the death of James Spann, Sen'r, the eldest child was about five or six years of age, and in 1810, must have been about twenty-one years of age. In the year 1794, John Fox and Mrs. Spann applied to the Register of Probates, in Augusta, for letters of administration on the estate of James Spann, dec'd, and paid the fees of administration: but no further proceedings are to be found on Record in the Ordinary's office, except the application for letters and the payment of fees; and there was no evidence offered of any destruction of the Records of the Ordinary's office, and consequently there was no evidence of administration on the estate of James Spann, dec'd, until administration was taken out by the present complainant, James Gardner, as administrator on the estate of James Spann, dec'd, in the year 1838. The books and receipts, and other papers belonging to James Spann & Co., and subsequently continued by John Fox, were drawn from the executors of Fox, by a notice served on them to produce them, and were admitted in evidence before the Jury—and the Court permitted the books to be given in evidence to the latest period of their connection with the dealings of James Spann & Co.; and these books and receipts, drawn from the executors of Fox, were the only data from which the Jury made their verdict, against the estate of John Fox, dec'd. John Fox continued to reside in Augusta to the time of his death, which was in the year 1836—and he left a Will—and the defendants are the surviving executors, and against whom the before stated Bill was filed, for an account of the funds of James Spann, dec'd, in the hands of John Fox, dec'd, as the surviving co-partner of James Spann & Co. This Bill was filed in 1838, and upon which Bill two Special Juries have found verdicts for complainant. The first verdict was for \$112,500—the last Jury found a

9 \*verdict for \$103,733 04c. The defendants answered the Bill, and insisted on the lapse of time, or the equitable bar, as protecting them from any decree in favour of the complainant; and the Jury were appealed to as twelve Chancellors, in-

dependent of the opinion of the Court, who were bound to apply the lapse of time as an equitable bar to the complainant's recovery. The Jury, differing from the counsel for defendants, found the verdict as last stated. And a motion is now made for a new trial, upon seven grounds taken, and which will be severally considered by the Court, but not in the precise order in which they are stated by the defendant's counsel.

I shall, therefore, consider the second ground before the others—which is, "That this Court erred, in charging the Jury, that the claim of the complainant, was not barred by the lapse of time, from 1793, when James Spann died, till 1838, when said Bill was filed." In considering this ground, it is necessary to enquire, in what point of view does a Court of Equity apply the lapse of time? It applies it by way of evidence, and considers it as furnishing proofs of the satisfaction of the demand. If, after a long lapse of time, say twenty years, or more, a party who was competent to sue, and a defendant against whom suit could be brought, were to lie by without rendering to the Court a sufficient reason for not pursuing their remedy within the time prescribed by the statute of limitations, if within such statute, or within the time usually assumed by Courts of Equity, when the demand is purely of an equitable nature, and which is generally twenty years—in such cases the Court and jury would enforce the equitable bar by lapse of time, and that this lapse of time operates by way of evidence, (see 4 Johns. Ch. R. 293, 1 Harris & Johnson R. 204, 12 Vesey's C. R. 355, 5 Johns. Ch. R. 550,) and when the statute of limitations is applicable to any demand sought to be enforced in Equity, it is applied, not as a punishment of those who neglect to assert their rights, but for the protection of those who have remained in possession under a title supposed to be good. 2 Wheat. 25.

Whether the lapse of time insisted on under this ground, be taken purely as an equitable claim, and only relievable in a Court of Equity, or whether it is considered as likewise suable at Law, and therefore the remedies in this case as concurrent,

I apprehend that the construction \*and application of the statute and the equitable bar, must be the same in Courts of Equity, as well as Courts of Law. (See 6 Marshall's Ky. R. 214; Ibid. 163. Also, 3 Starkie's Ev. 1217. Also, see Sugd. L. V. and P. 242.)—He says: "Equitable rights, in general, will, by the like analogy, be effected by time in the same manner as legal estates, and the legal provisions are so strictly adhered to, that persons laboring under any of the disabilities specified in the statute of limitations, will be allowed the same time as they would be entitled to in the case of a legal claim." (3 Johns. Ch. R. 139 and 144, 7 English C. L. Rep. 66, 1 Harris & Johns. R. 339, 4 Bro. C. C. 441,)—and hence the necessity for a knowledge of all the cases, whether decided at Law or in Equity. Mr. Chitty,

in his general Practice, (see 1 vol., p. 760)—and the same page he says: Every new right of Action in Equity must be acted upon within twenty years after it accrues. (2 Sch. & Lef. 633; 1 Turn. & Russ. 118—636.) And this will bring us to the question, as to when there was a cause of action against John Fox, the surviving co-partner of James Spann & Co. It is contended by defendants, that the distributees of James Spann could have sued John Fox, as surviving co-partner, without any administration on the estate of James Spann. And this position is denied by the complainant, he insisting that there is no privity either in Law or in Equity, between the distributees of Spann, and Fox, the surviving co-partner—(Charlt. R. 6, 6 Marshall's Ky. R. 20, 1 Marshall, 10,)—that the heirs of Spann, (as such,) cannot enforce the rights of their ancestor, except by an administration on his estate; and then the rights of creditors would be paramount to the heirs of Spann. No other authorities were adduced to this point, on either side; but the Court was referred to a case decided by Judge Holt, in Burke Superior Court, of Dickinson v. the administrators of Batt Jones, dec'd—where Dickinson, as legatee, under the Will of Jones, filed his Bill to recover the legacy from the administrator of the executor of Jones, and the Court decided, that Dickinson, as legatee, could not recover in Equity, except from the executor of Jones; and he being dead, there was no privity between him, as legatee, and the administrator of the executor. And the principle has been so often decided in the Middle Circuit, that the distributees of an estate cannot recover, over the right of the executor or administrator, that it is not now considered an open question, there being no privity between the distributees \*of an estate and any third person who may have the property of deceased in possession, as none but the executor or administrator can reduce the same to possession, and then pay the debts and expenses of administration, and distribute the residue according to Law.

The next question to be considered, is—When did the cause of action, either in Law, or in Equity, accrue? "Not until the claimant could legally sue." (1 Chitty's Gen'l. Practice, 765.) And in the same page, Mr. Chitty says: "The term cause of action, implies not only a right of action; but also, that there is some person in existence, who could assert it, and also a person to be sued—and therefore, when the payee of a bill was dead, when it became due, it was held that the statute did not begin to run, until letters of administration had been obtained by some one." (Douglass v. Forest: 4 Bing. 686, 7 English C. L. 67.) But it is contended by defendants, that Spann, in his life time, had a cause or right of action against his co-partner, John Fox, in his (Fox's) life time, by action of account for any thing that might be coming from Fox to Spann, and the statute of limitations had begun to

run in the life time of Spann, and having once begun, no subsequent disability could stop it. The Court admits the latter proposition to be true—that when the statute once begins to run, no subsequent disability will stop it. But the Court does not admit the former part of the proposition—that any cause or right of action arose or accrued in the life time of James Spann, against his co-partner, John Fox, as it is contended by complainant there is no evidence that any dispute had arisen between the co-partners, but on the contrary, that they were doing a profitable business in merchandize, and were making large profits, and which was dissolved alone on account of the death of James Spann. The Court, therefore, cannot discover, that any cause of action had accrued in the life time of James Spann, and of course the statute never did commence to run against James Spann, in his life time. If then, the children or distributees of James Spann, (as such,) could not sue John Fox, in his life time, the next question is—When did any cause of action accrue against him or his executors after his death? It is admitted by the counsel, on both sides of this question, that John Fox, at the death of James Spann, was rightfully and lawfully in possession, as surviving co-partner, of the assets, bonds,

notes and books of account, and could have recovered any of \*them, either in Law or Equity, from either the children of James Spann, or his administrator, if there had been one, (see 6 Cowen's R. 441—Murray v. Mumford,) so as to enable him, as the surviving partner, to settle up the concern of James Spann & Co., and for this purpose, under the Jus accrescendi, the Law making him the legal owner of the assets; and he may, for the purposes before named, make sale of any, or all of the assets of the firm, if needed, to pay the debts—and then the Law, relating to co-partners, makes him a trustee, to account and pay over a moiety of the net profits to the administrator of the deceased partner. The possession of John Fox, as surviving co-partner of James Spann & Co., was therefore a rightful one, and perfectly in accordance with the trust reposed in him by law, and the rights and claims of his cestui que trust, the administrator of James Spann, dec'd, (See Kaine v. Bloodgood, 7 Johns. Chancery R. 121. See also as to surviving partner being a trustee, Toller Ex. 453; Collier, on partnership, 177 to 187,) John Fox, being rightfully in possession for the purposes stated, by the Law of co-partnership, he was not holding adversely to any one. (See 3 Starkie Evi. 1217. Also, 6 Marshall 163.) At what time, then, did John Fox, or his representatives, render himself liable to a suit, either in Law or Equity? As laid down by Mr. Chitty, not until there was some person in existence who could sue, and give a release. And there being no such person in existence, until James Gardner took out administration on the estate of James Spann, dec'd, in the year 1838, this Court is bound to de-



cide, that until the grant of administration, there was no one in existence, who could make any legal demand on John Fox, or his executors, since his death, or commence any suit, either in Law or Equity. And for the foregoing reasons, neither the statute of limitations, nor the equitable bar, could commence its operation against the administrator of James Spann, dec'd.—(see 6 Marshall's R. 214)—but, from the grant of administration to James Gardner, jr., he is bound to make a demand on the executors of Fox, for an account of the profits of the concern of Fox and Spann, and to receive a moiety thereof, with profits made before and since the death of James Spann, if the funds were employed by John Fox—or simple interest, if Fox made that much by employing the funds of James Spann—(see Collier, on partnership, 186)—and on the refusal of the executors of John Fox thus to account, he (Gardner) was

13 bound to commence his suit, \*either in Law or Equity, and that too within the time limited by Law, as the remedy, since 1820, is a concurrent one, and therefore Equity will adopt the statute of limitations. But it is further contended by the defendants, that after a lapse of twenty years, or more, a Court of Equity will presume any and every thing, in order that men's estates may be quieted—that it will presume deeds, wills, records and grants; and the following, with many other cases, were cited by the defendants' counsel:—Harper's R. page 1; 2 Consti. R. (So. Ca.) 420; 1 Bay's R. 26; 2 T. R. 158-9; Cowper 100 and 102; 1 Hill's R. 222; 12 Vesey's R. 266; 1 Hill's C. R. 378; 9th Peters' R. 405 and 415; Angel, on Lim. 345; Collier, on Part. 207-8; 24 Law Lib. 310-610; English Cond'd. Ch. R. 240; 1 Story's E. 502; 2 Story's E. 735; 2 Nott & McCor. 96. 2nd. Bailey 101; Jacob & Walker, 2; 2 Bailey's R. (So. Ca.) 597. And on the part of the complainant, it is urged, that Courts of Equity will only apply the statute of limitations where it applies, under the same rules, and observe the same exceptions, and give the same construction as a court of Law will; and that Courts of Equity, where the statute does not apply, will enforce the equitable bar, under the following circumstances: 1st. That there must be proper parties in existence, capable of suing, or being sued, for the statute or the equitable bar to commence against. 2nd. When the rightful owner, suffering one who claims the estate, as his own, to make valuable improvements thereon. 3rd. To protect a bona fide purchaser, and without notice. 4th. To protect a long adverse possession, disputing the right claimed, and continuing that possession as adverse. 5th. Where a person is created a trustee by aliunde testimony, and by decree of a Court of Equity, with notice of the trust, but claiming by an adverse title as a resulting trust, &c. 6th. Where one, who by law, or contract, was bound to account, and refused, when called on by the person who had a right to demand it, the bar will commence from the

refusal. (7 Johns. C. R. 123)—and a number of cases of like character, which it would be too tedious to mention. But when the trustee's possession is consistent with, and not adverse to, the rights of a cestui que trust, and who by Law has a right to recover, and retain possession, and hold the same until demanded by the cestui que trust, that such possession of the trustee is not adverse to the cestui que trust, until the cestui que trust is in a situation to make a demand, and fails to do so; or, having made a demand, the same was

14 \*refused by the trustee: and this doctrine applies to trustees created by the Law—as was the case of Kane v. Bloodgood, 7 Johns. C. R. 135)—and that in this case, John Fox was a trustee created by the operation of the Law, as between co-partners—that no action, either in Law or Equity, accrued in the life time of James Spann, and that there was no right in any one to call on John Fox, until after the death of James Spann, and that no one but the administrator on the estate of James Spann, dec'd, could have made that demand—that no administration has ever been granted on the estate of James Spann, until the year 1838, to James Gardner, jr., and John Fox could not denude himself of that trust, until some one was authorized to demand and receive it; and that John Fox, in his life time, could not hold adversely to the equitable owner, because such person had never been created by the Ordinary: and, therefore, that neither the statute of limitations, nor the equitable bar, could in this case commence its operation, or raise any presumption of payment and satisfaction by John Fox, in his life time. And in support of these positions, the complainant quotes the following authorities:—1 vol. Chitty's Gen'l. Practice, 765 and 786; 6 Marshall's R. 214 and 15; also, 163; Adams, on Ejectment 47-58; Mathews on Presumptions, 194, 197, 208; 4 Munf. 342; 4th Dana. Abridg. 200; 1 Harris & Johns. R. 339; 1 Haywood's R. 180, 247; 6 Bingh. 179-581; 3 Murphey's R. 144; 3 Marshall 15; 8 Yerger 240 and 1; 2 Desaus. C. R. 55; Rice's R. (So. Ca.) 339; 3 Leigh's R. (Virginia) 349; 2 Schoale & Lefroy 630; English C. L. R. 67; 5 Barn. & Alderson Equity Evidence 158; 1 Page's R. 393; Collier, on Part. 186; 7 English Com. L. R. 66; 3 Bro. C. C. 640; 20 Johns. R. 580; 1 B. & Beaty C. R. 156; 1 Schoale & Lefroy 231; Harris & Johns. R. 204; 4 Johns. C. R. 293; 2 Ves. jr. 93 and 272; Jacob & Walker 51. Upon an examination and comparison of the authorities cited on both sides of this question, the Court has deduced the following conclusions:

1st. That no cause of action had accrued to James Spann, in his life time, against his co-partner, John Fox, and therefore neither the statute nor the equitable bar had commenced against James Spann, in favour of John Fox.

2nd. That the children and widow of James Spann, dec'd. as such

15 \*distributees, had no equitable or

legal right to sue John Fox, as surviving co-partner of James Spann & Co.; nor could they have given John Fox a release.

3rd. That John Fox, as surviving partner, was lawfully seized of the property, books, and other evidences of debt, belonging to James Spann & Co., (see 6 Cowen 441,) and had a right to retain them until some one was authorized by Law, as the representative of James Spann's estate, to demand a moiety.

4th. That none but the administrator of James Spann could make such demand, and give a release.

5th. That until the Ordinary granted such administration, and clothed some one with the authority to reduce the moiety coming to the estate of Spann, into possession, neither the statute of limitation nor the equitable bar, could commence their operation against the estate of Spann, and in favor of Fox, the possession not being adverse. (See 6 Marshall's R. 163 and 214; 7 English Com. Law Rep'ts. 66; 3 Bro. C. C. 640.)

6th. That John Fox, as surviving partner, could not hold adversely to the estate of Spann, until the grant of administration on the estate of Spann to James Gardner, jr., (the present complainant,) in the year 1838: and on which conclusions, this Court decides—that it did not err, when it charged the Jury, that neither the statute of limitations, nor the equitable bar, by lapse of time, could be successfully set up, to prevent the complainant's recovery.

The next ground to be considered by the Court, is, "That the Court erred in charging the Jury, that a record of the grant of administration upon the estate of James Spann, dec'd, in the year 1794, could not be presumed from the lapse of time, although such a presumption would have been supported by the receipt of the Register of Probates, in evidence."

If it is insisted, that the receipt of the Register of Probates, for his fees, created the presumption, this presumption was amply rebutted by the facts, that the application for letters was the only evidence in \*the office, and no further proceedings were to be found. Nor was there any evidence offered, that the records of the Register's office had ever been destroyed; but on the contrary, it is conceded, that the records of that office had not been destroyed, and no grant of administration is found of record—no bond filed—no schedule returned—and no settlement of any kind: which, it seems, would outweigh the mere fact of an application appearing and a receipt for fees. This presumption was therefore rebutted by the other facts in the case.

But if it be contended, that the Court ought to have charged the Jury, that from the long lapse of time which had expired from the death of Spann, and to protect one who had been in possession under a claim of right, and adverse to the estate of Spann—then, without any evidence to in-

duce a presumption, this Court would have been bound to charge the Jury, that to quiet the adverse possession, they were bound so to presume, although they did not believe the fact to be so, as these presumptions are made by Courts, not because there is any evidence that the facts are so, but because the facts ought to be so: in order that long continued adverse possession—or a purchaser, for a valuable consideration, holding adversely under a purchase—or when a person having a right to sue, stands by, or neglects to sue, and permits another person to treat the property as his own, for a long lapse of time, and many other such cases. (See Johns. C. R. 550.) Let us then enquire, was John Fox standing in any of the relations before mentioned towards the administrator on the estate of James Spann, dec'd, which would have called on the Court to charge the Jury, that they should have presumed a matter of record against the fact, and in favour of John Fox. The first question is—At what time did John Fox denude himself of his character of trustee, as surviving partner: or, how could he have done so until administration was taken out on the estate of James Spann, dec'd, whereby he could have begun to hold adversely. The Court cannot see how it could have taken place; but, on the contrary, the Court holds, that Fox's possession was strictly in accordance with the trust reposed by law in him, and that therefore his possession was the possession of his cestui que trust, the administrator of Spann. (See 3 Starkie Evi. 1217.) And in all these cases, the question is—Could the trustee have maintained an action at

17 Law, to recover the \*property of James Spann & Co.? If so, the legal estate being in him, his possession was consistent with the rights of the cestui que trust, (see 6 Marshall 163-214,) and that Fox could recover at Law, (see 6 Cowen 441,) and that the statute of limitations could not run, and a fortiori the equitable bar, (see 7 Johns. Ch. R. 122,) and for these reasons, the Court decides: that it did not err, when it charged the Jury, that under the facts in this case, they could not presume a record of administration on the estate of James Spann, when the records of the Ordinary proved the contrary.

"Ground the Third. That the Court erred, in admitting in evidence, on the trial of said cause, the books of account of said John Fox, kept after October, 1795, when it was in evidence, the firm name of James Spann & Co., was abandoned by him, and a new business commenced, under the firm of John Fox & Co. There being no allegation in the Bill to authorize such evidence, or to apprise the defendants that it would be relied on in said cause." The Bill alleged, that John Fox had made large profits, by continuing the business, and using the co-partnership funds in merchandizing, and, under this allegation, the Court decided, that so long as the books kept by John Fox would shew a connection with the funds of James Spann & Co., the books



were competent evidence for the complainant in following those funds; and there was no evidence that the firm books were changed, or that said firm was changed, except a letter written by John Fox to one of his mercantile correspondents, that he wished him in future to direct his letters to John Fox & Co., but the books did not shew any such change at that time—and therefore the Court did not err, in letting the books kept by John Fox go in evidence, so long as there was any connection traced with them and the concern of James Spann & Co., as by Law the complainant had a right to follow the funds, so long as they were used or employed by Fox, the surviving partner. (Collier on Part'p 186; 1 Page R. 393 and 9; Jacob & Walker 128.)

"The fourth ground, is: That the Court erred in charging the Jury, that Interest was recoverable on the amount due by John Fox to James Spann, while the Court held that John Fox could not discharge himself by payment of such amount to any person, because there was no administration of the estate of James Spann."

18 \*In relation to this ground, the Court charged the Jury, that the complainant had a right to follow the funds of James Spann & Co., and if they found that John Fox, the surviving co-partner, had employed the funds of the co-partnership, and had thereby made profits more than eight per cent., they might find a moiety of such profits, or if Fox had made 8 per cent. interest, he would be responsible for the interest—as he continued to use the fund, he was answerable for its profit; but if John Fox did not use the funds, then he was not answerable for interest. And in this part of the Court's charge, it does not believe that it did err, because John Fox, as surviving co-partner, was the legal owner, and might, if he chose, use the fund and make profits, and first pay the debts of the firm, and hold the overplus, as trustee, for the administrator of James Spann—and so long as John Fox could not denude himself of the trust, and he continued to employ the fund, he certainly was answerable for the profits, the Jury allowing him a reasonable compensation for his services, in so employing it: all of which was submitted by the Court to the consideration of the Jury. (Collier, on Part'p, 186; 1 Page R. 393 to 9; Jacob & Walker 128.)

The fifth ground taken, is: That the Jury have erred, in allowing interest on the amount found by them to be due, and so consolidated the same with the principal in their verdict, that the Court cannot distinguish between them, and enter a decree in terms of the Law in such cases made and provided.

The sixth ground, is: That the Jury (although so instructed by the Court) have not, in their verdict, allowed to the defendants any deduction for the amount of James Spann's account, due to the firm.

The seventh ground taken, is: That the Jury have erred, in the basis and calcula-

tion by which they made their verdict—a duly verified statement of which is herewith submitted; in this: that they have allowed forty per cent. profit, on the amount of sales of the firm of James Spann & Co., instead of on the cost of the goods sold, and have charged the defendants with one half of stock on hand, when upon the basis they adopted, the said stock was purchased on credit, and was paid for, or to be paid for, by John Fox.

19 \*The last three grounds taken—say the 5th, 6th and 7th—will all be considered by the Court at the same time, as they are all involved in the question—Whether the Court can judicially take notice of what passed in the Jury room, between the Jurors, as to the basis on which they formed their verdict? The evidence by which these last three grounds are brought to the knowledge of the Court, is, by the affidavit of two of the Jurors, setting forth the basis upon which their verdict was formed, and out of which the last three grounds arise: and the complainant objects to the legality of the evidence offered to prove the facts stated: and the objection taken, if sustained, will decide the three grounds. The Court will therefore decide upon said objection first. The question has been decided both ways, both in England and the several States. At one time the Courts held, that the affidavit of the Jury could be received, to shew in what manner they came to an agreement as to their verdict, whether by drawing lots, or each putting down a specified sum, and dividing by 12. (See 7 Cowen 562; 2 Barnes 438; 3 Caines 57; 1 Root 194; 2 Mass. Rep. 541; 1 Barnes 441; 2 Wm. Black. 1299; 1 Randolph 39.)

But the practice appears to be now generally settled, both in England and this Country, to reject the affidavits of Jurors, inculcating themselves; and if the Jury have adopted an irregular or illegal mode in making up their verdict, the Court must derive their knowledge from some other source, such as, from some person having seen the transaction through a window, or by some such other means. (See 1 T. R. 11; 1 New. R. 326; 4 Johns. Ch. R. 487; 5 Cowen 106; 6 Cowen 53; 2 T. R. 281; 5 Burr. 2667; 1 Wendell 297; 2 Tyler 11; 3 Gil. & Johns. 473; 1 Harris & McHenry 230; 2 Moody & Ryl. 216.) From the cases before cited, the modern rule seems clearly to be, that the affidavit of the Jurors, in a civil case, cannot be received in evidence by the Court, on a motion for a new trial, in order to shew what passed in the Jury room, calculated to set aside their verdict, after having been returned under oath, and received by the Court, and they have separated: and this question has also been so decided in our own State, by Judge Berrien, in the Eastern Circuit. (See Charlton's R. page 1.) And I agree with the Court in its remarks in the case of Robbins v. Wendover, (2 Tyler 11,) where they say—"This would open a novel and alarming source of litigation, and it would be

difficult to say when a suit was terminated. The Court consider it to be far better to establish it as a general rule, that the affidavits of Jurors, respecting the deliberations which led to their verdict, should, in no civil cause, be admitted."

And I also concur, in the concluding remarks of the Court in Pennsylvania, in the case of *Willing v. Swasey*, (1 Brown 123,) where the Court say—"And in my opinion it ought to be rejected, because it tends to defeat his own solemn act under oath, where third persons are interested. It ought to be rejected, because its admission would open a door to tamper with Jurymen, after they had given their verdict. It ought to be rejected because it might be the means, in the hands of a dissatisfied Juror, to destroy a verdict at any time, after he had assented to it. In fine, it ought to be rejected, because it would unsettle all the verdicts in the Country." See 18 English Com. Law R. 321.

Upon a review of the authorities before referred to, and the reasons assigned for and against the rule, as to receiving the affidavits of Jurors, shewing the manner of making up their verdict, and the object of which is, to undo, or set aside their verdict, this Court is of opinion, and so decides, that the modern rule of rejecting the affidavits of Jurors, for all such purposes, is the correct rule, and is better calculated to reserve the stability of a Jury trial, than the contrary rule of allowing such affidavits to affect their verdicts, and set them aside.

The last three grounds are therefore overruled, because the Court is not legally informed of their existence.

For the reasons assigned in the foregoing decision, upon all the grounds taken for a new trial, a new trial is refused.

Messrs. Bauskett, Law, McAllister, and Miller, for the defendants.

Messrs. Longstreet, Crawford, and Schley, for the complainant.

21 \*The Clerk of the Court will enter this decision on the minutes of the Court, and forward the original to the governor of this State, as the Law directs.

JOHN SHLY, Judge  
Superior Courts, Middle District, Georgia.

22 \*John H. Knight v. Philip H. Mantz,  
Adm'r of Walton Knight.

January Term, 1842.

1. New Trial—Conflicting Evidence.\*—Where there is a mass of conflicting testimony to be considered by the Jury, the Court will not grant a new trial.

\*New Trial—Conflicting Evidence.—Where conflicting evidence has been submitted to the jury, and no rule of law violated in its admission, a new trial will not be granted on the ground that the verdict is contrary to the evidence, unless it appears that the verdict is clearly against the preponderance of evidence. The jury in such cases are the exclusive judges as to the weight of the evidence

2. Sureties—Payment—Subrogation.\*—In an action of Assumpsit for the recovery of money paid by a security, he will be entitled to recover interest, if the original creditor had such right. He will be substituted in place of the original creditor.

This is an action of Assumpsit, to recover a balance due upon a bond, given by the deceased Walton Knight, and the plaintiff, as security of Walton Knight, to one Tarlton W. Knight, as executor of Woodson Knight, dec'd; and the plaintiff produced the bond in evidence to shew what amount he had paid as surety. The defendant introduced a number of letters from the plaintiff to his intestate, by which it appears, that a portion of the bond was paid by W. Knight, dec'd, in money, and discounting a legacy coming to him from his father's estate, to whom the bond was made payable; and many letters passed between the plaintiff and the deceased W. Knight, as to the payment of this bond, and from that correspondence, it appears that the plaintiff was acting as the agent of W. Knight, in obtaining a settlement from T. W. Knight, the executor of Woodson Knight, and that pending the settlement of the claim, the deceased W. Knight, remitted sums of money to the plaintiff, which, with the legacy due deceased, the defendant insisted was sufficient to discharge the bond. And on the other side, for plaintiff, it was insisted, that the plaintiff could not effect a settlement for some time, and informed the deceased that he would deposite the money in bank, till the settlement with the executor could be effected; and upon this evidence the Jury found for the plaintiff.

A motion for a new trial is now made upon the following grounds:

1st. That the verdict is against evidence, and contrary to the principles of Justice and Equity. 2nd. That the verdict is contrary to Law, being increased by interest on an unliquidated demand.

23 \*In relation to the first ground taken for a new trial, there is a mass of evidence by way of correspondence, which shewed that the settlement of the

and the credibility of the witnesses. *Stroud v. Mays*, 7 Ga. 269; *Walker v. Walker*, 11 Ga. 203; *Boon v. Boon*, 29 Ga. 134; *Coggin v. Jones*, 29 Ga. 257; *Mayer v. Dawson*, 33 Ga. 529; *Dart v. Dupree*, 44 Ga. 55; *Thompson v. State*, 55 Ga. 47; *Georgia R., etc., Co. v. Bohler*, 98 Ga. 184, 26 S. E. Rep. 739. See also, *Bagshaw v. Dorsett*, Ga. Dec., pt. 2, p. 42, and *foot-note*; *Irwin v. Morell*, *Dud.* 72, and *foot-note*.

In such cases, it is a matter of discretion with the trial court to refuse a new trial, and the appellate court will not, unless the verdict is clearly against the weight of evidence, control the court below in the exercise of this discretion. *Treadwell v. Phinizy*, 41 Ga. 65; *Archer v. Heidt*, 55 Ga. 200. See also, *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453; *Hooks v. Hays*, 86 Ga. 797, 13 S. E. Rep. 134; *Miller v. Miller*, 87 Ga. 600, 13 S. E. Rep. 635; *McBride v. Bagley*, 88 Ga. 462, 14 S. E. Rep. 866; *Parks v. Ragan*, 97 Ga. 335, 22 S. E. Rep. 939. See also, *Bagshaw v. Dorsett*, Ga. Dec. pt. 2, p. 42, and *foot-note*; *Irwin v. Morell*, *Dud.* 72, and *foot-note*.

\*See *Norris v. Ham*, R. M. Charl. 267.



bond was dependent on the settlement with the estate of the father of Walton Knight, and from this evidence, the Jury were the proper judges, and it was their province to decide, at what time these credits should be entered—and they having determined that matter, under the evidence, this Court does not consider the present case to be so clearly against evidence, as to authorize it to set the verdict aside on that ground.

The second ground is, that the Jury gave interest upon the amount paid by the security on the bond. In looking into the Law upon this subject, the Court finds it laid down in 2 Johns. Ch. C. 554, *King v. Baldwin* and *Fowler*, that there is no difference in the rule, as applied to securities, between a Court of Law and a Court of Equity, and that either Court will place a security, who has paid off the debt, in the same situation as the creditor was who held the bond or note, and give him the benefit of all collateral securities, which the creditor had. If such be the Law, it is very clear that the security can and ought to recover interest, as the creditor had a right to do; and by referring to our own statutes upon the subject of securities paying off the debt, the Law gives them the use of the *fi. fa.*, to remunerate themselves by substituting them in the place of the plaintiff, thus paid off, and it has never been doubted, but that the security, in collecting the *fi. fa.*, always collects the interest due on the same, till paid. This Court, therefore, decides, that the security has a right to be substituted in place and stead of the creditor. And as the creditor could have recovered interest, so can the security.

The motion for a new trial, is, therefore, overruled.

Mr. Miller, for Plaintiff. Cases cited by plaintiff—2d. *Campb. R.* 439, 7 *Johns. R.* 332.

Mr. Holt, for Defendant. Cases cited by defendant—3 *East. R.* 167, 8 *Johns. R.* 156.

JOHN SHLY, Judge

Superior Courts, Middle District, Georgia.

January Term, 1842.

1. Right of Widow to One Year's Maintenance—Statute.

—Under the Act of 1838, the widow and children of a testator, or an intestate, are entitled to one year's maintenance out of his estate, without reference to its insolvency.

2. Same—Bill for—Multifariousness.—A bill for one year's maintenance of a decedent's family, and praying an account of the co-partnership against his executors, and a surviving partner, and charging a combination, is multifarious: and one of the causes of complaint will be stricken out.

The Bill, in this case, seeks discovery and relief—first, for the maintenance of the

widow and children of the deceased, for one year after his death, under the provisions of the Act of 1838.

And to this part of the Bill the defendants demur, and insist, that the provisions under the Act of 1838, are only applicable to those cases where the estate is insolvent; but if the estate be solvent, and the widow and children have any thing in distribution coming to them, that their maintenance must be deducted from such distributive share.

The Court overrules this demurrer, upon the ground, that by the statute above referred to, the widow and children attached to the family of the deceased, at the time of his death, are entitled to a year's support, whether they have any more coming to them by way of distribution, or not—the Legislature intending to place the estate for one year, under the same duty, as to the maintenance of the wife and children, as the father would have been, if in life.

The Bill also prayed discovery from John Nelson and James Harper, as executors of Matthew Nelson, dec'd; and also prayed an account against one William Nelson, of the co-partnership between said William Nelson and the testator Matthew Nelson, dec'd—and charged combination, between the executors and the surviving co-partner.

And to this part of the Bill, the 25 defendants also demurred \*for multifariousness, the complainants seeking to bring before the court, separate and distinct matters in no wise connected, and with which William Nelson, the partner, has no interest, and was in no wise accountable, to wit: the year's maintenance of the widow and children.

In looking into the subject matter of this Bill, the Court decides, that the claim set up by the widow and children, for a year's maintenance, is in no wise connected with William Nelson, the surviving co-partner: This is a distinct claim, and is only between the widow and children, and the two executors of the Will of deceased.

The court, therefore, decides, that this Bill is multifarious, and sustains the demurrer to that part of the Bill; and it is ordered, that the complainants amend their Bill, by striking out one of the causes of complaint, so improperly joined.

JOHN SCHLY, Judge  
Superior Courts, Middle District, Georgia.

January Term, 1842.

26 \*John W. Pomeroy v. Peter Golly.

1. Malicious Prosecution—Want of Probable Cause.—In an action for a malicious prosecution, whether there be want of probable cause, is a mixed question of Law and fact, and if there be evidence submitted to a Jury, tending to establish both the presence and absence of probable cause, the Jury must find malice, accordingly as they determine this question.

2. Original Affidavit and Warrant—Admissibility in Evidence.—An original affidavit and warrant is

admissible in evidence, on proof of the Magistrate's hand writing, though he is present in Court, and is not sworn.

3. **New Trial—Excessive Damages.**—In an action sounding in tort, the Court will not grant a new trial on the ground of excessive damages, unless they be so outrageous, as to imply that the Jury acted more from prejudice than sound judgment.

This is an action for a false and malicious prosecution, on the part of the defendant, by charging the plaintiff with forging two Checks on the Mechanics' Bank. The defendant took the plaintiff with a warrant; and he was carried before a Justice of the Peace, and, after examination, was committed to Jail, where he remained four days, and then gave bail. The defendant, Golly, did not farther appear to prosecute the case, and the plaintiff was discharged by the Superior Court, for the want of prosecution. The plaintiff also proved, that when the defendant was urged to prosecute the plaintiff, the defendant stated, that he did not believe that the plaintiff would do such an act; but was subsequently induced to take out a warrant for, and have the plaintiff committed to Jail. And whilst plaintiff was in Jail, defendant said, he did believe the plaintiff was guilty, and that plaintiff ought not to blame him, as he was urged by the Mechanics' Bank to prosecute him, and that defendant could get out of Jail, if he wished, and that Mr. Sibley would be his bail. It also appeared in evidence, that whilst the defendant and the officers of the Mechanics' Bank were consulting about who it was that committed the forgery, that a witness who knew the plaintiff's hand writing thought it resembled it, except one letter, which he did not think looked like plaintiff's hand writing. The plaintiff proved the warrant and mittimus, by proving the Justice's hand writing, and that the Justice was an acting Magistrate.

27 \*The defendant introduced no testimony, and took the conclusion before the Jury. The Jury found for the plaintiff, as above stated: being the same amount found by the Petit Jury, in the Inferior Court.

A motion for a new trial is now made upon the following grounds:

1st. That the verdict is contrary to Law.

\***New Trial—Excessive Damages.**—In cases of tort and personal injury, where the damages are unliquidated and the law furnishes no rule of measurement save the discretion of the jury upon the evidence before them, a verdict will not be set aside and a new trial granted, upon the ground of excessive damages, unless the amount is so unreasonable and excessive as to evince passion, prejudice, partiality, corruption, or misapprehension. Longstreet v. Reeside, Ga. Dec. pt. 1, p. 39; Bishop v. Macon, 7 Ga. 200; Broach v. King, 23 Ga. 500; Dye v. Denham, 54 Ga. 224; Patterson v. Phinizy, 51 Ga. 33; Goins v. Alabama Western R. Co., 59 Ga. 426; Davis v. Central R. Co., 60 Ga. 329; Central R. Co. v. Roach, 70 Ga. 434; Brown v. Autrey, 78 Ga. 753. 3 S. E. Rep. 669; Western, etc., R. Co. v. Lewis, 84 Ga. 211, 10 S. E. Rep. 736.

2nd. That the verdict is contrary to evidence.

3rd. That the verdict is contrary to Law and evidence, in this: That the plaintiff failed to prove a want of probable cause for the prosecution against him.

4th. That the verdict is contrary to Law and evidence, in this: That the plaintiff failed to prove malice on the part of the defendant.

5th. That the verdict is contrary to Law and evidence, in this: That the defendant proved probable cause for the prosecution of plaintiff, on the trial of the above issue.

6th. That the damages are excessive.

7th. That the plaintiff failed in his proofs, in this: That he did not adduce the testimony of the committing Magistrate, (although he was present in Court,) and prove the circumstances under which plaintiff was committed.

Flournoy & Son and H. H. Cumming, for Plaintiff. Cases cited by plaintiff—Starkie's Ev., vol. 2nd, 907 and 915; Roscoe's Ev. 302; 2 Phillips' Ev. 114; Selw. Pract. 487; 1 Wils. R. 22; 3rd Wils. 47; 2 Wm. Blac. 1327; 2nd Wils. 244, 205, 161; 7 Bac. Ab. 776, 781; Woodson's Lect. 187; Impey's Prac. 416; 1 Burr. R. 397; 3 Bla. Com. 392; 1 Burr. R. 609; 1 Nott & McCord 278.

A. J. & T. W. Miller and Charles J. Jenkins, for Defendant. Cases cited by defendant's counsel—Espinasse on 28 Ev. 234; 1 \*Cheev. R. 32; 1 Cook's R. 315; 2 Hayw. R. 29; 1 Gilm. R. 36; 1 Nott & McCord 278; 15 Mass. R. 243; 1 Wendell 140; 1 Campb. N. P. R. 99; 1 Ld. Raym. 381; 1 Wils. R. 232; Espin. on Ev. 229; 2 Espin. D. G. 529.

The grounds before stated, resolve themselves into the following: 1st. That there was no want of probable cause shewn by plaintiff. 2nd. That the Court erred, in admitting the plaintiff to introduce the warrant and mittimus, upon proof of the Justice's signature, and that he was an acting Magistrate. 3rd. That the damages are excessive.

Upon the first ground, whether there was a want of probable cause shewn by the plaintiff, the Court holds the Law to be this: that to ascertain whether there be probable cause, is a mixed question of Law and fact. And it is the duty of the Court to charge the Jury, if evidence is clear, as to the existence of certain facts, whether they amount to a probable cause for the prosecution, as this is a matter of Law.

But if there be evidence, which renders the facts doubtful as to the probable cause, then the Court must charge the Jury: in the alternative, either that there is, or is not, probable cause, as they may find the facts.

In this case, there being evidence of defendant's sayings, both before and after taking out the warrant to arrest the plaintiff, the Court charged the Jury—That if they believed, from the evidence, that the defendant was acting under an honest conviction, that the plaintiff was the one who



committed the forgery: then there was probable cause for the prosecution, and they must find for the defendant. But if, from the evidence before them, they believed that the defendant was not acting under such conviction of plaintiff's guilt, and was induced, by the persuasion of others, and also to enable him to make a settlement with the bank on better terms; then there was a want of probable cause; and, from a want of probable cause, they, by Law, had a right to infer malice, and in that event, to find for the plaintiff such damages as they, from the evidence, believed him entitled to.

29 \*The Jury having exercised their legal right, and having found against the state of facts which constituted a probable cause, and they having found in favor of that state of facts which shew a want of probable cause, and thereby inferring malice, and assessed such damages as they believed just—Would not this Court be assuming the right of the Jury, were it to set their verdict aside, because they did not find the facts the other way? It most certainly would assume such power, and which this Court has not the legal power to do. It cannot, therefore, disturb the verdict on this ground.

The next ground is—that the Court erred, by permitting the original affidavit and mittimus to go to the Jury, upon proof of the Justice's signature, and that he was an acting Magistrate.

It is contended, that the Justice ought to be produced to prove his own hand writing. By referring to the cases, we find that the Justice has been introduced to prove his warrant and mittimus, but it does not appear that any point was made whether other evidence, such as his hand writing, may not be proved—and, in 2nd Espin. N. P. 128, I find Mr. Justice Buller allowed an office copy of an affidavit to hold to bail, to be good evidence, without producing the original, in this kind of action.

But in this case, the original affidavit and warrant and mittimus were before the Court, and proof of the hand writing was, in the opinion of this Court, competent evidence of the fact. The Court will therefore refuse a new trial, on this ground.

The other ground taken, is, that the damages are excessive. In an action of this nature sounding in tort, the Court would not interfere, unless in some case where the Jury had rendered such a verdict as would satisfy the Court, that they acted more from prejudice than sound judgment. Two Juries having concurred in finding this amount, this Court will not, for that cause, set their verdict aside.

A new trial, upon all the grounds is therefore refused.

JOHN SCHLY, Judge  
Superior Courts, Middle District, Georgia.

30 \*Edwin L. Antony v. Andrew J. Miller,  
Executor of Milton Antony, Deceased.

January Term, 1842.

Debts of Decedents—Set-Off by Executor.—In a suit

against an executor, on a demand against a testator in his life time, he may set off a debt created with him, as executor, by the plaintiff, since the testator's death, though the converse of this proposition will not hold good.

In this case, the plaintiff brought this action upon a Note of hand, made by the deceased, in his life time, to the plaintiff. The defendant (the executor) pleaded a set off, sufficient to pay off the plaintiff's demand; which set off was created with the defendant, as executor, since the death of the testator, by plaintiff's owing the executor for rent of deceased's house, and hire of deceased's negroes. The plaintiff demurred to defendant's plea, and insisted that the set off was not due in the same right, and therefore could not be set off against the plaintiff's demand, and cited 4th Johns. C. R., page 11. On the part of the defendant, it was contended, that the debt was due in the same right, as it was the property of the deceased that went to pay off the demand, and as concerns the plaintiff, the death of the maker of the note did not alter the principle—that the plaintiff was bound to pay his debts to the deceased, and to his estate, after his death.

By the Court. In examining the case referred to, the Court finds, that the case there, was an attempt to set off a debt due by plaintiff to the deceased and another: It was, therefore, strictly a joint demand, which could not be set off against a several demand; and the Chancellor, in examining the law, and shewing that a debt due by the deceased, in his life time, could not be the subject of set off against a debt created with the administrator since the death—and he makes this remark: "Neither could the executor, if he was the defendant, for the rule must be mutual." This obiter dictum of the Chancellor's was not called for by the case he was then deciding; and he quotes no decided cases to support that dictum. Let us see, then, whether the converse of the proposition be true, and whether there be any good reason why such a rule should prevail. Why is it, that

31 \*a debt due by the deceased, cannot be set off against a debt created with the administrator, since deceased's death? It is this: that as soon as a party dies, the Law creates a different mode for his administrator to pay his debts, than the Law had prescribed to the deceased, when in life: and if a set off were allowed of deceased's debts, due in his life time, against the assets come to administrator's hands, he might be unable to pay as the Law directs him.

Let us then examine and see, whether there is any reason for the converse of the rule to prevail. Does the death of a debtor make any difference in relation to his administrator claiming, as matter of payment, any and all claims which he holds against the creditor, whether they be due to the deceased, or his administrator, or in both capacities? So far as the creditor of the estate is concerned, the Law makes him responsible for the payment of all his

debts, no matter in what character due. So far as the Law is concerned, there is no reason to say that they are not due, in the same right, to wit: The deceased and his estate, in the hands of his administrator, are the same. If a contrary rule were to prevail, what might be the effect? An estate might be indebted to a man for a note made by the deceased—and the creditor might afterwards get from the administrator sufficient to nearly pay off the debt—and when the creditor sued for the debt due by the deceased, the administrator would be estopped from pleading as a set off, the debt created with him as such, when the creditor had received pay out of the property of the deceased who gave the note, and the creditor might be insolvent, and the estate solvent—so that he could recover his debt, and the estate would have to lose its claim: for, if the fact be as contended, that the debts are not due in the same right, if the administrator had a judgment for his debt, against the creditor, he would be no better off, as he could not set off the judgments, as they would not be due in the same right—the Law making the creditor responsible for the payment of his debts, and having received pay, from the executor, out of the assets of his debtor, whether before or after his death, it can make no difference, as to him; and as our statute of set off allows a defendant to plead a debt, which he gets at any time before Plea pleaded by assignment: This Court decides, that the debt created with the executor, may be set off against a debt due by the deceased, in his life time, to the same person.

32 \*Notwithstanding, the same rule would not prevail when the executor is plaintiff, for a debt created with him, as such executor, the Law creating a new duty on the executor in paying off the debts of the deceased; but makes no change to the persons owing the estate. They are bound to pay them as though the decedent were in life.

The demurrer is overruled, and the set off allowed.

JOHN SCHLY, Judge  
Superior Courts, Middle District, Georgia.

33 \*Thomas Evans v. McCullen Pollock and Richard Downs.

January Term, 1842.

**Tender—Agreement to Receive Less Than Due.**—A creditor is not bound by a contract to receive from his debtor a smaller sum in money, for his discharge from a greater, unless the money is actually paid and accepted at the time. No subsequent tender will avail him. The creditor has a right to refuse it.

A motion is made for a new trial in this case, upon two grounds: 1st. That the Court erred, in charging the Jury that the contract of the plaintiff, with defendant, Downs, to receive Ten Dollars, in discharge of said defendant's liability as indorser of

the note sued on, was a valid contract, and that payment of said sum was a discharge of such liability. 2nd. That the Court erred, in charging the Jury that the tender of said Ten Dollars, was equivalent to a reception of the same by the plaintiff, in discharge and satisfaction of said defendant's liability as indorser, as aforesaid.

Mr. A. J. Miller, for the plaintiff—who refers the Court to the following cases, in support of his motion: 1 Strange 425; 19 No. Law Libra. 111; 5 East's R. 230; 2nd. T. R. 24; 2 Hen. Blac. R. 317; 1 Ld. Raym. 122; 2 Johns. R. 448; 5 Johns. R. 386; 9th. English C. L. R. 152; 2nd. Camp. R. 124 and 383; 11 East's R. 390; 2 Starkie's R. 417; 3 Camp. R. 175; 2 Barn. & Cresswell R. 477.

Mr. Crawford, for Defendant—refers the Court to 3 Johns. Cases, 243; 16 Johns. R. 86—and 2 T. R. 4, as to granting new trials.

In this case, the defendant, Downs, offered the plaintiff, Evans, Ten dollars, to let him off from all liability, as indorser on the note made by the defendant, Pollock, which the plaintiff agreed to—but no money was paid as a satisfaction. In some short time after, the defendant, Downs, tendered the Ten dollars to the plaintiff, who refused to receive it, and brought this action to recover the note and interest, which was about \$180; and upon the trial, the defendant proved the agreement and subsequent tender of the

34 \$10, and the \*refusal to receive it by the plaintiff—and upon the trial, the Court charged the Jury, that if the plaintiff chose to make such a contract, it was a valid one; and that a tender and refusal of the money, was equivalent to a performance of the agreement, by the defendant, Downs;—and the Jury found for the defendant.

But upon this motion, the Court has been referred to the authorities before stated; and upon a full examination of them, the rule is as follows:—If a creditor agree to accept a less amount than his debt, in property, and does accept in discharge, the defendant may plead it by way of accord and satisfaction: or if the creditor agree to accept payment of the full amount of his debt, in some other species of property, and it is afterwards tendered to him, and he refuses to receive it, this amounts to an accord and satisfaction, and may be successfully pleaded to such demand. But where a creditor agrees to accept a smaller sum in money, in satisfaction, and the money is not paid by the debtor, and accepted by the creditor, at the time—no subsequent tender of such less sum, and refusal by the creditor, will amount to an accord and satisfaction of the debt.

In this case, therefore, the Court not having drawn the proper distinction between a tender of the full amount of the debt, either in money or property, and a tender of only a small part in money—which does not amount to an accord and satisfaction, even if the creditor agreed to take it, but



not receive it at the time, and subsequently refused: Such subsequent refusal does not amount to a receipt of the money, as in other cases of contract, where tender by one, and refusal by the other, will amount to a performance of the contract.

The Court, therefore, did err, when it charged the Jury, that a tender of the \$10, subsequently, by Downs, to the plaintiff, did amount to an accord and satisfaction of the liability of the defendant, on the note sued on, and that the plaintiff might sue the defendant, Downs, for the \$10.

A new trial is, therefore, ordered, before another Special Jury, for the mis-direction of the Judge in point of Law.

JOHN SHLY, Judge  
Superior Courts, Middle District, Georgia.

### 35 \*The State v. William Fox.

January Term. 1842.

1. **New Trial—Separation of Jury.**\*—It is no ground for a new trial, that a part of the Jury separated from the rest without the knowledge of the Court, or the presence of an officer, unless there was evidence that they were tampered with, which might be presumed, if the absence was a considerable time.

2. **Arrest of Judgment—Misnomer of One of Grand Jury.**+—When the Indictment is based upon the presentment of a Grand Jury, a misnomer of one of the Jury in the former, is no ground for the arrest of the Judgment.

Motion for a new trial, upon the following ground:—That some of the Jury separated for a few minutes from their fellow Jurors, without the consent or knowledge of the Court, or in the custody of an officer.

**\*Grounds for New Trial—Separation of Jury.**—In support of the proposition that a mere separation of the jury, even though unauthorized and improper, does not of itself justify a new trial unless prejudice actually resulted or may reasonably be inferred from the circumstances, see principal case cited in *State v. Negro man*, Peters, Ga. Dec. pt. 1. p. 35. See also, on this question, *Roberts v. Copenhagen*, 14 Ga. 8; *State v. Helvenston*, R. M. Charl. 48; *Cohron v. State*, 20 Ga. 752; *Westmoreland v. State*, 45 Ga. 225; *Barrow v. State*, 80 Ga. 191. 5 S. E. Rep. 64.

But it has been held that the mere fact of a temporary separation, unauthorized or without permission of court, raises a presumption of injury, and is *prima facie* ground for a new trial. *Monroe v. State*, 5 Ga. 85; *Westmoreland v. State*, 45 Ga. 225; *Daniel v. State*, 56 Ga. 653; *Silvey v. State*, 71 Ga. 553.

A new trial, however, will not be granted because of a temporary separation of the jury, where the fact is known at the time to the defense, and is not brought to the attention of the court until after verdict. *Kirk v. State*, 73 Ga. 620; *Eberhart v. State*, 47 Ga. 598; *Carter v. State*, 56 Ga. 463.

**\*Arrest of Judgment—Clerical Error—Initials of Names of Grand Jurors.**—A judgment will not be arrested because three of the nineteen grand jurors' names are set out by the initials of the Christian name only. *Hatcher v. State*, 18 Ga. 460.

Upon an examination of the authorities, the Court finds the rule to be, that a mere separation of the Jury, for a short time, per se, will not avoid the verdict; but if the separation has been for a length of time, and under circumstances which induce a suspicion of their being tampered with, then the court will exercise a sound discretion, and according to the facts of each case, will set aside, or sustain the verdict—(1 Cowen 221; Barnes 441; 8 Pick'g. 170; 4 Cowen 26; 1 Conn. Rep. 401; 1 Gall. 360; 1 Halst. 110; 2 Hayw. 238)—and it must appear that something more than a mere separation for a short time took place. In this case, it is not contended that any thing but a separation for a few minutes took place. This Court, therefore, overrules the motion for a new trial, upon the ground taken.

The prisoner then moves in arrest of judgment: because the Attorney General, in making out the Indictment, founded on the presentment of a Grand Jury, in setting out the names of the Grand Jurors, he has set out the name of Philip D. Woolhopter as Philip C. Woolhopter, and therefore there is a misnomer of the Juror; and Mr. Miller, for the prisoner, quotes 4 Johns. R. Note 119; 5 Johns. R. 84; 2nd. Crown Cases (English) 303.

36 \*The Attorney General quotes, 11 Petersd. R. 545; 2nd. T. R. 5; 4 T. R. 469; 5 Term R. 525.

And the Court, upon further examination, and in 1 Cro. Eliza. 256—at that day, it was held amendable if the christian name was right, and an error in the surname—as a man can have but one christian name, when he may have two surnames: and in 1 Cro. Car. 563, it was held, that by the Stat. 21 of Jac. 1, a misnomer in the surname was no ground for arresting the judgment. Yet it was held, that at Common Law, christian names of Jurors were also amendable. So in 2nd. Barnes 454, if it appear that it was the Juryman intended, it will not arrest the judgment.

But from the decisions which will prevail in this Circuit: that where an Indictment is founded on the presentments of a Grand Jury, the presentment must be given in evidence to sustain the charge; and if that be deficient in substance, the most perfect Indictment, framed on it, cannot help the defect in the presentment. The presentment being in evidence in this case, and the name being properly set forth, the names of the Grand Jurors were properly before the Petit Jury: and, therefore, the motion, in arrest of judgment, is also overruled.

JOHN SHLY, Judge  
Superior Courts, Middle District, Georgia.

### 37 \*N. K. Butler & Co. v. Luther Roll.

January Term. 1842.

1. **Purchasers of Personal Property—Title—Fraud.**—Between purchasers of personal property, the elder title must prevail, unless it be infected with fraud.

**2. Sale of Personal Property—Retention of Possession by Vendor.**—The possession of the seller after the sale, is not, of itself, evidence of fraud; and that he had a right to redeem the property, is a circumstance to be considered by the Jury, in explanation of the possession.

In this case, Morrow made a bill of sale of a negro, sued for, to the defendant, Roll, dated on the 21st July, 1836, and at the same time Morrow signed a non-descript paper, stating, an agreement, that if he paid R. a certain amount, then Roll was to let him have the negro back, but this agreement was signed only by Morrow: and no proof was made of a delivery from Morrow to Roll, except the delivery of the bill of sale, and Roll, sometime afterwards, had the boy attached and sold, and purchased him at the Sheriff's sale, after the plaintiff's title accrued, on the 26th July, 1836: five days after this sale to Roll, Morrow sold the boy to the plaintiff, and executed a bill of sale to Butler, and delivered the boy to Butler, and Butler immediately hired the boy to Morrow, and delivered him back to Morrow. Roll got, and kept possession of the boy sometime after, and retains possession of him. And the above action was brought to recover the boy. And the

Jury, after hearing the evidence, found a verdict for the defendant.

The plaintiffs now move for a new trial:

1st. That there was no delivery of the property by Morrow to Roll, and that Morrow continued in possession.

2nd. That the boy was delivered to the plaintiff, at the execution of the bill of sale by Morrow to him, and that the plaintiffs' title was complete.

And it is contended, by Gould & 38 Cumming, that a new trial \*should be granted, as the verdict is contrary to the evidence, as the want of delivery was a fraud on the last purchaser.

Mr. Miller contends, that the delivery of the bill of sale, by Morrow to Roll, amounts (in Law) to implied delivery of the thing sold; and this, added to the written memorandum signed by Morrow, shewing that he was to have the boy back from Roll, by paying a certain sum of money, sufficiently accounts for R.'s want of possession—and that possession not following and accompanying the deed, is not, per se, a fraud, even against creditors, if the same be accounted for to the satisfaction of the Jury. But this is a case between purchasers, and therefore the one who has the elder title will hold the property; and he quotes the following cases:—17 Mass. R. 110; 1 T. R. 205; Buller's N. P. 258; Long, on Sales, 118. Also, 2 Pick'g. R. 607.

The Court charged the Jury, that this is a case between purchasers, and that the delivery of the bill of sale was an implied delivery of the property, and as between purchasers, the elder title should prevail, unless they believed the first title was fraudulent. If so, they should find for the plaintiff: but if they believed, that the elder title was not fraudulent, then to find for the defendant; and these were questions for the Jury, and they have passed upon them.

The Court sees no ground on which the verdict should be set aside. A new trial is therefore refused.

JOHN SHLY, Judge

Superior Courts, Middle District, Georgia.

39 \*Gilbert Longstreet v. Reeside and Fuller.

January Term, 1842.

1. Contracts against Public Policy—Fraud—Evidence.—

Contracts entered into to defraud the Government, are void, as against public policy; but the contract itself must furnish evidence of the fraudulent intent, unless it be specially pleaded, and then it may be shewn by aliunde testimony.

2. Evidence—What Admissible under General Issue—

Statute.—Under our statute, no evidence is admissible under the general issue, except such as disproves the cause of action. All matters in satisfaction, in whole, or in part, or in avoidance of the contract, either by reason of illegality, or otherwise, must be specially pleaded.

\*Retention of Possession as a Badge of Fraud.—In Fleming v. Townsend, 6 Ga. 103, 50 Am. Dec. 318, the court said: "This court has adopted the rule, equally applicable to real and personal estate, to sales for valuable consideration, and to voluntary deeds, that possession in the vendor, in case of an absolute sale, is *prima facie* evidence of fraud; that it may be explained; that the *onus* of explanation, after possession is proven, is upon the grantee, and that the question of fraud or not is submitted to the jury." Citing Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368. In support of this proposition, see Spalding v. Grigg, 4 Ga. 75; Williams v. Kelsey, 6 Ga. 365; Carter v. Stanfield, 8 Ga. 49; Colquitt v. Thomas, 8 Ga. 274; Beers v. Dawson, 8 Ga. 556; Perkins v. Patten, 10 Ga. 241; Clayton v. Brown, 17 Ga. 217; Scott v. Winship, 20 Ga. 429; Goodwyn v. Goodwyn, 20 Ga. 600; Collins v. Taggart, 57 Ga. 355; Ross v. Cooley, 113 Ga. 1047, 39 S. E. Rep. 471.

In Dollner v. Williams, 29 Ga. 743, it was held, that if one, after selling personal property, retains possession, and subsequently, and while in possession, executes a mortgage to a third person to secure a debt, the lien of the mortgage must prevail over the previous sale, if the mortgage was not fraudulent, and the mortgagees had no notice of the former sale at or previous to their taking the mortgage.

Same—Retention by Parent of Property Conveyed to Child.—But the possession of a parent, the natural guardian of his infant child, who conveys property to such child and retains possession thereof, is the possession of the donee, or at least such possession is not inconsistent with the donee's title. In such case, there is no presumption of fraud. As the parent is entitled to the possession of the property of his minor child, the law does not require him to make a formal delivery to the child, when he must at once repossess himself of the property given. Hargrove v. Turner, 112 Ga. 134, 37 S. E. Rep. 89; Ross v. Cooley, 113 Ga. 1047, 39 S. E. Rep. 471. See also, Dasher v. Ellis, 102 Ga. 830, 30 S. E. Rep. 544.



3. **New Trial—Excessive Damages.**—The Court will not grant a new trial, on the ground of excessive damages, unless the damages are flagrantly excessive.

In this case, a motion is made for a new trial, upon the following grounds, to wit:

1st. That the Court erred, in refusing to receive the evidence offered by the defendant, for the purpose of shewing that the contract sued on, was entered into between the parties, for the purpose of putting down competition between them, in the proposals to the Post Master General of the United States, for the Mail contract in question.

2nd. That the damages, found by the Jury, are excessive.

3rd. That the Court erred, in charging the Jury, that they could not look beyond the written contract, in order to determine whether it was made with a view of committing a fraud on the United States Government.

And if these grounds be overruled, the Court will be moved to arrest the judgment in said cause, upon the ground, that the contract set out in the plaintiff's declaration, and the cause therein alleged, as leading to the making of said contract, are contrary to public policy, and can form no legal, or valid cause of action, wherein the plaintiff's declaration is wholly defective, and insufficient to authorize any judgment thereon.

40 \*The above stated action was brought upon a written agreement between the parties, which is, in substance, as follows:—That defendants, being Mail contractors, for carrying the Mail contract between Augusta and Savannah, which was about to expire on the first day of January, 1835: in the month of October, 1834, plaintiff and defendants entered into a written agreement—that defendants were to bid for the new contract, commencing on the 1st January, 1835, and if obtained, they were to transfer the same to the plaintiff: and it further appeared, that the plaintiff was also to put in an offer for said contract, with the Post Office Department—and plaintiff agreed to purchase the stock of horses, stages, wagons, and harness, which should be employed on the line, on the 1st day of November, then next, for the sum of Six Thousand Dollars, payable by instalments: and it was further agreed, between the parties, that, if neither of them got the contract offered for, then the defendants were to transfer their unexpired term of the contract to the plaintiff, and he was to take the stock, whether either of the parties got the contract or not; yet the plaintiff was bound to pay the defendants the Six Thousand Dollars, as agreed—and, it appears, from the evidence in the cause, that both plaintiff and defendants made an offer for the contract, but were underbid by some third offer; but this third man being unable to comply, the defendants

finally got the contract, and gave it to the plaintiff.

And this action was brought to recover damages, for a breach of the written agreement, in having nearly all of the good horses taken off the line, and inferior ones placed there, by the time the plaintiff was to take possession—say, 1st November, 1834. The plaintiff also set out breaches about the harness, &c.

The defendants pleaded the general issue alone, and offered to prove that the contract was void, on the ground of public policy, as the agreement being made, before the offer to the Department, would have the effect of lessening competition, and the government be thereby defrauded.

But the Court decided, that such evidence could not be received, under the general issue: that if defendants intended to set up such defence, they should have notified the plaintiff by their plea.

41 \*The defendants then insisted, that the plaintiff had set out enough in their declaration, to shew that the contract was illegal.

The Court charged the Jury—If they believed, from the agreement and pleadings, that it was the intention of the parties to defraud the Government: then the contract was void, upon the ground of public policy—and they would then find for the defendant.

But if they did not find, from the written agreement, and the plaintiff's allegations, that this contract was entered into to defraud the Government: then they should proceed to examine the evidence for the plaintiff, and assess such damages as they believed just, according to the evidence; and they found for the plaintiff, Six Thousand Dollars.

Mr. Longstreet, for the plaintiff, refers the Court to the following authorities:—1 Peters' Sup. C. R. 591; 3 Cranch 180; 1 Peters' C. C. R. 85, and 170 to 183; 2nd. Wash. R. 226; 4 Burr. 2069; 3 T. R. 418; 2 Peters' Sup. C. R. 216; 9th. Wheat. R. 673; 5 Taunt. 727; 21 vol. Com. L. R. 29; 1 Peters' Digest, sect. 14, p. 297; 3 Peters' Digest, 232; 10 Peters' R. 343; 1 Gall. C. C. R. 388; 2 Nott & McCord R. 528.

Mr. Miller, for defendants, refers the Court to the following authorities:—Saunders on Plead. 39, 46 and 50; Chitty on Contra. 523, 559; 3 Johns. Ca. 29; 6 Johns. R. 194; 13 Johns. R. 112; 8 Johns. R. 444; 5 Halst'd. N. J. R. 87.

And upon a view of the authorities referred to, the Court finds the following to be the rules of Law:—First. If two enter into a contract, whereby competition is taken away, or lessened, and the Government has been thereby compelled to pay a higher price, and the parties apply to the Court to enforce such agreement, the Court will refuse to enforce it, upon the ground of public policy: or, if a party makes an offer for, or has an office, and he makes a sale of it, to the prejudice of the Government—such contract cannot be enforced. But in all these cases, the gist of the action is the il-

\*See *Pomeroy v. Golly*, Ga. Dec. pt. 1, p. 26, and *foot-note*.

legal contract, and form the consideration of it. But in this case, what evidence have we of the nature and consideration of this contract? \*No other than what appears by the written contract itself, and the pleadings. If we look to the agreement for the consideration, do we find that the obtaining of the contract, to commence on the 1st of January, 1835, formed any party of it?—For, by the terms of agreement, Longstreet was to give the \$6000 to defendants, whether either got the new contract, or not: provided, the defendants transferred the remaining time of the old contract, and the horses, stages and harness. It, therefore, appears, that the performance of the contract was in no wise to depend on the obtaining of the new contract, for the mail. By what mode of legal reasoning, then, can the Court be called on to say, that the consideration of this agreement was against public policy? The agreement does not say so; nor was there any proof, aliunde, to establish the fact. This Court is, therefore, bound to say, that neither by pleadings, nor the proof, does it appear, that the obtaining the new contract, (even supposing it to have been illegal,) formed the consideration for this agreement: and this question was fully given in charge to the Jury, who have passed upon it. The Court, therefore, overrules the motion for a new trial, upon the third ground taken, and also the motion in arrest of judgment.

The next question to be decided, is, the error imputed to the Court, in ruling out the evidence of the illegality of the contract, by aliunde testimony, under the plea of the general issue. Whatever may have been the decisions under the English Law, as admitting various defences, under the general issue, our statute of 1799, has introduced a new rule, and the decisions upon that statute, are, that the general issue will only allow the defendant to prove, that no such contract was ever made—but that all matters in satisfaction, either in whole, or in part—or in avoidance of the contract, either by reason of its illegality, or otherwise, must be specially pleaded, and be plainly and distinctly set forth, by the defendant, that the plaintiff may be informed of what is to be proved against him.

This Court, therefore, decides—that it did not err, in rejecting the proof offered, under the general issue; and, therefore, overrules the first ground taken for a new trial.

And, as to the second ground taken, (that the damages are excessive,) 43 \*this was a question for the Jury: and it must be a flagrant case, as to damages, before the Court would undertake to controul their verdict in this particular: and in this case, the plaintiff adduced proof of the injury sustained by the fraud of the defendants; and as the Jury were the competent judges, from the evidence, and the Court having no evidence of misconduct in them, it will not disturb the verdict on that ground.

A new trial, upon all the grounds, is therefore refused.

JOHN SHLY, Judge  
Superior Courts, Middle District, Georgia.

#### 44 \*Jones, Benjamin & Co. v. Henry Dalby.

January Term, 1842.

**Evidence—Declarations against Interest—Admissibility.**—In Claim cases, the sayings of the defendant, in execution, prior to his being defendant, may be given in evidence, to sustain the title of the claimant—such sayings being presumptively against his interest.

Motion for a new trial, upon the following grounds:

1st. That the Court erred, in admitting as evidence, the declarations of the defendant, in execution, in relation to the claimant's right to the property levied on.

2nd. That the Court erred, in admitting as evidence, the declarations of the defendant, and his refusal to do acts, in relation to the property levied on, after the date of the plaintiffs' mortgage.

The question here presented, is not whether the sayings of the defendant, after the relation of plaintiff and defendant has been created, can be given in evidence for the claimant; as that question has been decided by the Judges: But, whether the defendant, whilst he was merely a debtor, his acts and admissions may not be given in evidence, for the claimant, in relation to the property levied on—the Judges admit, that, according to the rules of evidence, he might be admitted, as he would be swearing against his interest; but, after he becomes a defendant, his interest is sometimes for the claimant, and at other times, against him, and therefore they have thought it a more safe rule to reject his sayings for either party: but the defendant's acts, in relation to the property, have uniformly been admitted, for either party; and the defendant has been considered such a party to the claim, that he could not be sworn as a witness: But, prior to his being a defendant, there is no rule of evidence which will exclude his sayings, if against his ownership of the property, and the case will be governed by the usual rules of evidence, prior to his being a defendant—although he may be indebted at the time. In this case, the sayings of the defendant, Dalby, were

**\*Evidence—Declarations against Interest—Admissibility.**—In *Powell v. Watts*, 72 Ga. 774, the court said: "Whether admissions made by the defendant, while in possession of the land claimed, in disparagement of his title, are competent, would in some measure, depend upon the time at which they were made. If made, as it seems probable they were in this instance, before the commencement of the plaintiff's suit, then there would, we think, be little doubt of their admissibility. (Maxwell v. Harrison, 8 Ga. 66, citing *Jones v. Dalby*, Ga. Dec. pt. 1, p. 44; *Horn v. Ross*, 20 Ga. 210; *Smith v. Cox*, 20 Ga. 240; *Cloud v. Depree*, 28 Ga. 170.) even in favor of the claimant."



only allowed by the Court, before he was a defendant—he being only indebted to the plaintiff at \*the time, and not then a defendant. If a contrary rule were to prevail, a debtor having sold personal property to another, without a bill of sale, it would deprive the claimant of proof of such sale by parole, if a party, who happens to be indebted, sold it to him, though no judgment be against him; and the same rule would prevail, if he had the property of another in his possession, and to which he never laid any claim, if the admissions of the party in possession, prior to his being a defendant, were refused—and it is a very clear rule of evidence, and a rule of Law, that the claim of the creditor cannot be of higher or more binding effect, than that if the debtor through whom he claims, (except in the case of voluntary conveyances,) where the creditor may set aside such conveyance, when the debtor could not.

But, as between the defendant and a third person, and before he became a defendant, his acts and sayings in relation to the property claimed by, or through, him, would be competent evidence to go to a Jury; and particularly in a case like the present, where fraud, or no fraud, is purely a question of fact for the decision of the Jury: and as fraud is frequently made up, or resisted by many acts, the Court should not withhold from the jury, any evidence which may have a bearing on the case, unless forbidden by some well defined rule of evidence.

It is the decision of this Court, for the reasons above assigned, that it did not err, in admitting the sayings of Dalby, before he was placed in the situation of a defendant, to go to the jury. And a new trial is, therefore, refused.

Messrs. Millers, for the Plaintiff.

George Schley, for the Claimant.

JOHN SHLY, Judge.

Superior Courts, Middle District, Georgia.

#### 46 \*The State v. A Negro Man, (Peter,) the Property of N. L. Sturges.

January Term, 1842.

1. **Proceedings before Inferior Tribunal—Evidence.**—A waiver of the irregularity of the proceedings, before an inferior tribunal, is no consent to dispense with the proof of those proceedings.

2. **Criminal Law—Slaves—Capital Offences—Indictment.**—In all trials of Slaves, for Capital offences, it is necessary that the preliminary proceedings, before the Magistrates, should appear on the face of the Indictment, either by way of recital, or allegation, and must be proved before the Jury.

3. **Homicide—Grade of Offence—Question for Jury.**—Whether the facts of a case make it murder, or voluntary manslaughter, being a question for the consideration of the Jury, the Court will not, except in a clear case, interfere.

4. **New Trial—Separation of Jury.**\*—That a Jury have

dispersed, is not, of itself, a sufficient ground for a new trial.

In this case, the above stated writ was granted to examine this case, upon three grounds:

First: The Justices of the Inferior Court have no original jurisdiction over offences committed by slaves—that such jurisdiction is given to them by the several statutes of this State, and that by said statutes, (which must be strictly pursued,) the Justices of the Peace have original jurisdiction of all offences committed by slaves; and that said Justices must first examine into the nature of the offence, and if, upon such examination, it shall appear, that the same will effect the life of the accused—it then becomes their duty to turn over said accused to the Justices of the Inferior Court, to proceed as the Law directs: and that, on the above stated trial, there was no evidence offered to the Jury, of such preliminary hearing before the Justices. And, therefore, the verdict, in this case, is without the authority of Law.

Secondly: That the offence, as made out by the evidence, did not constitute the crime of murder—but only amounted to voluntary manslaughter, and therefore said verdict is contrary to evidence.

47 \*Thirdly: That a portion of the Jury, after being sworn, separated from their fellow Jurors, for a short time, unattended by a bailiff. And, upon all of these grounds, this Court is moved for a new trial.

The Justices of the Inferior Court, having made a return in answer to this certiorari, and furnished this Court with the substance of the evidence given in before the Court and Jury; and upon an examination of that return, in relation to the first ground taken for a new trial, the Court finds the following to be the facts:—That on the day the Court met for said trial, and when the State was called on to announce whether it was ready for trial, the counsel found that there were some irregularity in the proceedings before the Justices, and that the State could not be ready for trial, unless such irregularity was waived by prisoner's counsel; which was accordingly done, and the trial was then adjourned until the next day—when, on the meeting of the Court the next day, the Jury was selected, and the trial proceeded—and witnesses were sworn on both sides, in relation to the offence, as charged. But no evidence, whatever, was offered in relation to the preliminary hearing before the Justices, and of their having turned the case over to the Inferior Court.

The first question to be decided by this Court is, whether the consent made by the counsel, the day before the trial took place, amounted to a waiver of introducing such evidence before the Jury. This Court decides, that the agreement went no further, than to a waiver of its irregularity, and did not dispense with the proof of such proceedings before the Justices.

\*New Trial—Separation of Jury.—See State v. Fox, Ga. Dec. pt. 1, p. 35, and foot-note.

The next question, then, which presents itself on the first ground taken for a new trial, is, whether it is necessary, in all trials before the Inferior Court, of slaves, for a capital offence, that the preliminary proceedings, had before the Justices, should be set out, in substance, in the Indictment, and be proved on the trial before the Jury. This Court decides, that, as the Justices of the Inferior Court have no other jurisdiction of offences committed by slaves, except the same is given to them by the order and decision of the Justices of the Peace, who are first to examine into the nature of the charge—this Court decides, that such proceedings before the Justices, must be set forth, in substance, in the Indictment, and must be proved before \*the Jury: and this Court holds, that it is sufficiently set forth in this Indictment; nor is it material, whether it be alleged by way of recital of the proceedings, or by a positive averment of such proceedings: so that the same appear in the Indictment, it is sufficient—and that such averment is matter of substance, and must be proven before the Jury. And this Court further decides, that, in order to give the Inferior Court jurisdiction of a capital offence against a slave, two facts must be established:—First, that the offence was committed in the County; and, Secondly, that the defendant has been brought before a Court of Magistrates, and his case examined: and that the Justices have decided, that the offence is of a capital nature, and turned the prisoner over to the Inferior Court for trial.

In this case, there having been no such evidence before the Inferior Court, upon this trial, the said verdict is without authority of Law, and must be set aside—and a new trial awarded before the Justices of the Inferior Court, as the Law directs, at such time as they may direct.

Upon the second ground taken, whether the offence amounted to murder, or voluntary manslaughter, this Court will not undertake to say, as that was a question for the Jury—and (unless in a very clear case) this Court would not undertake to disturb the verdict of a Jury. But, as the decision of this Court is invoked, upon that provision of our penal code, which declares, that there must be an assault, by the party killed, upon the person killing, before the offence can be manslaughter—this Court decides, that, from reading the whole section, as to manslaughter, it evidently did not intend to confine it to an assault, alone, as it speaks of an assault or provocation given. In this case, as in all others, the Court ought to charge the Jury, that they are bound to take into consideration, the provocation given; and give the provocation due weight, in their determining whether the offence be murder, or manslaughter.

The third ground having been decided by this Court, in the case of the State v. Wm. Fox, the counsel for prisoner abandoned it: It is, therefore, overruled.

It is ordered, that the Clerk of this Court, inform the Justices of \*the Inferior Court, or a majority of them, that this Court has ordered a new trial: that they do proceed to draw a Jury, on the first Monday in March next, for a new trial of the prisoner, Peter, and there proceed according to Law; and that, with said case, he certify, and send to said Justices, this decision.

JOHN SHLY, Judge  
Superior Courts, Middle District, Georgia.

## 50 \*MUSCOGEE SUPERIOR COURT.

The Planters' and Mechanics' Bank of  
Columbus v. William S. Chipley, Leroy  
M. Wiley, and Others.

April Term, 1842.

1. **Justices' Courts.**—The Justices' Courts of Georgia are not Courts of Record.
2. **Amount in Controversy—Determination of—Several Claims.**—Several suits cannot be commenced by the same plaintiff, against the same defendant, at the same time, in a Court, not of Record, on several causes of action, which, in the aggregate, exceed the jurisdiction of such Court.
3. **Same—Same—Divided Claims—Constitutional Provision.**\*—Parties cannot, with a view giving Justices' Courts jurisdiction of a debt exceeding thirty dollars, divide it into smaller sums, though payable on different days. The Act of 1811, which authorizes it, is violative of the Constitution of 1798, under which it was passed, and therefore void.
4. **Same—Same—Reduction by Payments.**†—A debt, originally exceeding thirty dollars, and reduced to that sum, by actual payments, may be sued in a Justice's Court.
5. **Same—Same—Reduction from Other Causes.**—Parties to a debt, above thirty dollars, may sever it, for the purpose of negotiating a part, or parts of it, and for the purpose of giving different days of payment, so that the same be not done with a view to defeat the Constitution: and when so severed, suits may be brought on the several parts, in a Magistrate's Court.

### Legal Decision.

Two grounds of error are assigned in this petition for certiorari:

1st. That a Justice's Court is not a Court of Record: and that in as much as the Charter of the Bank which filed this petition, provides, that it shall be suitable in Courts of Record, no jurisdiction can be legitimately entertained by the Justices of

\*See the principal case cited in Kendall v. Justices, Ga. Dec. pt. 2, p. 186; Floyd v. Cox, 72 Ga. 150.

†Determination of Amount in Controversy—Original Amount Reduced by Payments.—In support of the proposition that a claim exceeding the amount over which a justice's court has jurisdiction may be brought within the jurisdiction by payments which reduce it to that amount, see Nichols v. McAbee, 30 Ga. 8.



the Peace, against whom this complaint is made.

2nd. That the plaintiff, in the case below, commenced several distinct suits, at one and the same time, to one and the same term of \*the Court, on several demands, exceeding in the aggregate the jurisdiction of the Court, which might have been embraced in one action, in the Superior or Inferior Courts; and that, for this reason, the Court below should be ousted of jurisdiction in the premises, and the plaintiff forced to sue, if at all, in the Superior or Inferior Court, of the County, which are Courts of Record.

The facts stated in the petition are admitted. Is the Court of the Justices of the Peace, in this State, a Court of Record? This has long been, and still is, a vexed question in Georgia. "A Court of Record is that where the acts and the judicial proceedings, are enrolled on parchment, for a perpetual memorial and testimony, which rolls of Court are called the Records of the Court, and are of such high and supereminent authority, that their truth is not to be called in question: for it is a settled rule and maxim, that nothing shall be averred against a Record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a Record be denied, it shall be tried by nothing but itself; that is, upon the inspection whether there be any such Record or no; else there would be no end of dispute. But if there be any mistake of the Clerk, in making up such Record, the Court will direct him to amend it. All Courts of Record, are the King's Courts, in right of his Crown and Royal dignity, and therefore no other Court hath authority to fine and imprison; so that the very erection of a new jurisdiction, with the power of fine and imprisonment, makes it a Court of Record." Black. Com. 3 vol., p. 23, 24. "Record, Recordum, is a memorial, or remembrance in rolls of parchment, of the proceedings and acts of a Court of Justice, which hath power to hold plea, according to the course of the Common Law, of real or mixed actions, or of actions quare vi et armis, or of personal actions, whereof the debt or damage amounts to forty shillings or above, which we call Courts of Record, and are created by Parliament, letters patent, or prescription. But, legally, records are restrained to the rolls of such only which are Courts of Record, and not to the rolls of Inferior, nor any other Courts, which proceed not secundum legem et consuetudinem Angliæ."—3 Coke. Litt. 322, 323. Tested by these definitions, the Courts of Justices of the Peace, in this State, are not Courts of Record. They do not enroll on parchment (or on paper) their acts and proceedings—do not hold plea, according to the course of the Common Law, of \*real or mixed actions, or of actions quare vi et armis, nor did they originally possess jurisdiction of debts exceeding forty shillings. The slight increase in the number of shillings, which may be now demanded in these Courts, can

have effected no change in their legal natures. I have said that they originally could take cognizance of debts less than forty shillings only. The country is much indebted to the recent labors of the presiding Judge of the Southern Circuit, (The Hon. C. B. Cole,) on this subject. He has traced back the Courts of the Justices of the Peace, in this State, to the old Courts of Requests, of London, or the Court of Conscience, as it was more frequently called.

See the case of the Monroe Rail Road and Banking Company v. Scott, and others, published in the Federal Union, of the 22nd March last. Bacon says of this Court: "There is also the Court of Requests, which is called the Court of Conscience, and is held before certain Commissioners, at Guildhall, and was established for recovering small debts, under forty shillings, but now raised to debts not exceeding five pounds."—2 vol. Bac. Abrid. 546. This Court, all the authorities agree, was not a Court of Record.

The Act of the Legislature of this State in which the title or appellation of this old jurisdiction, the Court of Requests of London, or the Court of Conscience, was changed to the one now in use, viz. the Justices' Courts, was passed in 1789. The 4th Section of that Act, provides, "That the Justices of several counties, or any one or more of them, shall have authority and jurisdiction, to hear and determine all suits, for any debt or liquidated demand, due by judgment, specialty, or account, for any sum or sums of money, not exceeding five pounds sterling, by petition, in a summary way, without the solemnity of a Jury. And the said Justice, or Justices, is, and are hereby, authorized to give judgment; and ten days after giving such judgment, award execution thereon, and not before."—Watk. Dig. 401. A popular error on the subject of the legal nature and constitution of Courts of Record, flows from the fact that the enrolling of their acts and proceedings on parchment, (or on paper,) is found very generally to obtain in Courts of Record, and may be regarded as a common and somewhat characteristic feature in them. It is

taken as true, to some extent, on the faith of this fact, that all \*Courts, whose proceedings are attested by written evidence, are Courts of Record. The authority of Lord Coke has just been quoted to the contrary. "But legally, records are restrained to the rolls of such Courts as are Courts of Record, and not to the rolls of Inferior, nor any other Courts, which proceed not secundum legem et consuetudinem Angliæ." Indeed, some Courts of very high authority and extensive jurisdiction, are not technically and legally Courts of Record.

"There are several of the King's Courts not of record—as the Court of Equity in Chancery, the Courts of Admiralty," &c.—Note 151 to 3 vol. Black. Com. 25, 4 Inst. 84. "The technical notion of a record is restricted to the rolls of such Courts, only

as proceed according to the course of the Common Law." The Court of Request of London, of which the Justices' Courts of this State, are but a modern version, was not of Common Law origin. It was created by the King and Council, in the reign of Henry VIII. It was confined, too, at its creation, exclusively to the city of London. Its proceedings were not by writ and plea, but by summons or warrant. The mode and character of proof were variant from the Common Law—the parties themselves were examinable before the Commissioners. Lastly, the decision of the Commissioners was final and conclusive between the parties, without the intervention of a Jury. Our own Justices' Courts, by their present and proper appellation as such, for a long time proceeded "without the solemnity of a Jury." The provisional and limited right of trial by Jury, of five men, which now exists in those Courts, is of comparatively recent date. It is not the Common Law right of trial by Jury, by any means. Blackstone, speaking of that mode of trial, says, that it is "a trial that has been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof."—3 vol. Com. p. 350. And again, at p. 351, same vol., he proceeds: "when therefore an issue is joined, by these words, and this the said A. B. prays may be enquired of by the Country," or, "and of this he puts himself upon the Country, and the said C. D. doth like the," the Court awards a venire facias, upon the roll, or record, commanding the Sheriff, "that he cause to come here on such a day, twelve free and lawful men, liberos et legales homines, of the body of this county, by whom the truth of the matter may be better known, and who are

54 \*neither of kin to the aforesaid A. B., or the aforesaid C. D., to recognize the truth of the issue between the parties." I am not deciding, whether the subject of Great Britain, in all cases, and as a matter of course, was entitled to this mode of trial. I am simply defining the right of trial by Jury, as it was usually enjoyed from the earliest age of English jurisprudence, in the case of an issue, joined in civil causes, and in the exercise of which in the manner just pointed out, may be regarded as a correct test, or example, of the ordinary course of it. Certainly the right to appeal from the formal and regular adjudication of an issue of facts, by a single Magistrate, to a Jury of only five men, on terms with which one may, or may not, be able to comply, as provided in the Justices' Courts of this State, is not to be placed upon the footing of the trial by Jury, as I have shown it to exist by the Common Law. These Courts, then, are not, either in their origin, or in their mode of proceeding, "according to the course of the Common Law."

The Act of the Legislature, passed in 1809, (see Prince's Dig. 501.) has been read by the counsel for the defendants, in certiorari, and relied upon, as constituting

them Courts of Record. "Each Justice of the Peace, in the State, shall keep a fair and legible book of entry of all civil proceedings, had before them, for the recovery of debts." If this Act is to be understood, as constituting them Courts of Record, the fact, at least, that they were not so before the passage of the Act is gained. And it may be well asked, what reason existed, at the time of the passage of the Act, for making them Courts of Record, which did not exist from the beginning? The Act itself furnishes no additional reason—it does not increase their jurisdiction, or in the slightest manner allude to the subject of their jurisdiction. The effect of this reference is somewhat weakened by the fact, already found to exist, that it is not the matter of preserving written proof of what takes place in a Court, that renders such Court one of Record, in the eye and contemplation of the Law. But let the language of the Act cited be considered: "Each Justice of the Peace, in the State, shall keep a fair and legible book of Entry (not a book of Record) of all civil proceedings." &c. And again: "in all cases where any Justice of the Peace in this State shall resign, or remove without the limits of the district, for which he shall have been appointed, it shall be the duty of the

55 Justice to deliver the said book, \*or a fair copy thereof, to his successor in office, within sixty days after he may be commissioned, or deposit the same with the Clerk of the Inferior Court."—See 2 Sec. of the Act cited. It is full compliance with the statute, to deposit "a fair copy of this book, with the successor, or with the Clerk of the Inferior Court"—and this, too, at any time within "sixty days" after the successor is commissioned: in the mean time, the original may be legitimately destroyed. Are these entries, thus to be made, and transmitted by the Magistrates, the "rolls on parchment," "the perpetual memorials" of a Court, "whose proceedings are according to the course of the Common Law," which the old Law writers, from whom I have quoted, understand to be records? But it is contended, that the Justices' Courts, in this State, are embraced within that portion of Judge Blackstone's definition of a Court of Record, which refers to the power to fine and imprison. And to this point, the Act, authorizing the Justices to fine and imprison for contempts of Court, is read. The allusion made by Blackstone and other Law writers, in popular use, to this subject, is well calculated to mislead. The description of cases to which the power of finding and imprisoning must apply, in order to bring the Court within the rule, or principle, relied upon, must be something more than the simple power of finding and imprisoning for contempts of Court. It must be the authority to take cognizance of crimes, for the commission of which, the offender is liable to indictment or prosecution, and for which, if convicted, he is punishable by fine and



imprisonment, under the public Law.—See the cases cited by Black, and others, *Groenvelt v. Burwell*, 1 Salk. Rep. 200.

The right to punish for contempt, by fine or imprisonment, is a wholly different one, and is enjoyed equally by all Courts, whether they be Courts of Record, or Courts not of Record—without this power, indeed, it is obvious that the transaction of business by the Court, would be practicable only at the pleasure of the bystanders. "For contempts in the face of the Court, Courts not of Record may commit."—2 Bac. Abridg. 499; 1 Coke's Eliz. 581; 2 N. & McC. 110; 2 Bay's Rep. 1.

The practical difficulties in the way of holding these Courts to be Courts of Record, are not less formidable. The fact that records, as matter of evidence, import absolute verity, and can neither be added to, nor taken from, by other testimony, makes it important that they \*be complete and perfect in themselves. They should of course ascertain, and define, with truth and accuracy, what takes place between the parties to them: This, "that there may be an end of disputes." Now, what are the facts in reference to the proceedings of Justice's Courts in this State? They commence suit by summons or warrant, which discloses no cause of action. The defence, on the other hand, is not, in a large majority of cases, even committed to writing at all, and if it be so, is usually without the necessary form and certainty in Law. No regular issue is joined, and the final disposition of the cause is exhibited and shown by certain meagre and laconic entries, made by the Magistrate who try the case, and a majority of which are perhaps in figures. So far from being full and complete in themselves, and so far from being final and conclusive in their nature and effect, they may, with more propriety, be said for all legal purposes, to settle, substantially, nothing at all. Other consequences, scarcely less embarrassing, both to these Courts, and others, into which their proceedings may find way, would come, of holding them to be Courts of Record; but it is considered not material to pursue them. Views similar to these obtain in our sister States. These Courts are, very generally, if not uniformly, held not to be Courts of Record—and this, too, in some instances in which they enjoy a much more extensive jurisdiction than they do in Georgia.—*Taylor v. Turner*, Ala. Rep. 204; *McGhee and Richardson v. Sheffield*, 3 Stew. and Port. 351; *Posson v. Brown*, 11 Johns. Rep. 166; *Hutson v. Lowrey and Neville*, Virg. Cases 2 vol. 42 Metc. and Perk. Dig. 617—which refers to 1 Tyler 450; 2 Chip. 90. The first ground taken in the petition for certiorari, is sustained.

2. In order to pass, with correctness and propriety, on the second assignment of error, in the petition, involving, as it does, the question and doctrine of consolidation of actions, it is important to ascertain in what light the jurisdiction of these Courts is to be viewed under the Law—in other words,

to define whether they are to be favored, or to be not favored.

"Nothing shall be intended to be within the jurisdiction of Inferior Courts, but what is expressly alleged."—2 Bac. 393; 1 Chit. Plead. 250; 4 Dall. 8; 4 Mass. 641.

"They are strictly confined to the \*powers given"—such Courts must not assume constructive powers, that is, powers not literally given, or necessarily consequent upon those given."—2 Bac. 396; 1 Bayl. Rep. 437; 4 Mass. 641.

The rule is still more exacting, when applied to Inferior Courts not of record, and of very limited jurisdiction. "Particular jurisdictions, derogating from the jurisdiction of the Common Law, are to be taken strictly."—Metc. and Perk. Dig. 629—which cites 1 Chipp. 37. This principle is both a rational and a benevolent one: It is based not only on the supposed diminution of chances that any given cause of action will fall within the scope of the authority of a very limited jurisdiction, but on the graver and more weighty consideration, that the legal rights of suitors, are not so likely to be protected, and awarded to them in the Courts of Inferior and restricted jurisdiction, as in those more comprehensively and liberally endowed. Certainly, in point of abstract weight, the citizen who is urging or resisting a demand, however small, is as much entitled to be heard before a tribunal, possessing the knowledge and means necessary to do him effectual justice, as is he who is engaged in a contest involving a larger amount. But as a matter of social policy and convenience, and to effect certain other desirable objects, the smaller demand is exposed, with less reluctance, to the greater hazard. It has ever been deemed wise and prudent, however, by the department of the government, which is charged with the execution of the Laws, to restrict rather than extend, as a matter of construction, that legislation which goes on a compromise of the security of rights. Hence the jealousy with which the jurisdiction of Inferior Courts, has ever been watched and guarded.

To return more immediately to the point before us: As a matter of discretionary humanity to defendants, even in the Superior Courts, "when the plaintiff has two causes of action, which may be joined in one action, he ought so to proceed; and if he bring two actions, he may be compelled to consolidate them, and to pay the costs of the application"—(1 Chit. Plead. 180; 2 Term. 639; Tidd's Prac., 8 ed., 664; Gould's Plead., 4 Chap., 103)—"For the institution of several suits, when all the ends of justice might have been attained by one, is considered oppressive."—Gould's Plead., 4 Chap., 103. When the effect of consolidation

is to oust an inferior tribunal, in \*which the trial by Jury does not exist, and where no record is kept of what transpires, and to bring the parties before a jurisdiction in which the orderly and benign rules, and cautious course of proceeding of the Common Law takes place,

can the motion to compel consolidation be weakened?—Must it not, under the principle already established, be stronger? It should so seem.

When, therefore, several suits have been commenced, by the same plaintiff, against the same defendant, at the same time, in a Court not of Record, on several causes of action, which, in the aggregate, exceed the jurisdiction of such Court, and which, in their nature, are capable of being united in the same action, I take it to be Law, that the Superior Court, which is charged with the superintendency of such inferior tribunal, is bound, on the application of the defendant, to arrest the suits below, and compel the plaintiff, either to sue in the higher Courts, or to abandon litigation. "If there be several contracts between A. and B., for divers sums, each under the jurisdiction of an Inferior Court, but amounting, in the whole, to a sufficient sum, to entitle the Superior Courts to jurisdiction, they shall be sued for in the Superior Courts, and not in an Inferior Court, which is not a Court of Record."—*The Monroe R. R. and B. Co. v. Scott and others: Fed. Union*, 22d March; 1 Vent. 65; *Mod. Cas.* 90; 1 Vent. 73; 2 Kirb. 617; 2 Roll. Ab. 280; 6 Bac. tit. Prohib.

The second ground of error is likewise sustained. I might here dismiss a case which has been very elaborately discussed and considered.—But justice to the interest of the country requires, that I go further, and dispose of another point incidentally connected with this subject, and which is daily presenting itself to me in petitions for certiorari. I refer now to the Act of 1811, a leading object of which was to extend the jurisdiction of the Justices' Courts, to certain newly supposed cases. This Act is reported in Prince's Dig. 501.

The first section is in these words: "That from and immediately after the passage of this Act, it shall and may be lawful for any person or persons, who has or have, in his, her or their hands, any bond, note, or account, for any sum exceeding thirty dollars, and the amount of which has been reduced by any payment or payments to a sum under thirty dollars, and such payment or payments are endorsed on the back of said bond or note, or when any bond, note or account, or other agreement, (gaming debts excepted,) which in its original exceeds the sum of thirty dollars, but has been reduced by bond, or bonds, note or notes, although of equal date, and payable at the same period, to a sum or sums of or under thirty dollars, then, and in every such case, it shall and may be lawful for every person or persons who has or have in his, her or their hands any such bond or bonds, note or notes, or accounts, as aforesaid, to bring suit thereon in the Magistrate's Court of the district where the said debtor or debtors may reside, and the Magistrate before whom such suit is brought may give judgment, for whatever appears to be due upon such bond or bonds, note or

notes, or account, provided the said judgment does not exceed on any one trial the sum of thirty dollars." In order to understand the reason which led to the passage of this Act, as well as to enable us to dispose of it on legal principles, it is necessary to refer to the jurisdiction of Justices' Courts, as it at that time found place in the Constitution of the State. The 5th Sec. of the 3d Art. of the Constitution, as it then stood, was in these words: "The Justices of the Peace shall be nominated by the Inferior Courts of the several counties, and commissioned by the Governor; and there shall be two Justices of the Peace in each Captain's district, either or both of whom shall have power to try all causes of a civil nature within their district, when the debt or liquidated demand, does not exceed thirty dollars, in such manner as the Legislature may by Law direct."—See the Constitution of 1798; *Watk. Dig.* 40. This provision remained a part of the Constitution until the year 1819, when the limitation contained in it was removed by an amendment.—(see *Lam. Dig.* 177.) The validity of the Act of 1811, however, must still be tested by reference to the Constitution, as it existed at the time the Act was passed. This is obvious. With this clause of the Constitution in view, there is no difficulty of understanding the motives and intentions of the movers of the Act in question. It was to enable parties to effect an escape, from a constitutional restraint, or in legal parlance, to perpetrate a fraud on the Constitution. The policy of the Act is apparent,—to enlarge by indirection the powers of these lesser Courts. This, the Legislature had no constitutional authority to do. It is clear, that such object could not have been accomplished by direct means, and it is a rule in Law, as it is a maxim in morals, that what cannot be done directly, cannot be done indirectly. If the Constitution limited the jurisdiction of these Courts, at the time that Act was passed, to the sum of thirty dollars, (and I have shown that it did,) neither individual suitors, nor the Legislature, could help them to more.—They must rest on their grant. It is clear, that the effect of that Act, if it is to be executed, is to remove at once all restraint; or limit on the jurisdiction of these Courts, so far as the amount, or size of the demands of which they are to take cognizance, is concerned. Debts of any and every imaginable size, are thus brought within their embrace. A. owes B. one thousand dollars, for which B. holds A.'s note. All will agree, that this demand, while in that form, could not be litigated in the Justices' Courts, even although the parties to the debt should expressly consent to it. Yet the Act proposes to enable them, by the shallow artifice of substituting forty small notes, for twenty-five dollars each, "although of equal date, and payable at the same period," and although sued in actions returnable to the same term, to elude the constitutional impediment, and get right-



fully into a Court of a jurisdiction limited, in the very face and by the plain letter of the Constitution, to demands not exceeding thirty dollars. The proposition, in a legal point of view, is extravagant. In the case put, what are the small notes but representatives of connected portions of the same contract? They do not, and cannot, in such circumstances, represent independent contracts. There are, in fact, in the case supposed, no independent contracts to be represented. The debt is equally before and after the division of the large note, in the hands of the contracting parties, a single debt of one thousand dollars, and the parties, with the motive, and for the purpose supposed, can make of it, so far certainly as the constitutional question is concerned, nothing more or less. It is no answer, that the defendant, having voluntarily agreed to give the creditor this advantage, ought not to be permitted to profit by a breach of faith. The reply is, that the jurisdiction of the Courts of Justice, is a matter to be determined by the authority which creates them, and can be neither enlarged nor abridged, at the will or pleasure of individuals. On objects beyond the boundaries set to their authority, they cannot, on the mere motion of suitors, or on any other pretence, legitimately embark the official means and agencies with which they are clothed.

Apart, then, from all considerations  
61 of mere agreement or consent, \*on the part of individuals, and as a matter of obligation and good conscience, on the part of the Courts themselves, they are compelled, in all circumstances, to abstain from other powers than those delegated to them. To this point, the authorities are numerous and clear.

"A deed executed for the purpose of giving jurisdiction to the Federal Court, will not be countenanced, so as to sustain the jurisdiction."—1 Wash. C. C. 70.

"Confessing a judgment in a Justice's Court, will not give it jurisdiction."—3 Caine's Rep. 129.

"Consent of parties cannot confer jurisdiction in a matter that is excluded by Law."—3 McCord 280; 1 Const. Rep. 478; Minor's Rep. 65; 7 Port. 37; Charlton's (Rob't M.) Rep. 298; (by Judge Law, in 1830;) Metc. and Perk., in their Dig. of American cases, cite to the same point—these additional authorities, to which I have not access, and on which I do not, therefore, rely; 1 Breese 32; 2 Yerg. 441; 3 Litt. 332; J. J. Marshall 476; 1 Bibb. 263; 6 Litt. 303; 5 Monr. 388; Kirby 111; Wright 21, 176. A few cases, bearing more immediately upon the true nature of the Act of 1811, and the construction proper to be placed upon it, and sustaining fully the decision that I am now making, shall be quoted. "A Magistrate, bound to act within his district in civil cases, and no where else, cannot sustain a jurisdiction beyond thirty dollars, and such must be

the entirety of the demand, as not to be susceptible of any division for the purpose of giving jurisdiction, upon distinct citations to different terms."—Charlton's (Rob't M.) Rep. 214; 15 Johns. 229; 16 Johns. 121. "A. owes B. eighty dollars, and gives four several single bills for twenty dollars each, payable at one day, and at one, two, and three months after date, respectively; and after the last is due, B. obtains warrants from a single Magistrate, to recover these several sums; A. may obtain from the Superior Court a writ of prohibition to prevent the Justice from proceeding, because the Justice has not jurisdiction in the cases; all the notes constituting only one debt." 2 vol. Virg. Cases, 42. Can a case be imagined, more immediately in point? It cannot be important to cite other authorities than these—numerous and respectable, and as I may add, uncontradicted, as they are.

62 \*Yet I do not wish to be understood as saying, that a debt originally exceeding thirty dollars, may not be reduced below that sum by actual payments, so as to be brought within the jurisdiction of the Justices' Courts, nor that the parties to the debt above thirty dollars, may not legitimately sever it, for the purpose of negotiating a part or parts of it, and for the purposes of giving different days of payment, so that the same be bona fide, and not merely colorable, and with a view to defeat the Constitution; and when so severed, different suits may not be brought in the Magistrates' Courts, on the several portions into which the original demand may have been divided. These are all and useful rights of property, which were recognized from the beginning; which needed no confirmation by the statute, and which should by no means be arrested for the citizen. But, so far as the statute is relied upon to justify the division of an entire debt, into parts, with the simple view of giving jurisdiction, as I have shown, it must be deemed to be nugatory and void.

It is not to be denied, that this decision is to work a very great retrenchment of the jurisdiction of the Justices' Courts, as heretofore taken and exercised in this State. Impressed with the consciousness of this, I have bestowed on the several points disposed of by this decision, a degree of labor and investigation commensurate, as I hope, with the extent of the interest, and the consequent responsibility, involved. A protracted and careful examination of the whole subject, has led me to the conclusion that the decision is demanded on principle, as I have shown it to be in literal pursuance of authority.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

Holt & Alexander, for the Plaintiffs, in certiorari.

S. A. Bailey & A. H. Cooper, for Defendants.

## 63 \*HARRIS SUPERIOR COURT.

## Kendrick v. Glover.

March Term, 1842.

## 1. Assignment of Open Account—Actions by Assignee.\*

—An open account is not assignable, so as to authorize the assignee to maintain an action in his own name.

## 2. Same—Same.—A promise to pay the account to the assignee, is a mere naked promise, and does not confer the right to sue in his own name.

The petition, in this case, states, that the plaintiff, Kendrick, commenced an action against the defendant, Glover, in the Justice's Court, for the 695th dist. Ga. Mil., of said county, returnable to February Term, eighteen hundred and forty-two, upon an open account of eighteen dollars eighty-seven and a half cents, in favour of one Cornelius D. Shell, on which was endorsed these words, to wit: "I except the within account"—to which endorsement the name of the defendant was subscribed: that at the first term of the Court following the commencement of suit, the defendant appeared, and pleaded that he owed the plaintiff nothing—that at April term of the Court the case was carried to the appeal, by the consent of the parties, and at the May term following, was submitted to the Jury—that on the trial before the Jury, the account was exhibited in evidence by the plaintiff, together with proof (to which the defendant objected) that at the time the endorsement above described was made on the account, the defendant promised the plaintiff to pay him, the plaintiff, the amount of the account. The petition further states, that the defendant then gave in evidence to the Jury a summons of garnishment in favour of one William C. Osborn, which was served on the defendant subsequent to his promise to pay the account to the plaintiff in the action below, requiring the defendant to appear in an attachment pending in the Justice's Court for the 672d dist. Ga. Mil. of said county, in favour of said Osborn against

64 \*the said Shell, and answer what he was indebted to the said Shell—that the defendant then proved that he appeared in obedience to said summons of garnishment, and deposed that he was indebted to the said Shell in the matter of the account on which the suit in favour of Kendrick was instituted, and that thereupon judgment was entered up against the defendant as garnishee, at the instance of Osborn, for the sum of eighteen dollars and fifty cents—that execution was subsequently issued upon that judgment—and that by virtue of it the defendant was forced

to pay, and did pay on the fifteenth day of March, in the year eighteen hundred and forty-two, the sum due from him upon the account, to the said Osborn: nevertheless, the Jury rendered a verdict in favour of the plaintiff, and against the defendant for the sum of eighteen dollars and fifty cents.

The petition complains that the Court below, committed error:

"1. In allowing said account and words written on the back thereof, to go to the Jury as evidence of debt due from the defendant to the plaintiff. 2. In admitting the evidence of a promise on the part of the defendant, at the time of the making of the endorsement upon the account, to pay the same to the plaintiff. 3. The Jury committed error in finding a verdict against the petitioner after he had been compelled by due course of Law to pay the said debt, or amount of said account, under garnishment, to said Osborn, one of Shell's creditors." The answer of the Justices to the writ of certiorari establishes the truth of the facts stated in the petition.

That open accounts are in their nature not negotiable either by verbal or written transfer, is a familiar principle of the Law. The possession of the account in favour of Shell, by the plaintiff, was no proof, then, of the right of the plaintiff to demand the money due upon it. Any acknowledgment, therefore, of the justice of the account, or any promise to pay it on the part of the defendant, even though made to the plaintiff in the case below, could have operated alone to the benefit of Shell, in whom the right and title to the account still rested. No obligation, either legal or moral, seems to have existed on the part of the defendant, to pay the account to the plaintiff, and as no consideration in the way of gain on the one hand, or loss on the other, is alleged to have passed between the parties, the

65 \*promise, if made by the defendant, was a mere naked one, and could have created no foundation, in Law, for the suit which was brought. Upon the plaintiff's own showing, then, the defendant was entitled to a verdict below. It is not important to discuss further the assignments of error.

Let the prayer of the petitioner be granted, and a new trial below be had.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

Crews, for Glover.  
Ingram, for Kendrick.

66 \*Reuben J. Crewes and Henry Moffit, Executors of Charles Phillips, Dec'd, v. Ambrose Davie and Ann Davie.

March Term, 1842.

## \*Assignment of Open Account—Actions by Assignee.

—The assignee of an open account, that was not transferred in writing, must bring his action thereon in the name of the party to whom it was originally payable. *Kirkland v. Dryfus*, 103 Ga. 127, 29 S. E. Rep. 612.

1. Equity Jurisdiction—Order to Arrest Property.—An order to arrest property upon a threat of its removal from the State, until the defendants give bond, is illegal. Such a procedure is not warranted by precedent or Law.



This bill states that Charles Phillips, late of Harris county, departed this life in the year eighteen hundred and thirty-six, leaving a will, of which the complainants were appointed the executors—that by his will, he gave to his wife, Ann Phillips, now Ann Davie, one of the defendants, a portion of his property, real and personal, during her life, with a provision that if she married after his death, it should be separated from other portions of his estate, with which it was otherwise to remain, and be enjoyed in common by her and other legatees, and be delivered to her, subject to be sold after her death, and the money arising therefrom to be equally divided among the various children of the testator. The bill further states, that in the year eighteen hundred and forty, the said Ann Phillips intermarried with Ambrose Davie, the other defendant, and the property above alluded to was received by the defendants into possession, in conformity with the provisions of the will, and still remains in their possession—that the defendants are now threatening and preparing to remove beyond the jurisdiction of the Courts of this State, to wit: into the State of Kentucky, and to carry with them all that portion of said property which is movable and personal in its nature, consisting, among other things, of various valuable negro slaves—and that the complainants have duly qualified and taken upon themselves the execution of said will, and are apprehensive that unless the interference of the Court of Chancery be had to prevent the removal of said property from the State, that the complainants will be unable to execute that portion of the will which provides for the division of the property in question among the children of the testator, on the death of the defendant, Ann Davie.

67 \*The bill prays, among other remedies, for an order to the Sheriff of the county, requiring him to arrest the property in dispute, and take, of the defendants, bond and security to have the said property forthcoming upon the death of the said Ann Davie, to answer the claim of the executors and the children of the testator in the premises. The Chancellor granted an order at Chambers, in conformity with the prayer of the bill, before time to answer was allowed, and the Sheriff has executed the same in compliance with the exigency thereof.

To the bill of complaint a general demurrer is filed, and upon that demurrer, has been predicated, in argument, a motion to rescind the order which has been granted, in the event the bill should be retained for other purposes.

It should be remarked, that the statute of this State, "to authorize the issuing of writs of ne exeat, at the instance of persons claiming personal property in remainder and reversion, and to preserve the rights of such persons," reported in Prince's Dig. 467, and which has been referred to, in argument, as furnishing, possibly, a remedy suitable to the case made by the bill, is not

relied on by the complainants' counsel. It is admitted by them, that the provisions of the Act which prescribe terms to those who seek the benefit of it, have not been complied with. They place the prayer of the bill, upon the general principles and practice of the Courts of Chancery, apart from statutory regulations.

No precedent for this order has been read from the books, and after a very careful and extensive examination of them, I have been able to find none for it myself. It is true, that an order for the arrest of property and the change of the possession of it, was passed by Judge Watties, in an action of trover brought by Robertson v. Bingley and Leslie, upon the ex parte statement, in Chancery, of the plaintiff, to the effect that the defendants were about removing the property, but the proceeding was discounted by the Court of Appeals, to whose judgment it was ultimately referred.—1 McCord's Ch. Rep. 333. The principle involved in the case of Robertson v. Bingley and Leslie, is somewhat analogous to the one presented in the case at bar. The attempt to uphold this proceeding is

68 based upon \*the supposed necessity of the case. Necessity alone, supposing it to exist, cannot justify it. It is the office of Courts of Justice to apply existing remedies—not to invent new ones. Cases are cited at bar in which, as it is represented, similar orders have been issued and sustained by the Chancellors of this State. If so, I must dissent from the doctrine on which they go. The working of these processes may become very embarrassing to the Chancellor, in events very likely to happen where they adventured upon. Suppose the defendant, in such a case, is unable or unwilling to give the required bond—What disposition is to be made of the property that has been seized? Shall it be turned over into the hands of the complainant, at hazard, or upon the execution of forthcoming bonds by him? Suppose that the complainant, in turn, is unable or indisposed, to give the necessary security, is the property, at the end of a course of unsuccessful experiments to improve the security of it, to be delivered back to him from whom it was arrested at the outset?—or shall it, for the want of another taker, remain in the hands of the executing officer until consumed perhaps in costs, embarrassing to all parties, and benefitting no one? Judge Watties, in view of these contingencies, in the case quoted, incorporated an alternative provision in the order issued by him, for the sale of the property. A disposition of the subject matter of the suit so obviously at variance with the right of property and all precedent, scarcely requires a serious refutation. Should such a remedy, then, as the one applied for, be deemed proper to be introduced into the administration of the Law, the cases suitable for the exercise of it should be specified, and the mode in which effect is to be given to it, defined by legal enactments.

Let the motion to set aside the order which

has been executed upon the defendants be granted, and on complainants' motion, the bill is dismissed.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

69 \*MUSCOGEE SUPERIOR COURT.

The State v. Wm. F. Luckie.

At Chambers—January 1st, 1842.

1. **Debts Due Partnership—Collection Where Partner Insolvent—Judgment Debt.**—If one of two parties plaintiff being partners in trade, take the benefit of the insolvent Law, and return upon his schedule, the debt due by judgment to the firm, and no trustee is appointed in terms of the Law, to take charge of the assets returned, no process can be issued for the collection of the judgment.

2. **Same—Same—Right of Other Partner to Collect.**—If one of two partners take benefit of the Insolvent Law, the other partner has no authority to collect such of the debts of the firm as are placed on the insolvent's schedule.

The facts in this case, as they appear by the return of the Sheriff, (Luckie,) and are agreed on by the parties in interest, are as follows: In the month of January, eighteen hundred and thirty-nine, Calhoun & Bass obtained a judgment in the Superior Court, of this county, against George W. Ross, for the sum of five thousand dollars. On that judgment, and within the last few days, a ca. sa. has been issued, returnable to the next term of the Inferior Court, by virtue of which the defendant has been arrested, and is now held in custody. At the last term of the Superior Court, in this county, and prior to the issuance of the ca. sa., one of the plaintiffs, to wit: Calhoun, took the oath, and received the benefit of the "Act for the relief of honest debtors," reported in Prince's Digest 291. In the schedule of property filed by Calhoun, preparatory to his discharge, is embraced the debt for which the defendant is now held in custody, and the judgment (and a fi. fa. which has heretofore been issued upon it) were, at the time of his discharge, placed within the control of the Court. An Act of the Legislature, passed December 5, 1801, reported in Prince's Digest 286, provides, that "if any part of the property so given up shall consist of judgments, bonds, notes, contracts, securities, mortgages, liquidated

70 \*shall order the same to be assigned over, by said debtor or debtors, to some fit or proper person, or persons, whom a majority of the creditors shall nominate, to the use of and in trust for such judgment creditors, which, when collected by the said trustees, together with the money which may be in the hands of the Sheriff, arising from the sale of any property of such debtor, or debtors, shall be subject to the further order of and after the payment of the costs and charges, shall be distrib-

uted by the said Court agreeably to the Laws within this State, for the payment of judgments and executions."

At the time the judgment on which this ca. sa. was issued, with the balance of the property owned by Calhoun, was reported to the Court, and a discharge from personal confinement awarded to Calhoun, the attention of the creditors and their counsel was called to the subject of a nomination of trustees, to take charge of that portion of the property returned, which was not reduced to possession; but time was asked for to agree upon a nomination, which was, by the Court, given to them. The subject seems, from that period, to have passed from the minds of those more immediately interested, and the Court adjourned without the making of any order of appointment in the premises. Since the adjournment of Court, and without authority or warrant of Law, the ca. sa. which has led to this motion has been issued, by the Clerk of the Inferior Court, and by the Sheriff levied upon the body of the defendant. It is from the custody of the levying officer that the defendant, Ross, seeks, by this writ of habeas corpus, to be relieved. That the defendant should be discharged from the custody of the Sheriff, and the ca. sa. itself cancelled, results from the fact that the debt which lies at the foundation of the ca. sa. was placed in the custody of the Superior Court, at its last term, and has not from thence been removed by competent authority. The control of this demand was given to the Court under the Law for the benefit of the creditors of Calhoun, and it must be, by the order of the Court, collected and distributed. This duty cannot be performed, consistently with the right of the Clerk and Sheriff, on their own voluntary motion, or by the instruction of the plaintiffs or their agents, to issue and execute a ca. sa. to coerce the payment of the debt. The legitimate result of the right of the plaintiffs to insist upon the prosecution of this ca. sa., is their right to receive the money due upon it. It is equally the privilege of

71 the defendant, too, \*to pay the money to either of the plaintiffs or to the Sheriff, if he be liable to the operation of the ca. sa. at the pleasure of the plaintiffs. Suppose the money thus paid, and in vacation, I know of no means by which the Court can, in the present situation of the case, protect and secure the funds, or any part of it, to the creditors of Calhoun. The right of Bass to receive a moiety of the money due from the defendant, cannot be used as a pretext for permitting the ca. sa. thus to proceed. That right the Court can and will respect and protect in the distribution of the money, when it shall be collected by its appropriate agents for this purpose, and be by him submitted to its order; but if the money be paid in present circumstances on the ca. sa., it may pass beyond the control of the Court. The proper custody of the demand, and the trust connected with it, then require that the ca. sa. in question be stayed. This, of course,



without prejudice to the demand on which it is founded.

The judgment of the Court, on this writ of habeas corpus, is, that the defendant be discharged from further confinement, and that the ca. sa., by virtue of which he has been arrested, be returned, and, by the Clerk who issued it, cancelled.

It is ordered, that the Clerk enter this decision upon the minutes of the Court, and file the same of record.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

72 \*FAYETTE SUPERIOR COURT.

Windom West v. A. & J. Johnson.

March Term, 1842.

**Limitation of Actions—Part Payment—Proof.**—A credit entered on a note barred by the statute of limitations, does not of itself take the case out of the statute of limitations. There must be proof that the payment on which the credit was entered was actually made.

The action in the Court below, upon which the above certiorari was predicated, was founded upon a promissory note for the sum of Twenty dollars, due on the 25th of December, 1833—which had a credit on it of Three dollars, dated 14th July, 1836—and the suit was commenced on the 12th May, 1840. The statute of limitations was pleaded, and the Court below overruled the plea, deciding that the credit on said note took the case out of the statute: this was the ground of error alleged in the petition for certiorari, and the Justice's return sustained said allegation. Upon the hearing of the certiorari, the Court is of opinion that the credit on the note is not of itself a sufficient acknowledgment of the debt to take the case out of the statute, and no proof having been adduced to shew that the money was in fact paid, to prove a promise to pay the note. It is therefore ordered,

**\*Limitations—Proof of Part Payment—Indorsement on Note.**—In *Black v. Holland*, 102 Ga. 523, 27 S. E. Rep. 671, the court said: "A credit on a promissory note, in order to constitute a new point from which the statute of limitations will commence to run, must be in writing and signed by the maker or by some one by him authorized; or, if unsigned, such credit must be in the handwriting of the maker himself. An unsigned credit, written by an agent of the maker, will not suffice to renew the promise or to constitute a new point from which the statute will run." *Approved in Moore v. Moore*, 103 Ga. 517, 30 S. E. Rep. 535. As to the sufficiency of the endorsement of a credit on a note to prevent the bar of the statute, see also, *Stone v. Parmalee*, 18 Fed. Rep. 280; *Webb v. Carter*, 62 Ga. 415; *Vines v. Tift*, 79 Ga. 301, 7 S. E. Rep. 227; *Watkins v. Harris*, 83 Ga. 680, 10 S. E. Rep. 447 (*disapproving Green v. Juban*, 66 Ga. 531); *Crockett v. Mitchell*, 88 Ga. 166, 14 S. E. Rep. 118; *Foster v. Cochran*, 89 Ga. 406, 15 S. E. Rep. 551.

that the certiorari be sustained, and the judgment below set aside.

WILLIAM EZZARD, J. S. C. C. C.

73 \*William Vernon v. William Miles,  
Plaintiff Below, and Jephtha Landrum  
and Zadock Davis, Justices.

March Term, 1842.

**Usury—Excessive Interest Added into Note.**—On proof that usurious interest is added into and constitutes a part of the consideration of a note sued on, a verdict cannot be rendered for the whole amount. The interest must be deducted.

The certiorari in this case, complained of certain proceedings had in the Court below, in two cases, in favour of William Miles v. William Vernon and James S. Vernon and W. M. Pellum, founded on two promissory notes, in which it was alleged that a part of the consideration of said notes was usurious. It appeared by the return of the Justices, that it was proven on the trial below, that the notes sued on were given to renew other notes, and that twenty-five per cent. was calculated on said notes, and added in the face of the new notes, notwithstanding which the Jury found a verdict for the full amount of said notes, with interest.

The Court is, therefore, of opinion, that the finding of the Jury in said cases was contrary to Law—the usury having been fully established by the proof. It is therefore ordered, that the certiorari be sustained, the verdicts set aside, and new trials ordered.

WILLIAM EZZARD, J. S. C. C. C.

74 \*James Hunter v. Eli Edmundson and  
George C. King, Justices, &c.

February Term, 1842.

**Executions—Property Subject to—Case at Bar.**—The part of a crop to which the cropper is entitled, under a contract that his portion was to be assigned him, after he paid his employer for provisions with which he should furnish him while he was making the crop, is not the subject of levy until the provisions are paid for.

This is a certiorari requiring the Justices to send up the proceedings had in a claim case tried before them on an execution in favour of ——— *Herring v. Crawford Morris*, defendant, and James Hunter, claimant. It appears by the return of the Justices, that the fi. fa. was levied upon a certain quantity of corn and fodder, as the property of defendant, in the possession of claimant, to which a claim was filed, and proof shewed that defendant lived with claimant as a cropper, and was to have a certain portion of the crop, after he had paid claimant for the provisions with which

claimant should furnish him during the year, and that the whole crop was to remain the property of claimant until said provisions were paid for, and there was no proof that said provisions had been paid for, notwithstanding which the Jury found the property subject, which verdict was contrary to evidence.

It is therefore ordered, that the certiorari be sustained, and a new trial ordered.

WILLIAM EZZARD, J. S. C. C. C.

75 \*MERIWETHER SUPERIOR COURT.

J. N. Vanpelt & Co. v. Elisha Kendall.

February Term, 1842.

**Failure of Consideration—Evidence.**—In an action on a note for a wheat fan, "if it proves to be a good one and performs well," it is not necessary on a plea of failure of consideration for the defendant to prove that he offered to return the fan. It is sufficient to prove that it was worthless.

This was a certiorari requiring the Justices of the Peace to send up their proceedings in the above stated case, then lately tried before them, upon the petition of the plaintiffs, in which they alleged, that the said action was predicated upon a promissory note for the sum of Twenty-four dollars, to which the defendant pleaded both a total and partial failure of consideration, which plea, it is alleged, was supported by proof that said note was given for a wheat fan, which broke the first day it was used, and which the witness stated he considered worth nothing; but the error complained of was, that the defendant had kept the fan in his possession for several months, and had made no offer to return it; also, that the Court had permitted the defendant's counsel to conclude the argument in the cause, notwithstanding he had introduced testimony, and that the Jury had returned a verdict for defendant. The return of the Magistrate sustained the allegations as to the failure of the defendant to prove a return of the fan, and also as to the fact of the defendant's counsel having the conclusion of the argument before the Jury. But a copy of the note on which the action was founded, was attached to the return, which reads as follows: "By the twenty-fifth of December next, I promise to pay J. N. Vanpelt & Co. twenty-four dollars for a wheat fan, if it proves to be a good one, and performs well, for value received of them, this 17th March, 1840. E. Kendall."

The Court is of opinion, that inasmuch as the note was conditional  
76 \*upon its face, that the defendant was not liable to pay the money, unless the fan had proved to be good and had performed well, in terms of said note; and it having been proven on the trial that it was of no value, it was not necessary, to enable the defendant to set up his defence,

to prove a return or offer to return said fan. Upon the second ground of error complained of, the Court is of opinion, that the Court did commit error, in awarding to defendant's counsel the conclusion of the argument; but this being a matter of practice and not an error of Law, and it being a matter which could, under the circumstances of this case, have done no injury to the party plaintiffs, it is not considered a sufficient ground for sustaining the certiorari. It is, therefore, ordered, that the certiorari be dismissed, and the proceedings below be affirmed.

WILLIAM EZZARD, J. S. C. C. C.

McMath, for Plaintiffs.  
Underwood, contra.

77 \*TROUP SUPERIOR COURT.

Ezekiel Brown v. Jas. J. Lester.

May Term, 1842.

1. **Evidence—Nonexpert Opinion—Health.**—It is competent for a person, not being a physician, to testify to the general health of a person.

2. **Same—Statements Showing Physical Condition.**—The sayings of a sick negro to her physician, cannot be given in evidence, except as to the disease of which she is afflicted at the time of the conversation.

This was an action founded upon a promissory note given for a negro woman. The defence set up was a total and partial failure of consideration, upon the ground that the negro was unsound, and therefore of little or no value. At the October term, 1841, of said Court, said case was tried on the appeal, and a verdict rendered for the plaintiff, for the full amount of the note, when defendant's counsel moved for a new trial, upon the following grounds:

1st. Because the Court erred in allowing the plaintiff to give in evidence the opinions of the witnesses not being physicians, with their reasons as to the condition of said negro before the sale, and before she was in the possession of the plaintiff, the same being objected to by defendant's counsel.

2d. Because the Court erred in rejecting the complaints and statements of the negro to the attending physicians when the same was offered to be proved by defendant.

The testimony objected to, which was admitted by the Court, and which is the ground of error assigned in the first ground

\***Evidence—Nonexpert Opinion—Health.**—In *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 546, it is said: "No witness who is not an expert as to the matter about which he is testifying, can give an opinion unless he states the facts on which that opinion is founded. This rule applies to one by whom it is proposed to prove the condition of the health of a party." See *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Chattanooga R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. Rep. 848.



of the rule, is the evidence of a witness by the name of John G. Mayne, contained in his answers to interrogatories: On being asked, whether he knew said negro, and whether she was sound or unsound, 78 he answers, "I have known the girl for several years. I cannot say what has been her condition since Ezekiel Brown bought her; but during the time I knew her, I always supposed her to be healthy and sound." He then further states—"My plantation joined Mr. Hayes, who formerly owned the girl, and during the time, I frequently saw the girl at my house, with my black people, as well as other places, and I infer that she was healthy, as I knew she grew fast, and had every appearance of health." Now the objection to this testimony, as stated in the rule, is, that the witness was permitted to give his opinion, with his reasons for that opinion—the expression of the witness is, "I always supposed her to be healthy and sound." Now the fact of whether a person be healthy or not, is such a fact as a witness could scarcely swear to, positively, and the law only requires the best evidence which the nature of the case will admit of. But the witness does not stop here, but goes on to state, that he had been acquainted with her for several years, and that he saw her frequently, and knew that she grew fast, and had every appearance of health—thus, not giving his mere opinion as to the fact, but stating the reasons upon which that opinion is predicated—which, it seems to me, are entirely satisfactory, and perhaps much more so than the testimony of a witness who might have sworn positively to the fact, to wit, that she was sound and healthy, without stating his reasons.—I am, therefore, of opinion, that the Court did not err on this ground.

The second ground of error complained of is, that the Court erred in rejecting the complaints and statements of the negro, to the attending physicians, when the same were offered to be proved by defendant.

This ground is predicated upon the rejection, by the Court, of a portion of the testimony of Drs. Phillips & Patten, taken also by interrogatories. These physicians were examined for the purpose of proving that the negro was diseased. The evidence was, that the negro was sold by Brown to Lester on the 1st of March, 1839; and the physicians testified, that they were first called to visit the negro in Sept. 1839—that they found her sick, labouring under remittent fever, with very strong asthmatic symptoms, also symptoms of dysmenorrhæa, which they found, on enquiry, to have existed ever since she had been in the possession of Lester, and the negro stated, 79 "sometime \*previous to his purchasing her from Brown. But, they say, as to the length of time she had been labouring under this disease, we have no means of ascertaining, only from the history, of the case as given by the negro. That portion of the testimony, which consisted of the sayings of the negro as to the com-

mencement of her disease, and the length of time which she had been labouring under the same, was rejected by the Court, and this is the error complained of. It was contended, by defendant's counsel, that the sayings of the negro to the physicians, were competent testimony to prove the nature of the disease, and also, as to the time of its commencement—and the case of *Grey v. Young*, (Harper's S. C. Rep'ts, page 38,) was relied on. It is true, that it is laid down in that case, that the complaints and declarations of a slave made to his physician, are admissible for the purpose of shewing the nature of the disease; but this rule is confined to the disease under which the slave is labouring at the time, as mere indications of the presence of the disease:—but this rule cannot be so extended, as to make the sayings of the negro, evidence, to show that he had been diseased at a period anterior to that time, or to prove that the disease had existed for any considerable length of time. This would be making the sayings of the negro evidence to prove a distinct fact which is susceptible of being proved by other testimony, and therefore the same necessity does not exist for it as in the other case. This distinction is fully sustained by the opinion of the Court delivered in the case of *McClintock v. Hunter*, as reported in *Dudley's S. C. Repts.* 328.

The testimony of the physicians as to the commencement of the disease being dependant alone upon the sayings of the negro, and the sayings being in the opinion of the Court clearly inadmissible to prove that fact, I am of opinion, that there was no error in rejecting said testimony.

The motion for a new trial is therefore refused.

7th May, 1842.

WILLIAM EZZARD, J. S. C. C. C.

#### 80 \*MERIWETHER SUPERIOR COURT.

John Doe, Edward S. Meadows and Priscilla Meadows v. Richard Roe, Casual Ejector, and Walter Barry, Tenant in Possession.

February Term, 1842.

1. Parole Evidence—Latent Ambiguity.—Parole evidence is admissible to raise a latent ambiguity in a grant, and then to explain it.
2. Same—Same—Mistake in Name of Grantee.\*—If

\*Parol Evidence Admissible to Identify Grantee in Deed.—Parol evidence that the grantee intended in a grant to "Alfred Brown" was Alfred Bowen, is admissible, upon proof that there was no such person as "Alfred Brown" who could have been the recipient of such grant. *Bowen v. Slaughter*, 24 Ga. 338, 71 Am. Dec. 135. See *Walker v. Wells*, 25 Ga. 141, 71 Am. Dec. 164. See also, *Hicks v. Ivey*, 99 Ga. 648, 26 S. E. Rep. 68.

In *Tuggle v. McMath*, 38 Ga. 648, where a grant is-

there be a mistake in the christian name of a grantee, it may be explained by parole evidence.

This is an action of Ejectment brought for the recovery of lot of land No. 134, in the eighth district of originally Troup, now Meriwether county. Upon the trial, plaintiff introduced in evidence a grant from the State of Georgia to James Meadows, orphan, of Harrol's district, Upson county, for said lot of land, bearing date on the 22nd day of March, 1834, and which in its body, to wit: the tenendum et habendum conveyed the said lot of land to the said James Meadows. He then proposed to introduce parole testimony, to show that Edward S. Meadows, and not James Meadows, was the grantee intended. This motion was resisted by defendant's counsel, upon the ground that parole testimony could not be admitted for the purpose of varying or explaining a written instrument. The Court overruled the objection, and permitted the evidence to go to the Jury. This testimony proved that Edward S. Meadows was an orphan at the time of giving in for draws in the land lottery of 1825 and 1826, and that he at that time resided in Harrol's district, Upson county, and that there was no person by the name of James Meadows residing in that district or county, and that the only orphan who resided in said district by the name of Meadows, at the time of taking in the names of persons entitled to draws in said lottery, was Edward S. Meadows, upon whose demise the plaintiff

81 relied. It was further \*proved, that Edward S. Meadows was an orphan of James Meadows, who had departed this life many years before in the county of Putnam. It did not appear that any individual by the name of James Meadows, or any other orphan by the name of Meadows, or any other name, had at any time set up a claim to said lot of land. The plaintiff proved the locus, and that the rent of said premises was worth, in the opinion of one witness, thirty dollars per annum, and one hundred dollars per annum, in the opinion of another. The Jury found for the plaintiff, on the demise of Edward S. Meadows, the premises in dispute, and one hundred and ninety-four dollars for mesne profits. The counsel for defendant then moved for a new trial, upon the following grounds:

1st. Because the Court committed error, in permitting parole evidence to shew that Edward S. Meadows, one of the lessors of the plaintiff, was the grantee intended, when the grant introduced by him was to James Meadows, orphan.

2nd. Because the Court committed error,

sued to Isaac O. Holland, orphan, and it appeared by parol that there was no such person as Isaac O. Holland, orphan, in the district at the time of giving in for draws, but that Isaac O. Holland's orphan, Mary Holland, was in the district and did give in for a draw, it was held that parol evidence of these facts might be given to the jury, not to prove a mistake in the name of the grantee, but to give effect to the grant, by identifying the person intended as the grantee.

in deciding that parole evidence could be introduced by the plaintiff to explain a latent ambiguity, when there was no ambiguity on the face of the grant, nor any ambiguity raised by any other testimony.

3rd. Because the Court permitted the plaintiff to introduce parole evidence to contradict the face of the grant which he had introduced himself in evidence, by shewing that Edward S. Meadows was the person intended to be the grantee, instead of James Meadows, (orphan,) the person named in the grant.

4th. Because the verdict was contrary to both Law and evidence.

It will be perceived, by an examination of the rule nisi, that the first three grounds are substantially the same, to wit: That the Court erred, in permitting the plaintiff to introduce parole testimony to prove that Edward S. Meadows, one of the lessors of the plaintiff, was the grantee intended, instead of James Meadows, the person named in the grant, or they are so nearly so that I shall consider them all together.

It is a general rule of Law, well

82 established and long acquiesced \*in, that parole testimony cannot be admitted to vary or contradict a written instrument, yet we find in practice that this, like most other general rules, under peculiar circumstances, is subject to certain modifications. There is a marked distinction between varying or contradicting a written instrument, and giving it effect by shewing its application to the proper subject matter. The provisions of any instrument in writing may become nugatory without the assistance of parole testimony. In fact, it is difficult to conceive in what manner the provisions of a grant can be applied to its subject matter, without the aid of extrinsic evidence. However clear and unambiguous a grant may be on its face, yet without parole testimony to define its location, to prescribe its boundaries, or identify its grantee, it might be rendered unavailing. Upon the same principle it has been held, that where a mistake occurs in a grant in describing a grantee, or the thing granted, parole testimony is admissible to give effect to the grant by explaining the mistake; if it were otherwise, it will be perceived that the rule would be productive of the most mischievous consequences. I apprehend that, upon a thorough examination of all the authorities, the settled rule will be found to be this:—that where the instrument contains a patent ambiguity, that is, one which is apparent upon the face of the instrument itself, it cannot be explained by parole testimony, but where the ambiguity is latent and not apparent upon its face, parole testimony is admissible, to explain it, and give it effect. "An ambiguity apparent on reading an instrument, is termed *ambiguitas patens*, that which arises merely upon its application, *ambiguitas latens*: the general rule of Law is, that the latter species of ambiguity may be removed by means of parole evidence."—Starkie's Ev. 3



vol. 999; Sugden on Vend. 152; Peake, 179, 180. But I consider the rule of Law on this subject, too well settled to require discussion—the only question is, whether the case under consideration falls within the rule. Let us then examine the facts of the case, and the authorities bearing upon them. This is a grant conveying a lot of land to James Meadows, orphan, of Harrol's district, Upson county. The evidence introduced by the plaintiff, shews, that at the time of giving in for draws in said lottery, there was an orphan by the name of Meadows, in Harrol's district, Upson county, but whose name was Edward S. instead of James, and that there was no orphan by the name of James Meadows in said district; there was then no person answering the description contained in the

83 \*grant, and it is not to be presumed that the grant was made without an object, and without intending to confer the title upon some one. Then as the title of the land was intended to pass and did pass out of the State, and as there was no such person as the ostensible grantee, there must be mistake in the grant, and an ambiguity arising in attempting to point its application to the proper grantee. Is not this such an ambiguity as can be explained by parole? Here is no ambiguity on the face of the grant, but every thing there, is right and clear; but this parole testimony, dehors the grant, establishing the fact that there was an orphan in said district, by the name of Meadows, whose name was Edward S., and that there was no orphan there by the name of James Meadows, raises the ambiguity. The ambiguity, if one exists at all, is a latent ambiguity, for it does not exhibit itself on the face of the grant, and as such, according to the authorities, is susceptible of explanation by parole proof. Now, if there were no person answering any part of the description contained in the grant, the parole evidence would raise no ambiguity, and there being no person who could take under the grant, it would be void for uncertainty. But when it can be shewn by the admission of parole testimony that there is a person who answers the description given of the grantee in the grant, in every particular except the christian name, and that there is no person answering the description fully, will not the conclusion irresistibly force itself upon the mind, that there is a mistake? and if it can be explained by parole testimony in accordance with the rules of Law, as above stated, should not the Court admit the testimony and thereby give effect to the grant, rather than to destroy its effect altogether, and render it void by rejecting the testimony? Let us now examine some of the decisions which have been made in the English Courts upon the subject of the admission of parole testimony, to explain latent ambiguities in written instruments. One of the first cases in point of time was Lend Cheney's case, (5th Coke 68,) where the testator had two sons by the name of John, parole testi-

mony was admitted to shew that John the younger was intended by the testator, (see 3rd Starkie 1022.) In another case, where the testatrix devised her estate to her cousin John Cluer, there being both father and son of that name, parole evidence was admitted to shew that the son was meant. —Jones v. Newsam, 1st Bl. R. 60; (3rd Starkie 1022.) A man having two manors called Dale, levied a fine of the manor of

Dale, circumstances may be proved to 84 shew \*which manor was meant. (1st T. R. 701.) A grant made to William, Bishop of Norwich, the name of the Bishop of Norwich being Richard, was held to be good, (3rd Starkie 1023;) so a devise made to John, son of J. S., and J. S. has but one son whose name is James, was held to be good.

Idem. It is laid down as a general rule by Mr. Starkie, 3d vol. 1024, "that when difficulties arising in the application of the terms of a will, from imperfection in the terms of description, either of the party to whom the estate is given, or of the estate, may be removed by the aid of extrinsic evidence, even although no part of the description be perfectly correct, and cites the case of Beaumont v. Fell, 2nd Peer Wms. 141, when a will was made in favor of Catharine Eardley, and evidence was allowed to shew that Gertrude Yardley was the person meant. Also the case of Dowset v. Sweet, (Ambler's 175,) when the testator gave a legacy to John and Benedict, sons of John Sweet, and John Sweet, the father, had two sons only, (viz.) James and Benedict, parole evidence was admitted to prove that the testator used to address James Sweet by the name of Jackey. Many other authors might be referred to, all going to establish the same principle.

But it may be objected that most of the decisions in the above cases were made in relation to wills, and that the Courts have always been more liberal in the construction of wills for the purpose of carrying into effect the intentions of the testator, than they have been in relation to grants. It is true, that in most of the cases referred to, the question arose under wills, but this does not prove that the doctrine is not applicable in cases of deeds, but is owing perhaps to the fact, that in England, lands are more frequently conveyed by devise or will than in any other way, and although different rules of construction may be applicable to the various kinds of instruments, yet I can see no good reason for a distinction in this particular. The question is, whether parole testimony can be admitted to raise and explain a latent ambiguity in a written instrument, or to shew that there is a mistake in the christian name of the grantee, and I can see no good reason why it should not be done in the one case as well as the other. But this question has not only been frequently litigated and adjudicated in the English Courts, but it has been adjudicated in the Courts of this country in cases of patents and 85 grants to \*land, and Judge Cowen, in

his annotations on Phillips on Evidence, when speaking upon this subject, says "that the doctrine in the text has been frequently recognized and acted upon. It is no less applicable to deeds and other written instruments than to wills." (4th Phillips 1362.) In the case of Jackson v. Stanley, (10th Johns. R. 133,) I think the doctrine contended for on the part of the plaintiff is fully sustained. There the lessors of the plaintiff were the heirs of Daniel Hungerford, and the patent to the land had issued in the name of David Hungerford. The plaintiff relied upon two grounds for a recovery: First, an Act of the Legislature, passed since the grant issued, vesting the title in Daniel Hungerford. Secondly, upon the ground that there was a mistake in the christian name of the patentee, which should have been Daniel instead of David. To sustain the first ground, the act of the Legislature was given in evidence. To sustain the second, the Court permitted the plaintiff to raise a latent ambiguity by showing that no individual by the name of David Hungerford was entitled as a soldier to a patent for the land in dispute, and after having raised the ambiguity by parole testimony, the Court permitted him by the same kind of testimony to prove that Daniel Hungerford was the soldier entitled, and consequently the patentee intended. And it will be recollected, that in that case, the defendant claimed under a real person, David Hungerford, which was carrying the doctrine a great deal farther than it was carried in the case before the Court, for in this case, there is no person claiming the land by the name of James Meadows. But it is contended by the defendant's counsel, that the ground upon which the decision in the case of Jackson v. Stanley, was predicated, was the act of the Legislature passed for the relief of Daniel Hungerford, vesting the title in him; but there is nothing more clear, than that if the title had once vested in David Hungerford, by virtue of the letters patent, that the Legislature had not the right or power to divest it, and so it was expressly stated by the Court. Chief Justice Kent, in delivering the opinion of the Court, decides, that it was competent for the plaintiff to raise a latent ambiguity by proving a mistake in the name of the grantee, and to explain that mistake by parole testimony. He then remarks, "the grant then is either void by reason of the misnomer, or the parole proof supplies and corrects the mistake in the christian name of the soldier intended, and in either case, the lessors of the plaintiff are entitled to recover.

86 We do not \*go upon the ground that the act of the Legislature could divest a right legally acquired under the patent. It could not. But the patent gave no title to the person under whom the defendant holds, because he was not the patentee." He does not decide that the patent is void on account of the misnomer, but says that such was the old rule, and even under that rule, he says, upon the au-

thority of Lord Coke, "that a grant may sometimes be good though the grantee's name of baptism be mistaken." He further says, that "if the patent had designated the Hungerford intended, by specifying the regiment and company to which he belonged at the time of his death, it might have been good, as being equally susceptible of being reduced to certainty. But the patent adds no description of demonstration to the name of the patentee. It is simply a patent of the lot to David Hungerford, and according to the rule which has been mentioned (to-wit, the old rule), the heir of Daniel Hungerford cannot take under that patent, because their ancestor is not the patentee named." "In all the cases which I have seen, where there was a misnomer, there was some description connected with the name, and there was no other person who set up a title in competition under the erroneous name." Now, what is the doctrine clearly deducible from this language?—First, that if there be a misnomer in the christian name, and the patent adds any words of description to the name of the patentee, and there being no other person answering to the name of the patentee, setting up a title in competition, the grant is not void, but may be rendered valid and effective by shewing who the patentee is, and that parole testimony may be admitted to prove the mistake, and explain the ambiguity. Then, is not the case under consideration just such a case? Here is a grant conveying a lot of land to James Meadows, orphan, of Harrol's district, Upson county—here are words of description and demonstration added to the name, and the parole testimony shews that the lesser of the plaintiff answers to the description of the person, given by the grant in every particular except in the christian name. It further shews, that there is no person by the name of James Meadows, setting up a title in competition. Is it not clear then, according to the rule here laid down by Chief Justice Kent, that the grant in this case is not void, but there being a mistake in it, of the christian name only, it is such a mistake as can be explained by parole testimony? But it is contended by defendant's counsel, that the case of Jackson v. Stanley, has been

87 \*overruled by the subsequent case of Jackson v. Hart, (12th Johns. R. 77.)

I must admit that it is very difficult to reconcile the doctrines laid down in these cases, but still there is a difference; in the one case, the mistake was in the christian name, in the other, it was in the surname. But the case of Jackson v. Hart, differs from the Case before the Court not only in that particular, but in another very essential and material point, to-wit, in that case there were two distinct names, and two real persons corresponding with them; in this, there is no real person answering to the name of James Meadows. And in the case of Jackson v. Goes, (13th Johns. R. 519,) Judge Spencer, in delivering his opinion, when speaking of the decision in the case



of Jackson v. Hart, says, "though I took no part in that decision, having been unavoidably absent when it was argued, I understand from the opinion expressed, that it was not intended to shake, much less to overrule, the prior decision in Jackson v. Stanley. And Chief Justice Thompson, in the same case, says, "that the identity of the patentee is a matter that may be enquired into in this collateral way, is settled by the case of Jackson v. Stanley, and which case I understand it was not intended to overrule by the decision in Jackson v. Hart, an enquiry as to the identity of the patentee, does not in any manner contradict or make void the patent, nor does it imply that there is not a person in esse capable of taking under the grant."

But it has been contended on the part of the defendant, that although it may be competent to admit parole testimony to explain a latent ambiguity, when such ambiguity is raised or created, by the introduction of evidence by the adverse party, yet the party introducing a grant which appears plain and clear on its face, cannot raise the ambiguity himself by the introduction of parole testimony. It will be remarked, however, that in the case of Jackson v. Stanley, the ambiguity was first raised by the introduction of testimony on the part of the plaintiff, and in fact, from the very nature of the circumstances, it is obvious, that in most of the cases referred to, this must have been the case. And it is expressly stated by Starkie, 3 vol. 1022, that parole evidence is inadmissible for the purpose of raising a latent ambiguity. It has been contended, also, that if there be a mistake in this grant, that the plaintiff should have applied to the Executive Department, for the purpose of having

88 it corrected in \*the manner prescribed in the act of 1827, on that subject. I am of opinion, however, that this act is only cumulative, and if a party fails to proceed according to its provisions, he is not thereby deprived of any rights which he may have had at the Common Law. If Edward S. Meadows was the grantee, which fact is established by the finding of the Jury, then certainly it will not be contended, that the act of 1827, which was passed for the relief of certain persons who had drawn land in said lottery, and in whose names mistakes had been committed from bad spelling, &c. could divest him of any right which had vested in him by virtue of the land lottery acts previously passed. If the effect of this act of 1827, be to divest a party rightfully entitled, of his vested rights, then it would certainly be affording them relief with a vengeance. Then, I must consider the act of 1827, as cumulative only, and if a party chooses to rely upon the judicial tribunals for the purpose of establishing his right to his property, without applying to the Executive, for the purpose of having a mistake corrected, he certainly has the right to do so. It has also been contended in the argument, that if the party be permitted to introduce this

parole testimony for the purpose of making out his case, that his title will rest partly in writing and partly in parole, and that it therefore falls within the operation of the Statute of Frauds. The same doctrine might be contended for, in every case where parole evidence is introduced to prove the identity of the grantee or the locality of the premises, for it must be borne in mind, that the object and effect of the parole testimony in this case, is nothing more than to fix the identity of the grantee or drawer of the lot of land, and the grant being in writing, which is not contradicted, but only explained by the parole testimony, does not fall within the letter or intention of the Statute of Frauds.

Owing to the fact, that we have no Reports of the decisions of our Courts in Georgia, it is impossible to know how often this question may have been agitated and decided in this State. I have, however, met with two decisions, in cases which I think bear a strong analogy to the case under consideration, in both of which it was decided that, parole evidence was admissible to explain a grant and shew its application. The first is the case of Doe, ex dem., Peyton Pinkard v. Doe and James Bell and Samuel Marshall decided by my predecessor in Coweta Superior Court, the report of 89 which I have found \*in a newspaper.

In this case, the plaintiff introduced in evidence a grant from the State to Elizabeth Frazier's children, for the lot of land in dispute, and was then permitted to shew, by parole testimony, that Grace A. F. Frazier, an illegitimate child of Elizabeth Frazier, was the grantee intended, notwithstanding it appeared that Elizabeth Frazier had another child by the name of Sally, under whom the defendants claimed. The other case is one decided at the last term of Marion Superior Court, by Judge Wellborn, with a note of which I have been furnished. That was an action of ejectment, brought by John Doe, ex dem., James R. Haines v. Alexander Goodson, in which the plaintiff offered in evidence a grant to Robert Haines, orph. The name of the grantee was written the same way whenever it occurred throughout the face of the grant—on the plat it was written thus: Robert Haines, orph.; in the certificate of registry, on the back of the grant made by the Secretary of State, it was written thus: Robert Haines' orph. And the Court admitted parole evidence to shew who was intended as grantee, or in other words, he permitted the party interested in the fact, to shew that the orphan or orphans of Robert Haines, and not Robert Haines, an orphan, was intended as grantee. It will be perceived, that the question decided in this last case, and the case before the Court, is substantially the same. In the case in Marion, the grant was to Robert Haines orph., and the party was permitted to show, by parole testimony, that James R. Haines, an orphan of Robert Haines, was the grantee intended; and in this case the grant was to James Meadows, orphan, and the party was per-

mitted to prove by parole that Edward S. Meadows, an orphan of James Meadows, was the grantee intended. And whether the error occurred by making a mistake in the christian name of the orphan, or by omitting the apostrophics, or apostrophe after the name of Meadows, cannot alter the principle, the question being whether parole testimony can be admitted to explain a latent ambiguity arising upon the application of the grant, by shewing who is the grantee intended. Upon considering the first three grounds taken in the rule, I am of opinion, that it was competent for the plaintiff to show, by parole testimony, that there was a mistake in the christian name of the grantee, and that this being done, there was such a latent ambiguity as could be explained by parole, and that the effect of said testimony was not to contradict, but to give effect to the grant, by pointing it to its legitimate object.

90 \*The only remaining ground is, that the verdict is contrary to Law and evidence. If the conclusion which the Court has come to upon the other grounds be correct, the verdict was not contrary to Law, and it being the province of the Jury to find the facts upon the evidence submitted, and the evidence being, in the opinion of the Court, sufficient to authorize the finding, I cannot conceive upon what principle this ground can be sustained. The motion for a new trial is therefore refused.

WILLIAM EZZARD, J. S. C. C. C.

H. & O. Warner, W. F. Samford & G. F. Hill, for the motion.

W. D. Alexander, contra.

91 \*BURKE SUPERIOR COURT.

Robert E. Wimberly v. Henry P. Jones.

In Equity—May Term, 1842.

1. **Infants—Contract—Avoidance.**—An infant may disaffirm a deed made during his minority, after he arrives at full age, by executing another conveyance.
2. **Same—Same—Ratification.**—A person may affirm a conveyance or contract made by him during his infancy, by doing any act which tends to confirm it.

The bill above stated was filed to set aside a deed, made by the complainant, Wimberly, to the defendant, Jones, for a tract of land in Burke county, made during the infancy of Wimberly; and after Wimberly arrived at full age, he conveyed the same land, by deed, to one Abraham Jones, and then brought this bill to set aside the first deed, and upon the trial before the Jury, the Court charged the Jury, that the plea of infancy being a personal privilege, and Wimberly, after arriving at full age, having conveyed all his interest in the land to A. Jones, and A. Jones having been made a

party to this suit, by cross bill, that A. Jones, to whom the land had been conveyed, could not set up the infancy of Wimberly to defeat the deed to Henry P. Jones, as this was a personal privilege in Wimberly alone, and that only so long as he claimed title to the land: and upon the trial before the Special Juries, in both trials, they found for the defendant.

A motion was made for a new trial, upon the ground of misdirection of the Court: alleging, that the complainant had a right to file his bill, and set aside the deed made during his minority, and by such bill shew his dissent to the deed, and have the same set aside.

The Court has examined the cases 92 cited by complainant's counsel, \*and finds the following to be the rules laid down, as to infants setting aside, or disaffirming their acts, made during infancy: First, where an infant makes a deed, he may, at any time after his arriving at full age, dissent to that contract: and this may be done, by making a conveyance of the same property to another person, provided he do this, before the statute of limitations will give the party holding the first deed, a statutory title. But if the party, after arriving at full age, shall do any act, in affirmance of the deed or contract, then, the first deed will be a valid one: as, where a lease made under age, and after majority, the infant continues to receive the rent reserved, or does some act (after a knowledge of his rights of disaffirmance) which will amount to a confirmation of the deed or contract, he will be bound by his act during infancy; but such act must be done with a view to such affirmance, and not a mere equivocal act, which may or may not be construed into an affirmance of the deed or contract—the intent to affirm must be clearly with that view.

And farther, that after an infant has done an act after he comes of age, which amounts to a disaffirmance, as making a second deed for the same land, such person may set up such act of disaffirmance to support the second conveyance made after he comes of age.—The Court decides, that it did commit an error in charging the Jury, that Wimberly could not set aside the deed, after he had conveyed the land to another person; and that the Court ought to have charged the Jury, that the making of the second deed after Wimberly arrived at full age, did amount to a disaffirmance of the deed made to H. P. Jones, the defendant; and therefore, had a right to a decree setting said deed aside. A new trial is therefore ordered, before another special Jury. Authorities cited, 14th Johnson's R. 124; 11 Johns. R. 593; 3 Barrow 1804.

George W. Crawford, for Complainant.

A. B. Longstreet and Flournoy, for Defendant.

JOHN SHLY, Judge

Superior Courts, Middle District, Georgia.



## 93 \*RICHMOND SUPERIOR COURT.

## The State v. Nathan S. King.

Georgia, Richmond County—In Chambers—In Equity—December 24th, 1841.

1. **Parent and Child—Custody of Child.\***—When the person in custody is an infant child, and the controversy is between its parents for the possession, the Court will look to the interest of the child, and award the possession to that parent, who will most likely train it properly.
2. **Order Depriving Court of Jurisdiction.**—The Chancellor will not permit it to be taken out of his jurisdiction.

In the above stated case, this writ has been obtained by Anna King, the wife of the defendant, to produce the body of their infant child, about two and a half years old, called Emily. And in her petition, she complains, that her husband has taken possession of said infant, and detains it, when the tender years of said infant requires the constant care of its mother. And upon this application the Court granted the writ, and the same being served on the defendant, he produced the said child and made his return to the said writ, and which return in substance is, that he admits that he went to another State, and took this child, and claims the custody of it, by virtue of his parental rights—that the mother is not a fit and proper person to take care of the child—that she neglected it, and is not qualified to attend to its morals or personal comfort—and that he and his wife have separated, and that he has brought a libel for a divorce in this county—and that the mother still retains her youngest child, a boy—and that he has a sister with him who will take charge of the child. And thus stands the case, by the pleadings, between the parties. And when the cause came to a hearing, a mass of evidence was produced relating to the various causes which

94 produced \*their separation; and evidence was also adduced, in relation to their capability as parents to discharge their duties to their children. And in deciding on this mass of testimony, the Court will not undertake to state and compare the testimony of each witness with the other; but will proceed and give the conclusions to which it has been brought by said evidence. And in the first place, this Court will not bring into this investigation the conduct of these parties, as to their separation, farther than it may be necessary to see whether it renders either party unfit to have charge of the child Emily: and from a comparison of the testimony adduced in

\***Custody of Child—Consideration Guiding Court in Awarding.**—In support of the proposition that, the welfare of the child is always the guiding consideration by which the court will be influenced in determining the proper parent or other person to whom the custody of the child will be granted, see *In re Ralston*. R. M. Charl. 119; *Bently v. Terry*, 59 Ga. 555; *Smith v. Bragg*, 68 Ga. 650; *Townsend v. Warren*, 99 Ga. 105, 24 S. E. Rep. 960.

this case, the mind of the Court is brought to the following conclusions:—First, the conduct and character of the father, is that of a good moral man, and no objection can be raised against him as a father. And on the part of the mother, there has been a mass of evidence shewing some improper conduct about their money matters, and some imprudent expressions at times, when labouring under feelings of despondence, and from which, and the appearance of the wife, the Court believes, that she is at times subject to feelings of great despondence, and was induced to make imprudent expressions, which she never executed, or intended to execute, and which she has not attempted to fulfil; and so far as relates to her fondness for her children, and her anxious care about them, and industry to maintain them, the evidence is ample in her favour, as well as for chastity; and that by her labour she can support them, and that both father and mother have to live by their labour: and it further appears, that the father assisted the mother to depart for Charleston with both their children—and that one child, a boy, is now about 9 or 12 months old, and the child, Emily, is about two years and four months old—and that the father went to Charleston, took the child, Emily, from the mother whilst absent from her house, and brought it to Augusta, and now has it in possession: and the before stated writ is brought to have it restored to the mother. These are the material facts upon which the Court is to decide, under the law, between the parties.

The first objection which is urged by the defendant is, that the writ being entitled at Common Law, the Court is bound by the Law to deliver the child to the father: but the jurisdiction which is exercised by the Chancellor is the same as at Common  
95 Law.—(See Law \*Libra. Mar. page 685, No. 99.) Where the Chancellor

grants the writ, he is *Parens Patriæ*, possesses powers over the legal rights of the father which a Common Law Judge does not. In this case, the Judges of the Superior Courts being clothed with both Law and Equity powers, it will look to the prayer of the writ, and see in which capacity the Court is called on to act, and proceed to make its decision accordingly: This Court, therefore, sees nothing in the address of the writ, which will not allow it to exercise its equity powers: as the case made by the petition shows that those powers are invoked in this case.

The question presented to this Court by the foregoing facts, is: What ought the Judge to do in such a case? This Court has had occasion to examine the rule in Chancery in cases like the present—the case of the State v. Heard, where most of the authorities referred to in this case, were also referred to in that case; and as the Law in the case of Heard, is equally applicable to this case, I must proceed to declare it the same here; which is this: That where this writ is granted, and the facts

shew that the Court is called on as *Patres Patriæ* to exercise its equitable powers, its great and paramount duty is, to look to the interest and safety of the child—as well as its morals, its education, and even its pecuniary interests: And the legal rights of the father to the custody of his child will not be enforced, if those rights, in any manner, conflict with these interests, or the welfare of the child.—(See *Law Libr. Mar. 685*, No. 90. All the authorities agree as to the rule above laid down; and it is in the application of the rule to each particular case, that has created some difference of opinion between the Judges, and as the Judges shall, under the facts of each case, believe it to be either for the safety and welfare of the child, or its pecuniary interests, so will they exercise or refuse to exercise this jurisdiction. The question now presented by the facts before the Court, is: Will it be for the welfare of this child to leave it in the possession of the father, or return it to its mother? Upon this point, we have the testimony of Doctors Eve and Garvin, as well as the opinion of several other witnesses, that this child will be better attended to, and more closely watched in its present state and very tender years, (it being only two years and four or five months old,) by the mother, that it can be attended to by the father, or any other person as a nurse for it; and particularly \*as the child is a female. And the Court being of the same opinion with the Doctors, and other witnesses on the subject—it is therefore ordered by the Court, that the defendant, Nathan S. King, deliver the infant child, Emily, back to his wife, Anna, to be by her nurtured and taken care of, as the exigencies of said child may require; but, upon this express condition, and it is hereby ordered, that said Anna King suffer and permit the said Nathan S. King to have reasonable access to the said child, through the agency of their friends or otherwise.

But as this Court is not allowed by Law, to make an order which will deprive itself of jurisdiction over the person of this child, and as the father has the same right to apply to this Court, when he thinks the welfare and safety of his child may require it, as the mother; and, as it appears by the evidence, that Mrs. King is now residing in Charleston, and without the jurisdiction of this Court, It is further ordered, that the said Anna King, by her friends, appear before the Clerk of this Court, and enter into bond, by such friend or friends, payable to the State of Georgia, in the penal sum of five hundred dollars, conditioned that the child Emily King, be not removed without the jurisdiction of this State. And it is further ordered, that if the said Anna King is unable to procure her friends to give said bond, then, the said child Emily is to remain under the care of her father, the said Nathan S. King, and he permitting the said Anna King to have reasonable access to said child Emily, through friends or otherwise, from time to time, as may be reason-

able. And it is further ordered, that said Nathan S. King pay the cost of this proceeding. And it is further ordered, that the Clerk of this Court, record this decision, on the minutes of the Court.

Cases cited in this case—*Law Library*, No. 99, page 408; 5 East 220-1; 17th Common Law Rep'ts 122; 9th Moore's R. 278; 10 Vesey, Jr. 52; 11 Vesey 526; Margin 6 Vesey 363.

JOHN SHLY, Judge  
Superior Courts, Middle District, Georgia.

#### 97 \*DEKALB SUPERIOR COURT.

Mary Cash and Moses W. Davis v. Lewis Cash, Adm'r of Peter Cash, and James Millican and Nathan Beauchamp, Justices of the Peace.

March Term, 1842.

1. *Set-Off—Mutuality of Demands.*\*—Debts must be mutual, i. e. due between the same parties, to be set off against each other.
2. *Same—Amount Exceeding Jurisdiction.*—A debt of \$252 75 cts. cannot be pleaded as a set off in a Justice's Court.

This certiorari was brought for the purpose of correcting certain errors alleged to have been committed, upon the ground, that the Court erred in refusing to permit the defendant in the Court below to bring in a set off to the note sued on by the plaintiff. It appears from the return of the Justices, that two suits were brought by Lewis Cash, as administrator of Peter Cash, deceased, v. Mary Cash and Moses W. Davis, upon two notes payable to him as administrator, and the defendants pleaded as a set off, an account for the sum of \$252 75, due from Peter Cash, deceased, to the said Mary Cash. This account was rejected by the Court, upon the ground, that the debts were not mutual, and also because said account exceeded a magistrate's jurisdiction. The Court is of opinion, that there was no error committed by said Justices, in said decision, but that said account was properly rejected upon both grounds. It is therefore ordered, that the certiorari be dismissed, and the judgments below confirmed.

WILLIAM EZZARD, J. S. C. C. C.

#### 98 \*LEE SUPERIOR COURT.

Jared B. Roberts, Burch M. Roberts, and William Janes, v. Washington Woolbright.

At Chambers—June 13, 1842.

1. *Vendor and Purchaser—Rescission of Contract—Defect of Title.*—Equity will not relieve before evic-

\**Set-Off—Mutuality of Demands.*—In support of the proposition that the debts must be mutual, i. e. due between the same parties, to be set off against each other, see *Buckhanan v. Gamble*, Ga. Dec. pt. 1, p. 156. See also, *Bibb Land L. Co. v. Lima Machine Works*, 104 Ga. 116. 30 S. E. Rep. 676.



tion, by rescinding a contract for the purchase of lands on the ground of a defective title. It may be that the outstanding title might never be urged.

2. *Same—Same—Same.*—A complaint coming into Chancery, to ask it to rescind a contract for the sale of land, must shew that he has used ordinary diligence in investigating the title.

This bill charges, that on the 16th day of December, 1839, the complainants, Jared B. Roberts and Burch M. Roberts, purchased from Woolbright, the defendant, three lots of land, in the second district of Baker County, viz. Thirty-nine, Forty and Forty-one for which, with William Janes as their security, they gave their promissory notes for the sum of Seven thousand Five hundred dollars, payable as follows: The first note, for one thousand dollars, on the first day of January, 1840; the second, for 2166 66 dolls., on the first day of Jan. 1841; the third, for 2166 66 dolls., on the first day of Jan. 1842; and the fourth, for 2166 66 dolls., on the first day of January, 1843. That they received from the defendant his warranty and to the aforesaid lots of land, and went immediately into the possession of the same. That the complainants Roberts have paid the first note, and all to a small balance of some three hundred dollars upon the second, which is in execution—that suit is now pending in the Superior Court of said County of Lee, upon the third note, and that the fourth note is still in the possession of the defendant—that at the time of purchasing the lands aforesaid, the

99 \*complainants were induced to do so, upon the statements of the defendant that his titles were full, good and indisputable, and that such titles as he could make would be valid and incumbered fee-simple titles—That since they purchased, they have discovered that the defendant had no title to lot Thirty-nine, other than as trustee for his wife—which lot has been conveyed to him by Benjamin Rector, the father of defendant's wife, for the sole use and benefit of his daughter—That his titles to Forty-one are also defective, the same never having passed from the grantee, Smith. That in thus representing his title to the complainants Roberts, to induce them to purchase his lands, that the defendant has acted fraudulently, that the defendant is in failing circumstances, and fear would not be able to respond in an action of covenant, upon his warranty in the deed. The bill seeks to enjoin Woolbright from further proceeding to force the collection of the fi. fa., the third note now in suit, and also from trading the fourth note, due Jan. 1st, 1843—to rescind the contract, and compel the defendant to surrender the notes, and fi. fa. to be cancelled, and to compel the defendant to refund the purchase money already paid. These are the material allegations in the complainants' bill—and which was sanctioned with expressions of doubt at the time, of the correctness in granting the injunction.

The defendant having answered the bill,

gave ten days notice to the opposite party, that he should move in Chambers, to dissolve the injunction on the 13th day of June.

Since granting the injunction, I have carefully and fully investigated the principles upon which the complainants have relied in coming into Chancery for relief, and after which, I am now clearly satisfied that the injunction cannot be sustained. The doctrine that a purchaser of land, who is in possession under a deed, cannot have relief against his contract to pay the purchase money, upon the mere ground of a defect of title, without any previous eviction I find running through and pervading all the cases.

Bumpers v. Platner, 1 Johns. Ch. R. 213, 218—"If there be no fraud, the purchaser must resort to his covenant if he apprehends a defect or failure of title, and wishes relief, before eviction. This is not the tribunal for the trial of titles 100 to land. It would \*lead to the greatest inconvenience and perhaps abuse, if a purchaser in the actual enjoyment of land, can be permitted on the mere suggestion of a defect or failure of title upon the principle of quia timet, to stop the payment of the purchase money and of all proceedings to recover it. Can this Court stop to try an outstanding title, or compel an absent party to litigate, who probably never thought of asserting such a title? No such principle can be found to exist, and a previous eviction at law is always necessary."

Abbott v. Allen, 2 Johns. Ch. Rep. 524—"If there is no ingredient of fraud, and the purchaser is in possession under a deed, the insufficiency of title is no ground for relief, unless there has been an eviction, the party must resort to his covenant to try titles."—2 Kent's Com. 470-1-2.

The cases here referred to, recognize the principle, that if there is fraud in the vendor, in inducing the purchaser to buy, when his titles are either concealed, or spurious and fraudulent in themselves, equity will relieve. In making out this case, the complainants charge no such facts as will or can sustain the allegation of fraud—For the defendant to represent his titles as genuine and perfect, though it were false, forms no ground for relief, unless the purchasers were precluded from investigating for themselves, the true character of the title claimed to exist in the vendor. Fraud is defined to "be any cunning, artifice or deception, used to circumvent, cheat, or deceive another—Fraud, in the sense of a Court of Equity, property includes all acts, omissions and concealments, which involve a breach of legal duty, trust or confidence, justly reposed, and are injurious to another—or by which an undue and unconscientious advantage is taken of another."—1 Story's Equity, 197. The bare allegation of fraud in the complainants' bill, without charging such acts of concealment, artifice and deception, as involve a breach of legal duty, trust or con-

fidence, and which no man of common sense would have done, unless he had been circumvented, cheated or deceived, does not make such a case of fraud in legal contemplation, as will justify this Court in granting relief. No such charges in this bill, but simply that Woolbright represented himself as being solvent, and his titles as complete to all the aforesaid lots of land, without offering to excuse themselves for

101 their culpable omission and negligence\*in not looking to the title. In purchasing land, the Law requires every man to look to the title, consult the registry, and perform every duty incumbent upon a vigilant man, in protecting his interest, and then if he has been cheated, circumvented, or deceived, equity will receive. In *Hume v. Mill*, 13th Vesey, 119, the Lord Chancellor draws "the distinction between personal chattels held by possession, and real estate held by title: The former is held by possession—the latter by title. Possession of real estate is not even prima facie evidence of title, other than a lease from year to year. No man in his senses would ever take an offer of a purchase from a man, merely because he stood upon the ground—a purchaser must look into his title, and if he purchases land without looking to the title, it is crassa negligentia." From this authority, it is clear to my mind, that no act is imputed to the defendant sufficiently tinctured with fraud, that will justify the Court in restraining the defendant from proceeding to collect the purchase money; but upon the other hand, the negligence of the complainants, in omitting to look into the title, will close the door of equity against their application.

As to the charge in the bill, that Woolbright held lot of land thirty-nine, merely as trustee for his wife, and therefore incapable of conveying, the same doctrine holds equally good. "A purchaser of land buys at his peril, and is always bound to look to the title and the competency of the vendor to sell, and if a purchaser with notice actual or constructive buys land held in trust for another, he becomes the trustee himself, notwithstanding the consideration he has paid."—*Murray & Winter v. Ballou & Hunt*, 1 Johns. Ch. R. 566.

That the complainants had constructive notice of the kind of title held by defendant to lot thirty-nine, before they purchased, is evident from their own exhibit, as the deed exhibited in their bill from Rector to Woolbright was recorded in the Clerk's office of Baker county, on the 11th day of October, 1836, more than three years prior to their purchase. "The American doctrine of notice has been fully settled," says Justice Story, in 1 Story's Equity, 392, "and it is uniformly held, that the registration of any conveyance operates as constructive notice to all subsequent purchasers of 102 any estate, legal\*or equitable. If a purchaser neglects to look into the title, it will be considered as his own folly, and he can have no relief.—1 Sugden on Vendors, 635."

The complainants failing to make out such a case of frauds as will justify the interposition of the powers of a Court of Chancery, and being satisfied that lot thirty-nine was purchased with constructive notice of the defect in the title, and under such circumstances of negligence in refusing to examine the titles before they purchased, this Court cannot interfere to rescind the contract, or restrain the defendant in proceeding to collect his purchase money. It is not for Courts of Justice to make contracts—they can only enforce the Law relating to the obligations of contract; men must be vigilant in protecting their rights and interest, and negligence will not justify a Court of Chancery, in relieving a party from the obligations of an extravagant and improvident contract.

As to the charge, that titles have never gone out of Smith, the grantee to lot Forty-one, that is denied by the defendant in his answer, and a copy of the deed from Smith to Hilliard is attached to his answer, and made a part of it. The deed from Smith to Hilliard, the only defect charged in the bill to exist, is supplied in the answer of the defendant, who alleges the deed to be genuine and made in good faith. The equity of the bill, therefore, so far as to lot Forty-one, is sworn off, and the defendant is entitled to a dissolution of the Injunction. But placing this question upon another footing, the defendant is entitled to a dismissal of the bill for the want of equity. "Where a purchaser has gone into possession under a deed, and enjoyed the premises, it is to be considered that he has adopted the contract, and he cannot disaffirm it. A contract can only be rescinded ab initio where both parties can be placed in the same situation in which they stood before the contract, and this cannot be if either party has received a partial benefit, the rule of caveat emptor always applies where the conveyance has been actually made."—*Chitty on Contracts*, 188, 276. The complainants do not charge, that they could place the defendant in the same situation in which he stood before the purchase, for aught that appears upon the face of this bill, that Roberts's may have sold and conveyed a portion of these very lands 103 to some other person,\*and therefore would be incapable of returning the lands purchased. This brings me to the last allegation in the bill, and that is, the insolvency of the defendant, Woolbright, in being remitted to their action of covenant; and though I very much doubt from authorities brought to bear upon the preceding allegations, disposed of in this bill, even admitting that to be true, and which the defendant however denies, but states in his answer his complete responsibility, and ability to respond to any and every obligation resting upon him, whether the complainants have made his solvency at all material to the equity of their case, but as the defendant has sworn off the equity, if there was any upon that point, I shall content myself with disposing of it upon the



answer, without discussing the other proposition—for these reasons, I shall therefore dissolve the injunction, and order the bill to be dismissed.

Vason, Warden & Scarborough, Counsel for Complainants.

Lyons and A. S. Wingfield, for Respondents.

WILLIAM TAYLOR, J. S. C. S. W. C.

#### 104 \*SUMPTER SUPERIOR COURT.

John T. McCrary v. Turner Coley.

May Term, 1842.

1. **Sureties—Discharge—Indulging Principal after Judgment.**—A security is entitled to be relieved in Equity, against a creditor who has extended indulgence to his principal, after judgment, for a valuable consideration.

2. **Same—Same—Same.**—This, however, is to be taken with some qualification, for if the security has not been injured by the stipulation between the creditor and his principal, it seems he is not entitled to relief.

This bill was filed by the complainant, John T. McCrary, to enjoin the collection of a *fi. fa.* obtained by the defendant, Turner Coley, against this complainant, as security to one Mark M. Brown. The bill charges that on the day of 18, the complainant became security for the said Mark M. Brown, to Coley. That in 18, the demand was sued and prosecuted to judgment, against the said Brown, as principal, and the complainant, as security. That after obtaining judgment, Coley, for a valuable consideration, without the privity or assent of McCrary, the security, agreed to indulge, at two different times, Brown, for and during the years of 1838 and 1839—That Brown owned and was in possession of a considerable estate in negroes, and though this security repeatedly called upon Coley, and requested him to collect his *fi. fa.*, yet he refused to do so, and actually permitted Brown to leave the country, carrying off with him some 25 or 30 negroes subject to this *fi. fa.*, and more than sufficient to have thrice paid the same. The complainant seeks to be discharged from further liability upon the *fi. fa.*, upon the grounds, that indulgence for a valuable consideration had been given to the principal, without his privity or assent—and that the indulgence will operate to the prejudice of the complainant, unless the said *fi. fa.* in enjoined from further proceeding. To this bill the defendant demurred, for the want of equity. That indulgence

105 \*to the principal after judgment, did not release the security in equity.

That indulgence to the principal before judgment, without the privity or assent of the security, for a valuable consideration, has ever been held to be a good defence, to discharge the security either at Law or in Equity, is a principle so clearly established,

that I shall content myself by only referring to a few of the many authorities in support of it.—1 Story Equity, 321; Rees v. Berrington, 2 Ves. 540; Boutbee v. Stubbs, 18 Ves. 20; King v. Baldwin, 2 Johns. Ch. R. 554; 17 Johns. Rep. 384.

But that indulgence after judgment for a valuable consideration, without the assent of the security, should discharge the security, is a question upon which I find the authorities to be somewhat conflicting. “In Bay v. Tallmage, 5 Johns. Ch. Rep. 305-315, it is asserted with much confidence, upon the authority in 1 Tidd’s Practice 158, 1 Sellon 192, and the case Lenox v. Prout, 4 Cond. Sup. C. R. 313, 314, that after judgment, the security having become fixed, the relation of principal and security ceases. It becomes then too late to enquire into the antecedent relation between the parties.” If I understand these authorities here relied upon, they do not go to the extent for it which it is contended by the respondent’s counsel. I am far from supposing that these authorities assert the novel doctrine, that an equitable relationship subsisting between the parties, become merged and cease to exist after judgment, and that the creditor, upon that principle, can be permitted to make any kind of a contract or agreement with the principal, without consulting the security or respecting his rights or interests. If I am correct, these authorities establish nothing more than they should establish. That by the judgment the liability of the security being equally fixed with the principal debtor, it is then too late to go back and enquire into the antecedent relation between the parties, in order to let in and investigate such defences as would have been good upon the trial—That such defences as would be good in releasing the security, should be made and insisted upon before his liability is fixed by the judgment, and not as counsel contend, that after judgment the liability being fixed, and the antecedent relation merged as to all matters happening before the judgment, that nothing subsequently can arise that should operate to discharge the

106 security.—\*“In Bay v. Tallmage, the Chancellor expressly remarks, that no new contract for a valuable consideration after the judgment having been proven, that that principle was not discussed, and the case went off upon other grounds.”

Indeed, no principle is better established, than that after judgment, the liability itself being fixed, you cannot travel behind the judgment, to go into any defence that would have been good upon the trial, unless the party can bring himself within the rule for granting a new trial, or can show such reasons as will excuse him in Equity, in permitting the judgment at Law to be enjoined until a trial can be had, upon his application in Equity.

I cannot recognize the principle, that the creditor can be permitted to make any new contract for indulgence after judgment, for a valuable consideration, without the privity or assent of the security, and that too how-

ever so injurious to his rights and interest, and refuse him that relief to which he is entitled in equity and good conscience. Such a doctrine would lead to as much mischief as any that could be recognized by a Court of justice. "If after judgment the creditor makes any new contract for indulgence upon a valuable consideration, not to issue execution against the principal until after the expiration of the time stipulated for indulgence, and it is done without the assent of the security, the security will be discharged in Equity."—*Rathbone v. Warren*, 10 Johns. Rep. 587. Cases might be supposed, where the doctrine contended for in this demurrer would operate most oppressively and unjustly: Suppose that A. should recover judgment against B., the principal, and agree to indulge him, say two years, for a valuable consideration, without the assent of the security, and C. the security, perceiving his principle to be in failing circumstances, should file his bill in Chancery, to compel the creditor to proceed to collect his money, which he has a right to do, or should pay off the judgment and take the control of it, "What would be the situation of the security? In the first place, the creditor could not proceed, for he is stopped by his agreement for indulgence based upon a valuable consideration! and in the second place, if he should pay off the judgment, he can only stand in the place of his creditor. "A security paying off

107 the debt of his principal only becomes subrogated \*to the rights of the creditor.—1 Story's Equity 323; *Hays v. Ward*, 4 Johns. Ch. R. 123; *Hampton v. Levy*, 1 McCord's R. 112.

The creditor having obligated himself not to proceed with his judgment for two years, the security paying off the debt and stepping into the shoes of the creditor, would be bound also by the same contract, a contract ruinous in its character, and destructive to his interest, made for him, and by which he is to be bound, without his concurrence or will. That our statute intends that the distinction for the benefit of the security should continue to exist after judgment, is clear to my mind, from the manner in which they are permitted to control the same by coming forward and paying up the principal, with interest and costs.—*Prince's Dig.* 461, 462. And whoever places it beyond the power of the security to indemnify himself by paying off the judgment and taking the control of it, by any new contract with the principal, does so at his peril, and the security must be relieved by resorting to a Court of Chancery.

In maintaining these positions, however, I would not be understood as running to the opposite extreme, that all contracts must operate of themselves to discharge the security—to assert such a doctrine seems to be equally objectionable as the principles that I have over-ruled. Each case must depend upon its own equity, a party coming into a Court of Equity, must ask for nothing but equity, and he must show that he is entitled to it.

"To discharge the security by an act of the creditor with the principal, the surety must show, that the principal was solvent and able to pay at the time of the contract, and lived within the jurisdiction of the Court."—*Warner v. Berdsly*, 194; 8 Wend 94;—13 Wend. 377.

To discharge the security, the creditor must do some act injurious to the security, or omit to do some act, when required, which equity and his duty to the security, enjoined it upon him to do, and which omission was injurious to the security.—*Pain v. Packard*, 13 Johns. 82, 174; *The Treasurer of — v. Johnson*, et alias, 4 McCord's Rep. 458; 1 Story's Equity 320.

Then let us apply these principles to the case which is now before the Court, and determine if the complainant is entitled to relief. If \*the principal debtor, Brown, had been insolvent, or if there were executions in existence, unsatisfied, of older date, more than sufficient to have consumed his effects, and left the *fi. fa.* of Coley unsatisfied, and that his effects had been applied justly to the payment of his creditors, I should hold that the contract not operating to the injury of the security, that the security should not be discharged. It is the injury which the party is supposed actually to sustain that makes his case, and for the relief of a Court of Equity, and unless he can show wherein, and how he has been injured, the security will not be relieved from his liability, which has become fixed by the judgment. But such is not the case at Bar. Brown was solvent, and able to pay, and resided within the jurisdiction of the Court, at the time of the contract, and though repeatedly requested and urged by the complainant to collect this debt, yet the defendant not only refused, but by his contract with the principal, placed it beyond the reach of the security to indemnify himself, had he seen proper to have paid off the *fi. fa.* By his contract too, the principal was enabled to carry off, and did carry off some 25 or 30 negroes, which were subject to, and should have been applied to the payment of this *fi. fa.* The conduct of Coley with the principal has therefore been to the injury of the complainant, and the demurrer must be over-ruled; and the defendant ordered to answer.

WILLIAM TAYLOR, J. S. C. S. W. C.

Sullivan & S. T. Bailey, for comp't.  
Warren & Scarborough, for resp't.

#### 109 \*COWETA SUPERIOR COURT.

John L. Martin and Joseph Frost and Mary (His Wife) v. Gilbert D. Greer and Dempsey J. Connally, Executors of Hiram Buckley, Dec'd.

March Term, 1842.

I. Trusts—Personalty—Parole Evidence.—An express trust in regard to personal property may be proved by parole evidence.



2. **Same—Rights of Beneficiary—Following Trust Property.**—Property wrongfully purchased with the trust fund, may at the option of the cestui que trust, be pursued in the hands of the trustee, or those in privity with him, and held subject to the terms of the original trust.
3. **Same—Creation by Parole—Statute of Limitations.**—An express trust against which the statute of limitations does not run, may be created by parole. The possession of the executors of a trustee, is the continuation of the trustee's possession, and the statute does not run in their favour.
4. **Possession of Trustee after Expiration of Trust.**—If a trustee holds over, after the expiration of the trust, his possession is for the cestui que trust, and no bar is created in his favour.
5. **Statute of Limitations—Reputation of Trust by Trustee.**—The statute does not begin to run in favour of a trustee until his possession becomes adverse by a refusal to deliver the trust property, or an appropriation of it by him.

This is a bill filed by John L. Martin, who sues in his own right, and as the assignee of Henry English, who married Catharine Martin, Jonathan Nutt, who married Eleanor Martin, and Morris Martin, and Joseph Frost and his wife May Frost—in which it is alleged, that John Langdon, in the year 1801, loaned to his daughter, Nancy Martin, then a widow, and mother of the complainants, a negro woman by the name of Nance—that in the year 1802, the said Nancy intermarried with one Hiram Buckley, now deceased, and upon said marriage, the said John Langdon, by express agreement and contract, permitted the said negro woman, Nance, to  
110 \*remain in the possession of the said Hiram Buckley and wife, expressly stipulating that she was to remain during the natural life of the said Hiram and wife, or either of them, and at the death of the survivor, the said negro woman and her increase was to become the property of the complainants, the children of the said Nancy Martin, by her former husband—that in the year 1807, the said Hiram Buckley being dissatisfied with the said negro woman, Nance, returned her to the said John Langdon, who, being anxious to make provision for his daughter and her children, furnished the said Hiram Buckley with the sum of \$400 in cash, in lieu thereof, with express instructions, and which was received by the said Hiram, with the distinct and express understanding that he was to purchase therewith another negro woman slave in the place and stead of the said Nance, and which, with her increase, was to follow all the conditions in stipulations made concerning the said Nance at the time she was delivered to the said Hiram and wife, to wit: that she was to remain in their possession during the life of the survivor, and at the death of the survivor to become the property of the said children of the said Nancy Martin, the present complainants. It is further stated, that the said Hiram kept the four hundred dollars in his possession for several years, and then purchased therewith a tract of land and

took the title thereto in his own name—and that, in the year 1812, he exchanged the said tract of land for a negro woman slave by the name of Jinny, and her two children, Bobb and Keziah, and placed them in the place and stead of the said negro woman Nance and her increase, and to follow the conditions and stipulations made and entered into concerning the said Nance and her increase. It is further stated, that the said Hiram, at the time he purchased the said negro woman Jinny and her children, although he then, and at all times afterwards during his life, admitted that the same were the proceeds of the said sum of \$400, and that he and his wife had only a life estate in the same, and at their death the same with their increase were to become the property of complainants, yet the said Hiram took a bill of sale to said negro woman Jinny and her children in his own name. They further charge, that said Hiram received and held said negro woman Jinny and her increase in trust for the said complainants, and that the said negro woman Jinny and her children, at the time of the purchase, did not exceed in value the said Nance and her increase, and that the actual cost of the same did not exceed  
111 the \*principal sum of \$400 and the interest thereon, from the time the same was received by the said Hiram till the said purchase was made. It is also alleged, that the said Hiram and wife continued to live together until the year 1819, when the said Nancy died, leaving no issue except the said complainants, and that said Hiram continued in possession of said negroes until the — day of July, 1831, when he died; having made a will and appointed the defendants his executors. That said negroes had increased to some eleven or twelve in number, and that they had been taken possession of by the said Greer & Connally, as executors, and that they were still in their possession. The bill then states the value of the negroes, and prays that defendants may be decreed to convey to them the negroes, and to account to them for the hire, &c. The defendants admit, by their answers, that Buckley did, in the year 1812, receive the said negro woman Jinny and her two children in exchange for a tract of land, from a man by the name of William Pollard, and that he took the bill of sale in his own name, as they contend he had a right to do. They deny any knowledge of all the facts and circumstances charged in said bill, which go to shew that Buckley had a life estate only, in said negroes, or that he held them in trust for said complainants, and contend that said negroes were bona fide the property of the said Buckley; and as a circumstance in confirmation of this fact, they attach to their answers a copy of the will of the said Buckley, by which he disposes of the said negroes as his own property. They admit that they, as the executors of said Buckley, took possession of said negroes immediately after his death, and have continued to hold and control them ever since. They also

insist upon the statute of limitations, by which they contend the complainants' right of recovery is barred.

Upon the trial, most of the material allegations in the bill were supported by testimony: there was some conflict however between the testimony of complainants and defendants, with regard to the identity of the money with which Buckley paid for the land which he exchanged for Jinny and her children. The Jury found a verdict in favour of complainants, for the sum of seven thousand dollars, to be discharged by the delivery of the negroes, and also for the sum of \$2557, as hire.

The defendant's counsel moved for a new trial, on the following grounds:

112 \*1st. Because the complainants on the trial of said cause, offered parole evidence to prove the trust set forth in their bill of complaint, which was objected to by defendants, on the ground that an express trust could not be proved by parole under the law, which objection was overruled by the Court, and the parole evidence admitted, on the ground that the trust alleged in the bill was an implied or resulting trust, and not an express trust.

2nd. Because the Court charged the Jury, that the statute of limitations did not commence running against the complainants, in favor of defendants, until the death of Buckley, which took place 15th July, 1831.

3rd. Because the Court charged the Jury, that the statute of limitations did not commence running against the complainants, in favour of defendants, until the time of the probate of the will of Buckley, by defendants.

4th. Because the Jury have returned a verdict in favor of Joseph Frost and wife, who have been made parties by amendment, who claim to be entitled to one-fifth of the property in controversy, without there being any evidence going to shew he had commenced any suit for his share of said property, against the defendants, until after the expiration of four years from the time of the probate of the will of said Buckley, so as to take the case out of the statute of limitations as to him.

5th. Because the defendants are sued by complainants as the executors of Hiram Buckley, deceased, and required to account for property held and possessed in their representative capacity, and the Jury have refused to allow them credit for their disbursements as rendered in their answer, which disbursements had been allowed and sanctioned by the Court of Ordinary of De Kalb County, and were not contradicted by any testimony.

6th. Because the Jury found contrary to Law and evidence.

These grounds will be considered in their order. As to the first, it is true that a motion was made at the trial, by defend-  
113 ants' counsel, \*to reject the evidence offered by complainants, upon the ground that according to the allegations in the bill, an express trust was created, and that an express trust could not be proved

by parole evidence.—The Court overruled the motion, and stated that it was of opinion, from the facts stated in the bill, that the trust was a resulting trust, and not an express trust, but the Court is now of opinion, that so far as this motion was concerned, it is not material whether this be considered as an express or implied trust, or a resulting trust, as the testimony would properly have been admitted to support either, that section of the Statute of Frauds and the other authorities relied on, not being considered as applicable to personal property.—See 2d vol. Story's Equity 235, and the case of Benbow v. Townsend, 7th vol. Eng. Ch. Rep'ts 143. The Court is therefore of opinion, that it did not err in overruling this motion, whether this be considered as an express or resulting trust.

As to the second ground, the Court will remark, that it has been furnished by both defendants' counsel with very able written arguments, in one of which the counsel has bestowed much labour on this branch of the case, for the purpose of establishing the position that Buckley did not have a life estate in the negro woman Jinny and her children, and that complainants could have commenced an action at Common Law against Buckley, for the recovery of the four hundred dollars, for his breach of trust, in not applying it in the manner directed, immediately upon their coming of age, and that having the right to sue for the four hundred dollars, and having failed to do so, their right to sue for the property purchased with the money was barred by the statute of limitations.

The counsel remarks in his argument, "that if the position assumed by the Court be true, that Buckley had a life estate in Jinny and her increase, and that the Martin children were seized of the property, as remainder men according to the rules of Law creating estates in remainder, then we admit the statute did not commence running until the death of Buckley." Let us then examine this question. An estate in remainder is defined to be "an estate limited to take effect and be enjoyed after another estate is determined."—2nd Blk. Com. 164. There then must be a particular estate to support the estate in remainder, the remainder must commence or pass out of the grantor at the time of the cre-  
114 ation of the particular \*estate, and the remainder must vest in the grantee during the continuance of the particular estate, or eo instanti that it determines." And an estate in remainder may be created in personal chattels as well as real."—Same authority 198.

The counsel asks "from whom, or by whom, has such an estate been created by Jinny and her increase in the Martin children? What grantor has conveyed Jinny and her increase to Buckley and wife during their lives, with remainder in fee to the Martin children? From what legal premises does the Court arrive at the conclusion that Buckley had a life estate only in Jinny and her increase?" The Court will en-



deavor to answer these interrogatories. In the first place, it will be recollected that it is alleged in the bill, which allegation is supported by proof, that in the year 1802, upon the intermarriage of Buckley with the widow Martin, John Langdon, the father of Mrs. Martin, delivered to Buckley and wife, the negro woman Nance, which was to remain in their possession during the life of the survivor, at whose death said negro and increase, was to become the property of the Martin children, that said negro remained in the possession of Buckley and wife, until the year 1807, when she was returned to Langdon, who furnished said Buckley with \$400 in lieu thereof, which was to be vested in another negro woman in the place and stead of Nance, that the \$400 was vested in a tract of land, and that in 1812, the land was exchanged for the negro woman Jinny and her two children, and placed in the place and stead of the said negro woman Nance and her increase, and to follow the conditions and stipulations made and entered into in relation to her. Now, it is a principle both of Law and Equity, "that whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or cestui que trust."—2d Story's Equity 502-3. The general proposition both at Law and in Equity upon this subject, is, that if any property in its original state and form, is converted with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right, (not being bona fide purchasers for a valuable consideration without notice) any more valid claim in respect to it, than they respectively had before \*such change.

An abuse of a trust can confer no rights on the party abusing it, or on those who claim in privity with him.—Idem. 502. Now, if the money had remained vested in the land for which it was first given, this would not have divested the Martin children of their interest in it, and if so, does not the doctrine apply much more forcibly when the land is exchanged for a negro woman, in accordance with the terms of the original agreement, and when that negro was, by Buckley himself, placed in the room and stead of the negro woman Nance, to be held and enjoyed upon the same terms and conditions? Then, in order to ascertain what kind of estate Buckley and complainants respectively had in the negro woman Jinny and her increase, we must not look to the conveyance from Pollard, (the person from whom Buckley bought her,) to Buckley, but we must look to the conveyance of the negro woman Nance, from Langdon to Buckley and his wife, for it will be recollected that when Nance was returned, the \$400 were advanced in lieu of her to purchase another negro woman, to be held upon the same conditions, and after the

negro woman Jinny was purchased by Buckley, it is in proof that she was placed by him in the room and stead of Nance, and to be held in the same way. Then, what kind of estate did Buckley have in Nance? Was it not a life estate, and did not the Martin children have an estate in remainder, limited to take effect and be enjoyed after the determination of such life estate? Did it not pass out of the grantor, Langdon, at the time of the creation of the particular estate? and did it not vest in the grantees, the Martin children, upon the very instant that Buckley's life estate determined. If so, according to the allegations in the bill, they had the same kind of estate in Jinny and her increase, for she was purchased with the money advanced in lieu of Nance, and placed in her room and stead. But it is contended, that whenever Buckley was guilty of a breach of his trust, by a misapplication of the trust money in the purchase of the land with it, instead of the negro woman, that he was liable to be sued for the money, and that not having commenced said suit within the time prescribed after they arrived at full age, that their right to do so was barred by the statute of limitations, and that not having sued for the money at that time, they cannot now maintain a suit for the property purchased with the money. Perhaps this may be true if the money had remained vested in the land and a suit had been commenced

116 for the recovery of the money; \*but there is very great doubt in my mind, whether if a suit had been commenced for the recovery of the money, under those circumstances, the statute would have been a bar until after demand made of the money. In the case of *Lever v. Lever*, 1 vol. Hill's Ch. Repts. I find this doctrine laid down by Judge Harper: "We concur with the Chancellor that when there is a concurrent remedy in Law and Equity upon the case made, the limitation is the same in both Courts, and the present case is to be considered as at Law, but at Law the statute does not begin to run until there is some usurpation of the claimant's right and a cause of action has arisen. The possession of an agent or bailee (and a bailment is a trust) is the possession of the bailor or principal and is not adverse till demand made. In the case of a simple deposit of money, to be left for the depositor or to be paid according to his direction, there is no cause of action till a demand be made or an account stated, and the statute does not begin to run till then." And even if the money had remained vested in the land until after the cestui que trusts came of age, they had the right to make their election and sue for the money, or to claim the land as having been purchased with their money. "If the trustee be guilty of wrongful conduct, he does not cease thereby to be trustee, and of the same kind of trust as before such conduct, but it is at the election of the cestui que trust, to consider the trust at an end if he chooses, and treat the trustee as a wrongdoer."—2d vol. Barbour & Harrington's Eq.

Digest 496, which cites the case of Falls v. Torrence, 4th Hawk. 413. But it must be recollected in this case, that before the complainants arrived at full age, and before any suit was brought for the money, that Buckley, in 1812, exchanged the land for a negro woman, in accordance with the original agreement, there was then no cause of complaint against him at the time the children came of age, and therefore no necessity for commencing a suit, but if a suit had been commenced, Buckley could have replied, I have complied with my contract, I have purchased a negro woman and placed her in the room and stead of Nance, and by the terms of the agreement, I am entitled to her during my life, and at my death, and not till then, will your right accrue. He might have added farther, it is true I did not do it immediately, nor was I required to do so by the contract, I have done it as soon perhaps as was convenient, and in ample time to secure all of your rights under the agreement, therefore you have

117 no cause of \*action against me. Would not this have been a full and complete answer and defence to such suit? I am therefore clearly of opinion, that according to the original agreement, Buckley had a life estate, and a life estate only, in Nance, and that when Jinny was purchased and placed in her stead, he had the same estate in her and no more, and that the fact of his having taken the title in his own name, cannot alter or affect the rights of the parties in any manner, except so far as the remedy is concerned, or the course proper to be pursued to obtain those rights. Buckley being tenant for life, must be, and is considered by the authorities, as a trustee. See McCord's Ch. Rep'ts 1 vol. 227. "Tenant for life and his privies are trustees for the remainder man." Also Fearn 414, and as above quoted from Story's Equity, an abuse of a trust by taking the title in his own name, can confer no rights on the party abusing it, or those who claim in privity with him. This disposes of the second ground.

The third ground is: because the Court charged the Jury, that the statute of limitations did not commence running against the complainants, in favor of defendants, until the time of the probate of the will of Buckley by defendants. In order to determine whether the Court erred upon this point, it will become necessary to go into the examination of the various kinds of trusts, the nature of the trust estate which Buckley held, and the rights conferred upon his executors by reason of their having acquired such estate as executors. Trusts are first divided into express and implied trusts. "Express trusts" (says Judge Story, 2 vol. 243) "are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will," and he defines implied trusts to be "those which are deducible from the nature of the transaction as matter or clear intention, although not found in the words of the parties," "or which are superinduced upon the transac-

tion by operation of Law, as matter of Equity independent of the particular intention of the parties." The latter of which, he says, comprehends all those trusts which are called constructive and resulting trusts. Trusts are again spoken of in many of the authorities as direct trusts, as contradistinguished from possible or eventual trusts. In Fonblanque's Equity, I find this authority: "Direct trusts are such as are created and acknowledged by the act of the parties. Possible or eventual trusts occur where a party who took possession originally in his own right, 118 and was prima \*facie the owner, is afterwards converted into a trustee, by evidence." Again, in the case of Kane v. Bloodgood, the Chancellor says: "Every deposit is a direct trust; every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is trustee, and suable either in Law or Equity. The several contracts of bailments which, according to Sir William Jones, "are amongst the principal springs and wheels of civil society," are cases of express and direct trusts. It will be perceived then, from these authorities, that it is not essential to the creation of a direct or even an express trust, that it should be in writing, except it be in relation to real estate, where it is made so by the statute of frauds. Then what kind of trust is the trust made by the complainants in this bill? Direct trusts are such as are created and acknowledged by the act of the parties. Then, most clearly, the contract of the parties in relation to the negro woman, Nance, and also in relation to the \$400, advanced in lieu of her, constituted a direct trust; then according to the doctrine already referred to in Story's Equity, "that if any property in its original form is converted with a trust in favor of the principal, no change of that state and form can divest it of such trust." The same position will hold good as to Jinny and her increase. The only thing that would give it the appearance of resulting trust, being the circumstance of the titles having been taken in the name of Buckley. It is true, that upon the execution of the title to Buckley for Jinny and her children, a trust did result to the complainants; but it may more properly be considered the tracing or following out the trust estate, previously created by the act of the parties. But perhaps it is not necessary to examine this question further, the main question being not whether this be a direct or implied trust—but whether it be such a case of trust as may be barred by the statute of limitations; and this is not the proper criterion by which to distinguish as to this matter, for executors and administrators are only constituted trustees by implication. Yet it is laid down in all the authorities, that no lapse of time will bar a legacy. What then is the rule by which we are to distinguish between cases in which the statute is a bar, and in which it is not? Upon a careful examination of the



authorities, I think the rule will be found to be this: that the trusts which are not within the statute, are those which are creatures of the Court of Equity, and not within the cognizance of a Court of 119 Law. It is laid down by \*many authorities, as a general rule, that no lapse of time will bar a direct trust, as between a trustee and a cestui que trust; and this is the doctrine laid down as a general proposition, in the case of *Decouche v. Savitier*, 3d Johns. Ch. Rep'ts. 190. But in the case of *Kane v. Bloodgood*, (7th Johns. Ch. Rep'ts. 110, where all the cases on the subject are reviewed,) Chancellor Kent, when speaking of the various cases of trusts, and of the propriety of withdrawing all such cases from the operation of the statute, says: "A review of the decisions will enable us, as I apprehend, to deduce from them a safer and sounder doctrine, and to establish upon the solid foundations of authority and policy, this rule that the trusts intended by the Courts of Equity not to be reached or effected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at Law, but fall within the proper, peculiar and exclusive jurisdiction of this Court." And Chief Justice Spencer, when delivering his opinion in the case of *Murray v. Coster*, 20th Johns. Rep'ts. 375, speaking upon the same subject, says: "I have, therefore, no hesitation in saying, that in a case where there is a concurrent jurisdiction in the Courts of Common Law and Equity, the rule must be the same, and the statute of limitations may be pleaded with the same effect in the one Court as the other, in cases of trusts and fraud, peculiarly, appropriately and exclusively, the objects of Equity jurisdiction, and according to the established doctrine the statute cannot be pleaded." I would, then, ask, is not the case, before the Court such a case? It must be obvious to the most superficial observer, that a common Law Court could have no jurisdiction in this case. In fact I have been informed that this bill was demurred to, for the want of Equity, and upon the ground that the complainants had a Common Law remedy, and my predecessor, as I think, very properly overruled the demurrer, thereby establishing the position, that, according to the allegations contained in the bill, the complainants had no Common Law remedy. In the case of *Decouche v. Savitier*, (3 Johns. Ch. Rep'ts. 216,) the Chancellor says: "There is a class of cases which admits a reasonable time to be a bar, but these are cases in which a party is turned into a trustee by matter of evidence merely, and took possession originally in his own right, and was prima facie the owner." But, I would ask, is this a case falling within this class of cases? Is Buckley turned into a trustee, by matter of evidence merely? or was 120 he so constituted by the contract \*and agreement of the parties, under which he received the negro woman, Nance?—and it must be borne in mind that Jinny

was placed in her stead. Did he take possession of Nance, originally, in his own right?—or we might make the same inquiry as to Jinny, whom he admitted he had bought and placed in the room and stead of Nance. But, suppose this to be such a case of trust as is not exempt from the operation of the statute, are the facts such as to protect these defendants from its operation? I think it has been clearly shewn that Buckley had only a life estate in this property with remainder in fee to the complainants. Then, according to the authority already referred to in the case of *Swan v. Ligon*, tenant for life and his privies are trustees for the remainder man. The executors of Buckley stand in the same relation to the complainants, as to this property, that Buckley did himself, and so long as they hold it, the statute can no more run, than if the property were still in the possession of Buckley. They set up no distinct title to the property, but claim it as his executors; therefore their possession is referred to his title, and to enable a party to plead the statute of limitations, there must be an adverse possession. Suppose that Buckley, instead of having a life estate in the property, had had an estate for ten years only, with remainder to the Martin children, and at the expiration of the ten years no demand had been made for the property, and he had continued in the peaceable possession of it for ten years longer, and had then refused to give it up, could he have then pleaded the statute of limitations successfully? I think not. This doctrine is fully sustained by the opinion of Lord Macclesfield, in the case of *Lockey v. Lockey*, as referred to in the case of *Kane v. Bloodgood*, 7th Johns. Ch. Rep'ts. 121, in which his Lordship says, "If the trustee is in possession and does not execute his trust, the possession of the trustee is the possession of the cestui que trust, and if the only circumstance be that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title. As in the case of lessee for years, though he does not pay his rent for 50 years, his possession is no bar to an ejectment, after the expiration of his term, because his possession is according to the right of the party against whom he seeks to set it up." If Buckley could not have pleaded the statute, can his executors who represent him, and claim under his title? No, in the language of Chancellor Kent, in the case of *Decouche v. 121 \*Savitier*, 3 Johns. Ch. Repts. 214, "The person to whom letters of administration were granted, succeeded to the possession of the property not in her own right, but expressly as trustee for the party having right, it would be unjust for the person who takes possession of the property of the intestate under the authority of Law qua administratrix to be at liberty after six years' possession, to set up the statute of limitations as a bar, to the cestui que trust." This doctrine is fully sustained by the Supreme Court of Alabama, in the

case of Maury's adm'rs v. Mason's adm'rs, 8th Porter's Repts. 211, and in delivering the opinion of the Court, the Judge quotes the opinion of Judge Story, in the case of Trecothick v. Austin, 4th Mason 16, where he observes, "executors are charged with no more in virtue of their office, than the administration of the assets of their testator; if at the time of his death, there is any specific personal property in his hands belonging to others, which he holds in trust or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, stock or other things, is not assets to be applied to the payment of his debts, or to be distributed among his heirs, but it is to be held as the testator himself held it." And again he remarks, "if the trust is still subsisting in the hands of the executor the lapse of five years (that being the limitation there) does not bar a remedy against him." And in the case of Lever v. Lever, Hill's S. C. Rep'ts. 1 vol. 67, before referred to, Judge Harper lays down the doctrine, that where there is a concurrent remedy in Law and Equity, the limitation is the same in both Courts, but that even at Law the statute does not begin to run until there is some usurpation of the claimant's right, and also that the possession of the bailee is the possession of the bailor, and is not adverse till demand made, and the statute does not begin to run till then. In Barbour & Harrington's Digest, in which the case of Falls v. Torrence, 4 Hawk., is referred to, I find this doctrine laid down: "In cases of direct and pure trusts, time has no influence. The estate of the trustee is that which supports the trusts, and without which it could not exist, and his possession operates for the benefit of the cestui que trust. The trustee cannot by any act of his, make his estate and possession adverse to the cestui que trust. The trust owes its existence to agreement, and it requires the consent of the parties to destroy it." The case of Collier and Wife v. Poe, 1 vol. Devereux 122 N. C. Rep'ts. 55, is a very \*strong case upon this point. In that case, James Paine, the grandfather of Elizabeth Collier, one of plaintiffs, on the intermarriage of Poe, the defendant, with his daughter, put into their possession several negroes, as a loan, during his pleasure, and not as a gift. This was in the year 1804. The wife of the defendant had issue—the plaintiff, Elizabeth—and immediately thereafter died. Paine died about the 4th of December, 1807, having first made his will, and bequeathed the negroes to the defendant for 18 years, and then directed them to be divided between the plaintiff Elizabeth and her father the defendant, the moiety of defendant to be retained by him during his life, and after his death to vest in her. The bill then set forth the marriage between the plaintiffs, and charged that defendant had denied their title, had sold some of the negroes and had threatened to sell others, that defendant was possessed

of but little property, and the plaintiffs believed, would remove all the negroes beyond the State. The plaintiffs prayed a special writ, &c. The answer of defendant denied the loan, and insisted upon the delivery of the negroes as an advancement to defendant's wife and alleged that defendant had always held and claimed the negroes as his own property, that when some report was circulated of the claim now set up, he had openly and publicly announced his title, had for more than three years before the death of Paine, and ever since, continued in adverse possession of the slaves, and insisted on the statute of limitations. It appeared in proof, that when the negroes were about being sent to the house of defendant, by Paine, he did declare to his daughter, that they were lent during his pleasure, and were not designed as a gift. But it did not appear that the defendant was present, and it was also in proof, that defendant always claimed title to the negroes, that he made it known and held them as his own, in opposition to the title now set up. Henderson, Judge, in delivering the opinion of the Court, says, "As to the statute of limitations relied on, in the answer, there is no pretence for its operation, either in Law or Equity, the possession of the defendant was that of a mere bailee, notwithstanding his declarations that he claimed them as his own, he could not by his own act throw off his character of bailee." Upon the application of the foregoing authorities to the case before the Court, I am clearly of opinion that the defendants can not protect themselves by the statute of limitations, even admitting that this is such case as in which

123 the statute might be a bar, \*because their possession is not adverse, being nothing but a continuance of the possession of Buckley, which was in accordance with the agreement, and consistent with the right of complainants, and also because their possession could not be adverse until demand made. The Court is therefore of opinion, that if it erred in charging the Jury that the statute did not commence running until after the probate of the will of Buckley, the error was in this, that it was thereby deciding that the statute did commence running from that time, which the Court does not now believe, and being favorable to the defendants, it is a matter of which they have no right to complain.

Fourth ground. Because the Jury have returned a verdict in favor of Joseph Frost and wife, who have been made parties by an amendment, who claim to be entitled to one-fifth of the property in controversy, without there being any evidence going to shew he had commenced any suit for his share of said property against the defendants, until after the expiration of four years from the time of the probate of the will of said Buckley, so as to take the case out of the statute of limitations as to him. The position occupied by defendants' counsel upon this ground is this, that the bill which was filed in the year 1835 by John L.



Martin, who states that he was the assignee of Frost and others, can not prevent the operation of the statute so far as Frost is concerned, because they say that on the trial Martin could not shew an assignment of Frost's interest, and therefore his interest cannot be considered as having been sued for, and that there was no action commenced as to him, or for his interest, until he was made a party by an amendment to the bill filed in 1839. If this be true that this was no suit as to him, then, there being no evidence to shew that any demand had ever been made for his interest, and it being necessary that there should be a demand made, to constitute the possession of defendants adverse according to the authorities already cited, it will be perceived, that the authorities relied on as to the third ground, are equally applicable to this—first, that it is a case in which there is no Common Law remedy, and therefore, being a case of trust, falling peculiarly and exclusively within the cognizance of a Court of Equity, the statute of limitations is no bar—secondly, that it were a case in which the statute could be pleaded, (which can only be done where the Courts of Law and Equity have concurrent jurisdiction,) that the statute has \*not run against the complainant because there is no adverse possession.

The fifth ground is: Because defendants are sued by complainants as the executors of Hiram Buckley, deceased, and required to account for property held and possessed in their representative capacity, and the Jury have refused to allow them credit for their disbursements as rendered in their answer, which disbursements had been allowed and sanctioned by the Court of Ordinary of De Kalb County, and were not contradicted by any testimony. As to this ground, it must be recollected, that the suit was not brought by the complainants as the legatees of Hiram Buckley, and do not therefore claim the property as belonging to his estate; if so, there would be no doubt that the returns made by the defendants as executors of said estate, being uncontradicted, ought to be allowed; but if complainants were entitled to the negroes as their own property immediately on the death of Buckley, they were also entitled to the hire of said negroes, after deducting therefrom the amount expended for the use and on account of said negroes; but there is no reason why the hire of said negroes should be applied to the payment of the debts of said Buckley, they should be paid out of the estate of Buckley proper. It will be found by reference to said returns, that the hire of the negroes, the subject of the suit, amounts to the sum of \$3157, and the interest on the same amounts to the sum of \$824, making together the sum of \$3981, and the Jury found the sum of \$2557 for hire, which leaves a balance of \$1424 of the hire and interest which they did not find, the presumption is, that the Jury considered this amount sufficient to satisfy all the disbursements which had been made by said

defendants, on account of said negroes, and this being a matter proper for the Jury to determine, and the allowance appearing to be sufficiently large, the Court cannot therefore disturb the verdict on this ground.

The sixth and last ground is: Because the Jury found contrary to Law and evidence. The Court has endeavoured to shew, that the verdict is not contrary to Law, and it was the peculiar province of the Jury to determine the facts to which the Law was applicable, and the evidence being conflicting as to some of the important facts of the case, the Court can not take upon itself to say that the verdict  
125 \*was contrary to evidence. The motion for a new trial is therefore refused.

WILLIAM EZZARD, J. S. C. C. C.

Warner & Foster, for the motion.

Colquitt, Ray, Calhoun & Clarke, contra.

## 126 \*RANDOLPH SUPERIOR COURT.

Nathan R. Smith v. Fanny Baker and James Baker.

April Term, 1842.

1. **Seals—What Constitutes a Seal.**—A scrawl annexed to the signature of a party to an instrument, is a seal, and the instrument is a sealed instrument, though it contain no words signifying the parties' intention that it shall be so considered.

2. **Evidence—Case at Bar.**—An instrument under seal pleaded as a set off to an action on a promissory note, but not described as being under seal, is inadmissible in evidence, on account of the variance.

This was an action of assumpsit upon a promissory note for two hundred and fifty dollars. The only evidence of the defendants, attempted to be introduced in order to resist the plaintiff's right to recover, was a bond made by the plaintiff to Fanny Baker, formerly Fanny Smith, at present the wife of James Baker. The bond was dated 24th December 1833, and was described in the defendants' answer as an instrument not under seal. Upon the production of the bond, when offered in evidence under the defendants' allegation, setting it forth in their answer, it was objected to by the plaintiff's counsel, upon the grounds of its being a sealed instrument, and therefore inadmissible under the pleading.

The presiding Judge (Judge Wellborn) sustained the objection, and the bond was rejected. The defendants then confessed judgment to the plaintiff for his principal sum with interest and costs of suit, and moved a 'rule nisi for a new trial, which was granted upon the ground, that the Court erred in ruling out the defendants' evidence.

The bond, after reciting the usual  
127 covenants to be performed by \*the obligor, concludes thus: "then the above bond to be void, else to remain in

full force and virtue, the day and year above written."

(Signed), Nathan R. Smith, [L. S.]  
Signed, sealed and acknowledged, in the presence of

Samuel Griffith,  
Benjamin Holland, J. I. C.

The only question made in this case, is: What is the legal import of the instrument sought to be introduced by the defendants under their pleading, and if it is necessary to constitute a sealed instrument, that it should contain the usual words in the body of the instrument itself, of "Witness my hand and seal?" The defendants contend that in the absence of those words, the attestation of the subscribing witnesses annexed to the bond, of "Signed, sealed and acknowledged in their presence," is not sufficient to constitute such a sealed instrument.

In the discussion of this question, it is unnecessary to go into the Common Law upon the doctrine of seals, as defined more particularly by Lord Coke. We are not to discuss, at this time, whether a seal consists of an impression being made upon wax or some other tenacious substance, or whether a flourish with a pen at the end of the party's signature, or a circle of ink, or a scrawl, does not come in the place of the Common Law method of sealing upon wax. I believe, with the exception of New-York, scarcely any other State in the Union, holds to the first, and that a seal in most of the States, is a good seal which is done with pen and ink, is a proposition equally true. The case of *Warner v. Lynch*, 5 Johns. Ch. Rep. 239, only reiterates and establishes what is laid down and contended for by Chancellor Kent, in 4 Kent's Com. 453, wherein the definition of Lord Coke, of seals, is literally recognized and adopted, that "a seal is with an impression 'sigillum est cera impressa, quia cera sine impressione, non est sigillum.' " Without stopping to discuss the more preferable mode of executing sealed instruments, would the instrument before us, under either form, be regarded as a sealed instrument in the absence of such words as are usually contained in the body of the instrument, in which the party manifests his intention to affix his seal.

In a deed, it is said by Comyn, (4 Com. Dig. 157,) that it is unnecessary  
128 \*to mention "Witness my hand and seal," and if a corporation seals, it is unnecessary to say, "Sigillum nostrum commune."—See also 5 Bacon, 159, tit. Obligation.

When a person uses a well known symbol or cypher which has usually been employed for the purpose of a seal, and no other, the Court will presume that it was annexed for that purpose, and no other.—*Ralph & Co. v. Gist*, adm'r of Coleman, 4 McCord's Rep. 267.

That the usual scrawl of [L. S.] constitutes as good a seal, and is so regarded in Georgia, as though it were done upon wax or some other tenacious substance, is so well

established, that I will say nothing upon that branch of the question which has incidentally presented itself, the same usage, that established the waxen seal in England, establishes and sanctions the scrawl in this State, and makes it of equal solemnity.

If there is nothing opposite the name of the party to indicate a seal, the words, "Witness my hand and seal," or "Signed, sealed and delivered in presence of," &c., cannot make it a sealed instrument.—*Taylor v. Glaser*, 2.

However, by an Act of the Legislature of Georgia, passed in 1838, all instruments are to be considered as sealed instruments, which contain any words indicating the party's intention to make a sealed instrument: either by using the scrawl, or adopting the familiar words of "Witness my hand and seal."

But as the Law stood before the Act of 1838, it was unnecessary that the scrawl should be adopted by the usual words in the body of the instrument. It is enough if the scrawl be affixed at the time of the execution, the usual words of "Witness by hand and seal," and of "Signed, sealed and delivered in," &c., can in reason make no difference, for the question always is, is this the seal of the obligor? and if he has delivered it with the scrawl, the Court must regard it as his seal.—*Trasher v. Everhart*, 3 Gill & Johnson, 234.

These authorities, to my mind, clearly establish, that the instrument  
129 \*under consideration is a sealed instrument, and the defendants, not having described it as such in their answer: It is therefore ordered, by the Court, that the Rule Nisi be discharged, and the motion for a new trial refused. It is also ordered, that the Clerk proceed to issue execution upon the judgment.

WILLIAM TAYLOR, J. S. C. S. W. C.

Holt & McDougald, Counsel for Plaintiff.  
J. Sturgis & S. Gainer, for Defendants.

130 \*MUSCOGEE SUPERIOR COURT.

The State v. John Harrell.

April Term, 1842.

Contempt—Attachment—Jurisdiction.—A Sheriff cannot execute an attachment, for a contempt of Court, out of his county.

This writ is directed to Daniel Mathewson, at the instance of John Harrell. From the return of Mathewson, it appears, that as the sheriff of Stewart County, in this State, he arrested the said John Harrell, in this county, on the second day of this month, by virtue of an attachment issued by the Justices of the Inferior Court of Stewart County, against the said Harrell, for an alleged contempt of their authority, in refusing to answer a writ of habeas corpus, lately directed to the said John, in the



County of Stewart, and that the said Daniel still holds the said John in custody.

The attachment is directed specially to the said Daniel, as the Sheriff of Stewart County, commanding him to arrest and commit the body of the said John, until the supposed contempt is purged. No jurisdiction is given in the attachment to any other officer, to execute it.

From these facts, it is most apparent that Mathewson, on the supposition that he was at the time of the arrest the Sheriff of Stewart, had no authority by virtue of the attachment, to arrest the prisoner in Muscogee county, and to detain him here in custody. His commission does not extend into this county for the purpose in question. "The authority of the Sheriff is confined to the county whereof he is Sheriff—if the Sheriff therefore execute a writ out of his county, he is a trespasser."—Watson, on the duty of Sheriffs, 44.

Other objections to the validity of the attachment have been taken, on the validity of which, it is not material to pass.

The application for the discharge of the petitioner, is granted.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

### 131 \*FAYETTE SUPERIOR COURT.

George P. Parker v. Clinton P. King, Justice of the Peace, and William McBride, Clerk of the Inferior Court.

September Term, 1842.

1. **Estrays—Compensation of Impounder.**—The Justice of the District, and Clerk of the Inferior Court, have the right to determine the amount of compensation due to the person who tols a stray mule, for keeping the same, and their decision is final.
2. **Same—Same.**—They have power to refuse compensation, when the mule has been put to work.

This certiorari was filed by the plaintiff, who was the taker up of two stray mules, in which he complained, that he had taken up two mules, as estrays, and kept them for thirteen months, until they were sold, and that the said defendants, whose duty it was to determine the amount of compensation which he was entitled to receive for keeping said mules, refused by their decision to allow him any compensation. The return shews, that it appeared, by the appearance and condition of said mules, at the time they were sold, also by the admissions of the said plaintiff, that they had been worked, and they were therefore of opinion, that inasmuch as he had put the said mules to labour, that he was entitled to no compensation for keeping them. This being a matter which the law assigns to the decision of those officers, and they having the right to determine it according to the circumstances, and it appearing from said return that said mules had been put to labour, I am of opinion, that there

was no error in said decision. It is therefore ordered, that said certiorari be dismissed, and the proceedings below confirmed.

WILLIAM EZZARD, J. S. C. C. C.

### 132 \*Constantine M. Dodson v. Christopher Connally and W. P. Allen and John S. Dodd.

September Term, 1842.

**Certiorari—When Writ Lies—Objections Not Raised Below.**\*—No matter can be assigned as a ground of error in the proceedings before a Justice's Court, that was not urged in that Court.

This certiorari was brought by the said Dodson, who was the defendant in the Court below, for the purpose of correcting certain errors alleged to have been committed on the trial of eight cases tried in the Court below, founded on eight promissory notes: the error complained of, is, that said notes were all given for the same consideration, which exceeded in the aggregate a Magistrate's jurisdiction, and the return of the Magistrate shews that there was no such plea filed or insisted on in the Court below. I am of the opinion, that as there was no plea filed to the jurisdiction, and no proof offered to shew that the consideration of said notes was the same, and no motion made to consolidate said cases, that there was no error committed by the Magistrate in giving judgment on said cases, either on the first or second trial, and that even admitting this defence to be good, if it had been made in the Court below, it can not be assigned as a ground of error, when no such defence was set up. It is therefore ordered, that the certiorari be dismissed, and the proceedings below confirmed.

WILLIAM EZZARD, J. S. C. C. C.

### 133 \*Bartholomew Westbrooks v. Daniel McDowell and John Simmons and Josiah Eder, Justices.

September Term, 1842.

1. **Assignment—Assignability of Debt Pending Suit.**—A plaintiff cannot assign a debt, the subject of a suit, during the pendency of the suit, to the prejudice of third persons.
2. **Garnishment upon Judgment—Payment—Effect.**—A defendant who is garnished to answer what he is indebted to the plaintiff, in a suit or judgment, and who admits his indebtedness to plaintiff, and judgment is entered against him on the garnishment, by paying this judgment, is discharged from the judgment entered in the original case.

It is alleged in the petition for certiorari in this case, that a judgment was obtained in a Justices' Court, in favour of Daniel

\*See Chambers v. Dickson, Ga. Dec. pt. 1, p. 164; Jack v. Watson, Ga. Dec. pt. 1, p. 168; Gresham v. Landens, Ga. Dec. pt. 2, p. 149.

McDowell against said Westbrooks, for the sum of ten dollars, from which the defendant appealed to a Jury, and that on the Jury trial said judgment was confirmed; that afterwards defendant was garnisheed by one William W. Boyett, to answer what he was indebted to the said McDowell, and that he appeared and answered that he was indebted ten dollars by reason of said judgment, and the Court gave judgment against him on the garnishment for the sum of ten dollars, and that afterwards execution issued against the said defendant and his securities on the appeal and stay upon the original debt which was levied upon his property, and that he swore to the illegality upon the ground that it had been paid off, by paying the execution which had issued against him upon the garnishment, and that the Court dismissed the illegality. All of the above facts are admitted in the return of the Magistrates; but this additional fact is stated, that during the pendency of the suit of McDowell v. Westbrooks, between the first and second trials, the judgment, or case, was assigned by McDowell to John Watson, and that notwithstanding they had given judgment against Westbrooks on the garnishment, they determined that he had acted in his own wrong in paying off the execution issued upon said garnishment, upon the ground that said debt had been transferred before said defendant was garnisheed. Now the whole question must depend up the validity of this assignment, and I am of opinion that said debt could not be assigned during the pendency

134 of the suit, \*so as to affect or prejudice the rights of third persons, and that the judgment having been obtained on a suit in favour of McDowell v. Westbrooks, fixed the indebtedness of Westbrooks to McDowell, and he having been garnisheed on account of this debt, and there being record evidence against him that he was indebted, and he having so answered, and a judgment having been rendered against him, and he having paid off the same, said payment was a discharge of the original judgment. It is therefore ordered, that the certiorari be sustained, and that the decision of said Court, dismissing the illegality to the garnishment *fi. fa.*, be set aside, and a new trial, upon said illegality, be ordered.

WILLIAM EZZARD, J. S. C. C. C.

135 \*TALBOT SUPERIOR COURT.

Martha H. Ferguson and Others v. James Ferguson, Jesse Carter and Others.

September Term, 1842.

Mistake of Law—Relief in Equity.\*—A Court of Chancery will not correct errors of Law; or in other

\*Mistake of Law—Relief in Equity.—The doctrine of the principal case does not appear to be sustained by the later cases. See *Lucas v. Lucas*, 30 Ga. 191, 76 Am. Dec. 642, where it is said: "The principle of

words, where the only ground on which relief is asked, is an ignorance of the Law, a Court of Equity will not interfere.

This bill states that the complainant, Martha H. Ferguson, is the wife, and the other complainants the minor children of the respondent, James H. Ferguson—that on the first day of September, eighteen hundred and thirty-eight, the respondent, Ferguson, was in a condition of pecuniary insolvency, and without the means of providing for the wants and necessities of the complainants—that one Richard Christmas, the father of the said Martha, and grandfather of the other complainants, actuated by motives of natural love and affection, and the sense of the destitute situation of the complainants, made to them a deed of gift of four slaves, a copy of which is attached as an exhibit to the bill, and which is in these words, to wit: "This indenture made and entered into this the first day of September eighteen hundred and thirty-eight, between Richard Christmas of Muscogee county and State aforesaid of the one part, and Martha Henrietta, daughter of the said Richard Christmas, and wife of James Ferguson of Talbot county in said State of the other part—Witnesseth, that the said Richard Christmas, for and in consideration of the natural love and affection, which he has and bears unto and for the said Martha Henrietta, she being his daughter, and for and in consideration of the sum of one dollar, to him in hand paid, by the same Martha Henrietta, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath given, granted, aliened, and confirmed, and by these presents doth give, grant, and alien and confirm unto the said Martha

136 \*Henrietta, and to her lawful children for her, and their own proper benefit and behoof, a certain negro woman named Athelia and her three children by name Sophia, Henry and Dick: To have and to hold unto her the said Martha Henrietta, and to her lawful children, to her and their own proper use, and benefit, and behoof, forever, in fee simple, independent of any interest, which they or either of them, may have in any real or personal estate, hereafter, at or after my death—In witness whereof I have hereunto set my hand and seal this the day and year above written in presence of 3 Burt, Pleasant F. Hardwick. (Signed,) Richard Christmas. [seal.]"

The bill further states, that the said Richard intended by said deed of conveyance to settle the property mentioned

granting relief from a mistake as to the legal effect of an instrument is established by repeated adjudications of this court, and also by statute. \* \* \* The principle is, that where there is a difference between the legal effect produced by the words, and the effect intended to be produced by them, the words, with their mistaken effect, shall yield, and the true intention shall prevail." *Citing Wyche v. Greene*, 11 Ga. 159; *Wyche v. Greene*, 16 Ga. 40. See also, *Clayton v. Bussey*, 30 Ga. 946, 76 Am. Dec. 680.



therein, upon the said Martha, and to her separate and exclusive use, and to debar the said James, and his creditors, from the same—that through ignorance of the parties as to the proper mode of framing the instrument so as to create, and settle a separate estate on the said Martha, the wife of said James Ferguson, and the want of knowledge that the said deed, as executed, would convey to the said Ferguson the interest designed for his wife exclusively, the deed appears in the form in which it is seen at bar, that the defendant, Carter, and the other defendants, are creditors of the said Ferguson, and have levied on the property included in said conveyance, and are seeking to have the same sold by the Sheriff of the county, to satisfy their demands. The prayer of the bill, is, that the parties to the said deed, may be permitted to correct the mistake alleged by them to have been committed, as to the legal effect of the instrument as it is written, and to have the same decreed to settle a separate estate on the said complainants to the exclusion of the husband, and his creditors, for the appointment of trustees, to take charge of the sole interest of the said Martha, and that in the meantime the creditors be enjoined from selling said property or any part thereof, and for general relief. To this bill, a general demurrer, for want of equity, is filed. From this statement of the case it is apparent, that the bill imports an application to the Court in behalf of the grantees in the deed for the correction of an error in Law, alleged to have taken place in framing the instrument, and for the reforming the language and legal effect of the instrument, so as to make it speak

the supposed intention of the parties  
 137 \*thereunto, contrary to what is written, as those intentions shall be shewn, by parole evidence, to have been at the time the deed was executed. The broad and general question of the right of a Court of Chancery to correct, by its decree, errors or mistakes in Law committed by individuals, has been much discussed, and variously decided. We are left to select from the different, and conflicting authorities on the subject, those we think most conformable to correct principles, and most conducive to the general good. It should be first observed, that the deed in question, is a full, unambiguous and perfect instrument. No omissions, mistakes or incongruities, appear on the face of it. It is, too, an instrument of great solemnity, being sealed and witnessed. Let it be further borne in mind, that it is not pretended that any misapprehension of the facts on which the deed was founded, existed between the parties at the time the instrument was executed, or that any fraud, deceit, or imposition, was practised to procure it. But the prayer of relief is placed on the naked ground of an error in Law, to be shewn by verbal testimony in direct contradiction to the plain and explicit language of the deed. The conveyance of the property in contest,

although nominally made to the complainants, Martha H. and her children is, in law, a conveyance to the respondent, Ferguson, to the precise extent to which the said Martha claims to be entitled. This, by virtue of that legal unity which exists between husband and wife. In order to prevent the marital rights of the husband from attaching to property conveyed to the wife, it is necessary that the conveyance contain words of express exclusion of him, or that the intent to exclude him do otherwise explicitly appear. The words in the gift or grant "to her," or "to her own use," will not have the effect in Law of vesting a separate estate in the wife. To this point the authorities are explicit. 1 Chitt. Gen. Prac. 60; Clancy on Rights, 267; 1 Brown's Ch. R. (by Belt), 383; 4 Mad. Ch. Rep. 216; Story's Com. on Equi. Indeed the bill is framed to meet this construction of the conveyance. So far then, as the intention of the parties to the deed is to be derived from the face of the instrument itself, it is conclusive in behalf of the title of the husband to the property in dispute. Now, on the score of credibility, this solemn and deliberate depository of the contract of the parties, other things being equal, stands on higher ground, as a means of establishing the intention of the parties, than the mode of proof by which it is  
 138 sought to \*be set aside. "Parole evidence is not admissible to contradict, or vary, or add to, the terms of a deed."—1 Phil. on Evi. 548; 2 Stark. 548. That relief will be granted against a deed where it has been executed under a mistake of material facts, or where fraud, or imposition, unconnected with guilt or criminal negligence on the part of the applicants, has been practised, is certainly true, but in the absence of some special ground of relief, the deed is conclusive upon the parties to it. We proceed to ascertain whether a mistake of the Law governing the instrument, can, in the circumstances stated in the bill, be made the reason for reversing or varying the terms of the conveyance. That "ignorance of the Law, which every man is bound to know. excuses no man," was an early maxim in the Law.—4 Black. 28. It is true, that the principle is here spoken of in more direct reference to the subject of criminal Laws, and the liability incurred by those who violate them, but the same doctrine has been very generally extended to civil cases also, alike at Law, and in Equity. "It is a well known maxim, that ignorance of Law will not furnish an excuse for any person either for a breach or an omission of duty: ignorantia legis neminem excusat: and this maxim is equally as much respected in Equity as in Law."—1 Story, Com. on Eq. 121; 1 Fonb. Eq. B. 1, Ch. 2, sec. 7, note (v) see page 109; 1 Lyon v. Richman, 2 Johns. Ch. Rep. p. 60. "The probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might not be carried."

—1 Story's Com. on Equity, 123. It is too easily understood to require proof, that the administration of criminal Law cannot be insisted on if the subjects of it are permitted to defend on the ground of ignorance of it—nor can the rights of property or reputation be protected, if individuals are allowed to repudiate the construction and operation of legal principles on their dealings and conduct. The rule that all must be held to know the law, as a general rule, is founded in the necessity of it, to government and social order. I lay down the principle with some qualification, for there are cases of very high authority, in which mistakes of the Law of a peculiar character have, in some circumstances, been relieved against in a Court of Chancery. A familiar instance is that of a defective execution of a power by one entrusted with it: As if an authority to sell land be conveyed in writing, and the deed made under it be informally executed through the ignorance of the

139 \*draftsman. In that case, the intentions of the parties being apparent on the face of the papers themselves, and the error resting in the intrinsic proof contained in the transaction itself, a Court of Equity will step in, and give effect to the real intentions of the parties to the conveyance.—1 Mad. 52; 1 Story's Equi. 185. But when the conveyance attacked is in itself a formal and complete one, and is drawn in the form chosen by the parties, it is not competent to resort to parole proof to contradict, and reform it, upon an alleged ignorance of its legal effect." "And if upon the mere ignorance of the Law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those, which have been executed by a complete performance there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature and difficulty of the proper proofs."

—1 Story's Equi. 123. I content myself with adding the authority of the Supreme Court of the United States, in the case of Hunt v. Rousmaniere's Adm., 1 Pet. 2. On the point now at bar, the Court, in the decision referred to, held the following language:—"The question then, is, ought the Court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of Law. We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such a mistake, and whatever exceptions there may be to this rule will be found to be not only few in number, but they will be found to have something peculiar in their character."—(See 16 p. of the vol.) I am unable to discover any thing in the case made by this bill, that will take it out of the general rule: on the contrary, there are strong considerations founded in policy and justice, against it. Demurrer sustained.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

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\*COWETA CIRCUIT.

John Doe, ex dem., Williamson Terrell v. Richard Roe, Casual Ejector, and Elizabeth Deane, James Samples and John H. Stinson, Tenants in Possession.

— Term, 1842.

Ejectment—Verdict and this point reserved to be submitted at the next term of the Court, to wit: Whether the plaintiff had made out such a case on the introduction of the grant from the State to Gregory O. Green, the power of attorney from Gregory O. Green to N. H. Greer, and N. H. Greer's deed to Williamson Terrell, as would entitle him to go to the Jury, having introduced no other evidence, of the identity, than contained in the aforesaid papers, and on the ground that there was no evidence of the identity of Gregory O. Green.

Ejectment—Title to Support—Evidence.—The lessor of the plaintiff is not required to introduce evidence of the identity of the person under whom he claims. A grant or deed to a person of that name makes out a presumptive case, and casts the onus on the opposite party.

The only point embraced in the above rule for the decision of the Court, is this: Whether the plaintiff had made out a sufficient title to carry his case to the Jury upon the introduction of the titles above referred to; or, in other words, whether it was necessary for him to adduce any other evidence as to the identity of the lessor of the plaintiff than a title in his name. This question was settled by the opinion of Judge Spencer, in the case of Jackson v. Goes, 13th Johns. Repts. 523, where the Judge uses this language: "In this action, (to wit: an action of ejectment,) whenever the plaintiff introduces a deed conveying premises to a person of the name of his lessor, it is prima facie evidence that the lessor is the real grantee, the burden of disproving this and repelling the presumption is thrown on the

defendant, and he may prove that the 141 deed was granted to a \*different person of the same name." This authority is directly in point and I think conclusive upon the question.

It is therefore ordered, that said rule be discharged, and that the verdict and judgment in said case stand affirmed.

WILLIAM EZZARD, J. S. C. C. C.

142 \*William W. Gilmer and John S. Johnson and His Wife Mary Ann Johnson v. Benjamin H. Cameron, Guardian, & C.

— Term, 1842.

1. New Trial—Misconduct of Jury.—That a Jury had spirits in their room of which they did not drink. is no ground for a new trial.

2. New Trial—Verdict Contrary to Evidence.—The Court will not grant a new trial on the ground that



the verdict is against evidence, when there is evidence on both sides, and on which the Jury might fairly predicate their verdict.

**3. Receipts as Evidence—Receipts in Full.\***—A receipt in full is not conclusive against the party who gives it, but may be explained.

This was a bill in Equity, filed by complainants against the defendant, as guardian of the said William W. and the said Mary Ann, for their distributive shares of the estate of their deceased father in the hands of their said guardian, which came on for trial on the appeal at the last term of this Court, when the Jury found a verdict for the defendant. A motion was made for a new trial upon the following grounds:

1st. Because the Jury, after they had been charged with said cause, and while deliberating on their verdict, had conversation with divers persons without the leave of said Court, and had in their Jury room ardent spirits, of which they drank freely, and also partook freely of ardent spirits out of their Jury room, while they were charged with said cause.

2. Because the verdict of the Jury was contrary to both Law and evidence, and the charge of the Court.

On the argument of this motion, it did not appear that the Jury had held any conversation with any person. On the other branch of the first ground, it appeared, that a bottle was seen suspended by a rope which was drawn upon the outside of the house and taken into the Jury room at a window

—two of the Jurors testified that they saw it, \*and one that he took it and smelt it—that it smelt like spirits of some kind, and that he took it and carried it out of the room. This is the only evidence of improper conduct on the part of the Jury. In opposition to this, the defendant has produced the affidavit of each member of the Jury, stating that he did not, after being charged with said case and before the verdict was returned, drink spirits of any kind, and that he did not know of any other member of said Jury's doing so. This, then, is sufficient evidence, in the absence of all proof to the contrary, to satisfy the mind of the Court that no spirits was drunk by the Jury; but it is contended, that it was highly improper for them to have spirits in their room, and that it could have been taken there for no other purpose than for the use of the Jury. It is true, this conduct was improper and such as to subject the Jury to suspicion, (and the conduct of a Jury should always be such as to be above suspicion,) but I know of no Law or precedent which would authorize the Court to grant a new trial upon the ground that there was spirits in the Jury room, when there was positive

evidence that it had not been tasted by any one of the Jury. It was decided by the Court, in a case reported in Cowen's Repts., 7th vol., 562, that when one of the Jury drank spirits, after being charged with the case, that it was a sufficient ground for the granting of a new trial, but I know of no authority that goes any further.

The second ground is, that the verdict is contrary to both Law and evidence, and the charge of the Court. The rule upon this subject is this: that when there is any evidence to authorize or support the verdict, the Court will not grant a new trial upon the ground that the verdict is contrary to the weight of evidence. The defendant rested his defence upon the ground that he had a full and fair settlement with complainants after they were of age and competent to settle, and had paid them all that was due them and taken their receipts in full, which receipts were given in evidence to the Jury on the trial. It appeared also on the trial, that the settlement was not made by the parties themselves, but that they had mutually agreed to refer the accounts of the guardian (the defendant) to three competent persons to make the calculations and settlement for them, and that after said calculations were made, defendant requested complainants to take the books and look over and examine the accounts for themselves, and that they did so, and that after making said

144 \*examination the complainant, Gilmer, claimed the additional sum of three hundred and fifty-six dollars and fifty-two cents, and Johnson the additional sum of two hundred and twenty dollars and six cents, which amounts were paid by defendant, the complainants giving him their receipts in full. It is true, as contended on the part of complainants, that these receipts are not conclusive between the parties, but they are certainly prima facie evidence, and would be sufficient evidence of satisfaction, unless it could be shewn that there was a mistake in the settlement, or that they had been obtained by fraud, or that they had been given by the parties when they were ignorant of their legal rights, and there was no evidence within the recollection of the Court to that effect, but on the contrary the settlement seems to have been made with great firmness and deliberation: in addition to this, there is an allegation in complainants' bill, "that any receipts which defendant may hold from them, of a settlement with them, are fraudulent, and were obtained by a fraudulent representation of the condition of said estate by said defendant, and a fraudulent concealment on his part of many of his actings and doings in the management of said estate," which charge is fully and positively denied by defendant's answer, and there having been no evidence on the trial to contradict said answer, it was evidence for the defendant. It has been contended by complainants' counsel, that taking the returns of defendant as to the amount of his indebtedness and the sums

\*Receipts as Evidence—Receipts in Full.—In support of the proposition that a receipt in full is not conclusive, but open to explanation to show a mistake, fraud or imposition in obtaining it, see *Dodd v. Mayson*, 39 Ga. 605; *City Bank v. Kent*, 57 Ga. 283; *Armour v. Ross*, 110 Ga. 403, 35 S. E. Rep. 787. See also, *Tarver v. Rankin*, 3 Ga. 210.

which he shews that he has paid by the receipts of complainants, and there will still be a considerable balance found in favour of complainants, and that therefore the verdict was contrary to evidence; but when a party receives a smaller sum than the amount of a debt due him, which he acknowledges to be in full of the debt, (according to the doctrine laid down by Chief Justice Marshall, in the case of *Henderson v. Moore*, 5th Cranch's Reports, 11,) the Jury would have the right to presume, therefore, that the whole debt had been paid, and that the receipt was taken for the amount paid at the time, it being a balance of the original indebtedness, and I think there was some evidence in this case that there had been money paid which was not included in the receipt. But even admitting it to be true, that there was a balance due them, is this any reason why the submission and settlement made by them should be set aside, provided it was made fairly and without any fraud or concealment, and when they had a full knowledge of all their legal \*rights, unless there had been some mistake which is not alleged in this case? I think not. I am therefore of opinion, that the verdict is not without evidence to support it, and therefore not contrary to evidence, nor do I consider it contrary to Law.

The Court, in this case, as in all others, endeavoured to charge the Jury as to the Law applicable to the case, and it was the peculiar province of the Jury to find the facts and make an application of the Law to the facts, and as the Court did not charge the Jury what their finding should be, I can not say that the finding was contrary to the charge of the Court.

It is therefore ordered, that the motion for a new trial be refused, and the verdict affirmed.

WILLIAM EZZARD. J. S. C. C. C.

146 \**Diannah Griggs v. Seaborn J. Thompson and Abner Glauten.*

—Term. 1843.

1. *Interpleader—When Sustainable.*—A bill of Interpleader will be sustained when there are two parties claiming of the complainant the same

\**Interpleader—When Sustainable.*—In *Adams v. Dixon*, 19 Ga. 513, 65 Am. Dec. 610, it is said: "To entitle a person to a bill of interpleader, he must be in a position in which he is liable to one of two or more persons who claim from him the same debt or duty, and he claims no right in opposition to the claimants, or either of them: and he does not know to whom he ought of right to render the debt or duty. In such case, he may generally call on the parties to interplead, that the court may judge between them, and he be protected. He must be a party entirely indifferent between them. The amount of the fund or matter in the hands of complainant, upon which hostile claims are alleged to have been made, must be taken to be as stated by the complainant, and cannot be controverted by the

demand, and it is no objection that one has been carried into judgment.

2. *Same—Same—Ground of Jurisdiction.*—The ground of equitable jurisdiction in such cases is the doubtful title of the defendants. Without it, the claimant might pay to the party having the inferior right, and thereby render himself liable to the other.

This bill is filed by the complainant, praying that the defendants shall be compelled to interplead upon the following state of facts.

She alleges in her bill, that on the twenty-ninth day of September, in the year 1839, she made her promissory note, payable to one Benjamin Keel, for the sum of five hundred and fifty dollars, due and payable on the twenty-fifth day of December, 1840. That, at some time thereafter, unknown to her, the said Keel transferred said note to one Martin Whatley, and that the said Seaborn J. Thompson commenced his suit against the said Whatley on a promissory note which he held against the said Whatley for the sum of eight hundred and eighty-five dollars and eighty cents, returnable to the April term, 1840, of said Court, and that pending said suit, to wit: on the twenty-second day of January, 1840, the said Thompson caused a summons of garnishment to be served on the said complainant, requiring her to answer what she was indebted to the said Whatley—that she appeared at the April term, 1841, of said Court, and answered said garnishment, denying that she was indebted to the said Whatley, not knowing at that time that her note had been transferred to him, and that her answer was traversed, and upon the trial of the issue the Jury found a verdict against her, and judgment has been entered up thereon in favour of said Thompson. And it is further stated, that the judgment of the said Thompson v. the said Whatley, on account of which complainant was garnisheed, has been paid off and satisfied by the then Sheriff of said county, by a rule, in consequence of his having taken insufficient bail, and that the judgment obtained against complainant on said garnishments improperly \*kept open, notwithstanding said Thompson has received his money. And it is further alleged, that said promissory note of said complainant was at some time, she does not know when, transferred by the said Whatley to the said Abner Glauten, and that she has reason to believe that it was after the time at which she was garnisheed, and with a knowledge of said fact. It is further stated, that said Glauten has caused suit to be commenced on said note, in the Superior Court of said county, and has obtained a judgment on the same against the complainant, from which she appealed, and which case is now pending on the appeal.

answers for the purpose of having it adjudicated upon." As to when a bill of interpleader is sustainable, see also, *Strange v. Bell*, 11 Ga. 103; *Burton v. Black*, 32 Ga. 53; *Davis v. Davis*, 96 Ga. 136, 21 S. E. Rep. 1002.



And therefore she alleges that she is in danger of being compelled to pay said debt twice, and prays that said defendants may be compelled to interplead, &c.

To this bill the defendants have demurred, upon the following grounds:

1st. Because, from complainant's own shewing, there is no equity in said bill.

2d. Because, complainant has an adequate Common Law remedy.

3d. Because, the allegations in said bill are inconsistent.

4th. Because, from the allegations in said bill, the complainant proposes to go into the investigation of the consideration of a subsisting judgment.

5th. Because, complainant, by her bill, calls upon these defendants to interplead in a matter that is determined by a trial and judgment of this Court, and an action now pending on the appeal at law.

As to the first ground, that there is no equity in the bill, this must depend upon the truth of the fact assumed in the second ground, to wit: that complainant has an adequate Common Law remedy. It is to be observed, in the first place, that this is a general demurrer, and therefore goes to the whole bill, and when this is the case, and there is any part, either as to the relief or the discovery, to which the defendant ought to put in an answer, it is generally considered that the demurrer being entire must be overruled. One charge in the bill, is,

148 \*that the note of complainant was transferred to Glauten, as complainant believes, after she was garnisheed, but she does not know at what time; now this is a very important fact to be established to enable her to defend herself in the suit pending against her, and it becomes necessary to resort to the conscience of said Glauten to establish it, and it is impossible to defend said action successfully without such proof. The complainant cannot therefore be said to have an adequate remedy at Law, so far as that case is concerned, with regard to the judgment in favour of Thompson; it may be true that she may have a Common Law remedy, provided the judgment upon which the garnishment was predicated has been paid off, but if it has not, it is the more important to have the discovery from Glauten, and if it has, then it ought to be satisfied and not kept open fraudulently, as is alleged. It seems to me then, under this state of facts, that complainant has not an adequate remedy at Common Law. But in bills of this kind, the Courts do not require a party to shew all the equitable circumstances which are ordinarily required to entitle him to go into a Court of Equity, but it is said that Courts of Equity assume jurisdiction in such cases.—Mitford's Pleadings, 196. It is further said, that the sole ground on which the jurisdiction of the Court in this case is supported, is the danger of injury to the plaintiff from the doubtful titles of the defendants.—Mitford's Pleadings, 83. Then, are there not two parties here claiming the same fund? and is not the complain-

ant in danger of being injured from their doubtful titles? If so, according to this authority, the Court has jurisdiction.

I do not think the third ground is sustained by the facts.

The 4th ground, is, that complainant seeks to go into the consideration of a subsisting judgment. This is not the object of the bill; but so far as the judgment is concerned it only proposes to be relieved from its operation upon the ground that it is paid off, and it is somewhat difficult to determine how the complainant could be relieved against the operation of this judgment by any Common Law proceeding. It will be recollected, that the bill does not allege that the judgment against complainant, founded on the garnishment, has been paid, but that the original judgment, in favour of Thompson v. Whatley, which was the foundation of the garnishment, 149 has been \*paid—then, could the Court upon an affidavit of illegality to the execution v. complainant, go back behind the judgment upon which it is predicated, and enquire into the facts whether the original judgment, upon which it is predicated, be paid off? I think it very doubtful. Then, if it could not, is not this a sufficient reason why the complainant should be entitled to the interposition of a Court of Equity to be relieved against said judgment?

5th ground. Because said complainant, by her bill of complaint, calls upon the defendants to interplead in a matter that is determined by a trial and judgment of this Court, and an action now pending on the appeal at law. If it were not for the charge in the bill, as to the payment of the judgment in favour of Thompson, then there might be some doubt as to the propriety of going against him in this proceeding, for his rights would be protected by the judgments; but if his judgment has been in fact paid off, it ceases to afford him this protection. And as to the suit in favour of Glauten, it is now pending on the appeal, and so far as any rights may have accrued to him by reason of the judgment on the first trial, they are all taken away by the appeal, and the complainant has as much right to defend herself against said suit as if no judgment had ever been obtained, and the very fact that two judgments have been obtained against complainant for the same debt, goes to show that she is in imminent danger of being compelled to pay it twice, and whether it is properly such a case as in which the defendants can be compelled to interplead, the complainant is certainly entitled to the interposition of this Court, for the purpose of obtaining a discovery to enable her to defend herself against this seemingly unjust litigation.

It is therefore ordered, that the demurrer be overruled, and that the defendants be required to answer within four months.

WILLIAM EZZARD, J. S. C. C. C.

## 150 \*MUSCOGEE SUPERIOR COURT.

## The State v. William Powers.

October Term, 1842.

1. **New Trial—Discretion of Court.**—When the principles of justice require that a trial should be granted, the Court will look into the evidence, and decide upon the consideration it is entitled to.
2. **Same—Same—Criminal Cases.**—Where circumstances of guilt are slight, in a high criminal case, the Court will grant a new trial.

The motion in this case is made on two grounds:—1. That the verdict is contrary to Law. 2. That it is contrary to Evidence. The bill of indictment contains two counts. The first charges, that the defendant on the night of the fourth day of January eighteen hundred and forty-two, in the county of Muscogee, committed the burglary complained of, by breaking and entering the dwelling house of James Sullivan and Mathew Brannon, with intent to commit a felony. The second count varies the accusation so far, as to charge the defendant with having actually stolen a fifty dollar treasury draft, and one hundred dollars in silver pieces of coin, consisting to a large extent of ten cent pieces, on the occasion of breaking and entering the house. On the part of the State, Mathew Brannon proved the breaking and entering the house described, at the time and place mentioned, and also the loss of a fifty dollar treasury note and one hundred dollars in silver coin, but is not able to give any marks of identity of the treasury note or the coin, except in this, that the note was written on a piece of paper the back of which was of red complexion, and that the coin consisted principally of ten cent pieces. He testifies, however, that the money was taken by the offender in a tin box that was deposited in a desk which was locked, and the key of which was placed on a shelf about three feet from the desk—that the desk was unlocked,

not broken or forced, and that he  
 151 \*had never seen the prisoner in his house until after it was broken,—that the prisoner was in the house the next day, drinking and treating, that he had in possession some ten cent pieces which were thrown upon the counter in the course of the day, and also had some bank bills, but witness saw no money which he recognized as that lost from the house the night before. Sarah Ann Evans proved, that a day or two after the house was broken, the prisoner was at her bar-room drinking, and exhibited some ten cent pieces, and also a bundle or roll of bank notes, among which she discovered one of a red complexion, which she took to be an Alabama bank note, but prisoner represented it to be a treasury draft, but witness did not have it in hand, nor did she see the face of it—was not able to identify the draft or paper in any way whatever. Nathaniel M. C. Robinson testifies, that he arrested the prisoner nine days after the perpetration of the offence, and prisoner at the time of the arrest admitted that he had

exchanged, a day or two before the arrest, forty or fifty dollars in ten cent pieces for Central bank notes at ten per cent. premium, at Hamilton, Harris county, and the witness states, that at that time silver was worth a premium, varying from twenty-five to thirty five per cent. on Central bank notes, but that the prisoner submitted without resistance to be searched, and placed in custody, and asserted that he was innocent. The evidence on the part of the State was here closed.

On the part of the prisoner, it was proved by John Dinsmore, that the prisoner came in company with witness from Apalachicola, Florida, the last of July, that they both reached Columbus, Georgia, on the first day of August, that prisoner on his way up had money, and that a considerable portion of it was in silver coin, some of which was in ten cent pieces, that witness was with prisoner at the time prisoner was at Mrs. Evans', as she has testified to, and saw nothing of the treasury draft, and did not hear prisoner speak of it, and that if he had spoken of it, witness thinks from the size of the room he would have heard it. Sarah Dodson testifies, in behalf of the prisoner, that on the night of the fourth of January last, prisoner went to bed at the house of Mrs. Evans, at nine o'clock at night, and did not get up until after sunrise the next morning, that prisoner could not have passed out of the house without unlocking a door, and passing through the room in which Mrs.

152 Evans and others lay, \*and that Mrs. Evans knew the prisoner passed the night on which the crime was perpetrated at her house. This is the substance of the evidence on either side of the case.

The counsel for the prisoner do not complain of the verdict, except on the ground of its being contrary to the evidence. I am aware of the caution with which Courts of justice interfere with verdicts of Juries on the ground, simply, of their being unjustified by the evidence. The Law having selected and set apart Jurors to try questions of fact peculiarly, it is proper that their verdicts should not be disturbed as being opposed to the proof, except on the most careful consideration. Nevertheless, the office of superintending their verdicts, even in this respect, and of granting new trials when, in the opinion of the Court, they are demanded by justice, has been exercised from the foundation of the mode of trial by Jury. And the Courts are not at liberty to decline an investigation of the sufficiency of the testimony on which the verdict is rendered, on the motion of one alleging himself to have been injured by an erroneous finding. In approaching the evidence on the part of the prosecution in the case at bar, it is perceived that there is no proof whatsoever of a positive character, of the agency of the defendant in the breaking and entering the house. Brannon, who alone proves the burglary, leaves it entirely indifferent who perpetrated it—but it is observable that he leaves the case in circum-



stances that would lead us to conclude that the breaking and entering the house were perpetrated by some one familiar with the premises, and not by a stranger, as the prisoner appears to have been. The mode and place in which the money taken was kept, the location of the desk and the disposition of the key, all render it probable, if not absolutely certain, that he who committed the robbery must have been minutely acquainted with the exact situation and management of the room from which the money was removed—and to the extent to which this presumption operates, it favours the accused. Indeed, the counsel for the prosecution have placed their case upon the supposed possession, by the accused, of the money taken, subsequently to the commission of the crime, and his alleged failure to account for it. Had the very money that was removed from the house on the night of the burglary, been found in the possession of the prisoner immediately after the felony was committed, it would have been properly relied on before \*the Jury as cogent evidence against him, in the absence of an explanation by him as to the means by which he obtained it.

But the error of the argument, is, that the treasury note and the silver pieces spoken of by the witnesses as having been in the possession of the prisoner after the night of the fourth, and of which there is no other proof than his own gratuitous admission, are not identified by any one as having been those that were taken from the house that was broken and entered. By whom has this been shewn? Certainly the naked facts, that the prisoner had in his hands a fifty dollar treasury note a day or two after the burglary was committed, and forty or fifty pieces of silver coin in ten cent pieces nine days thereafter, and that the latter may have been passed at a lower than the usual rate of exchange, are not sufficient in themselves to convict him of the high crime with which he is charged. I leave out of view, for the present, the evidence on the defence, for the prosecution clearly fails on its own shewing. Certainly this cannot be the strong and cogent proof of guilt, which, in the language of the Law, must run so high as that it leaves no reasonable doubt on the mind, to authorize a conviction. If we turn to the defence, we find the evidence here, it is true, of not a very satisfactory nature, but it certainly does detract something from the strength of the prosecution, too weak in itself for conviction.

The very character of the charge, it should be observed, is one that it is often difficult to disprove, if false even. On the supposition, however, that the onus probandi were reversed; in other words, were transferred from the State to the prisoner, and he were called upon to prove his innocence, the case is quite as well made out for him as is the prosecution. The grave nature of this charge, the highly penal consequences following conviction, and the very meagre and unsatisfactory nature of

the testimony in this case, require that the case should be submitted to the consideration of another Jury. Motion for a new trial granted.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

#### 154 \*TALBOT SUPERIOR COURT.

Peter F. Mahone v. James McDonald and John Took, Defendants, and Joseph Pou, Garnishee.

September Term. 1842.

##### 1. Jurisdiction of Justice—Amount in Controversy.—A

Justice of the Peace has no jurisdiction of a case in which a plaintiff in attachment swears to a debt due by the defendant exceeding thirty dollars.

##### 2. Same—Same.—When a Garnishee answers in a Justice's Court that he is indebted to the defendant in a sum exceeding thirty dollars, the Court cannot take jurisdiction of the case.

This petition is filed by Joseph Pou, the garnishee. From the petition and the return of the Justices to whom the writ of certiorari is directed, it appears that the plaintiff, Mahone, in the month of May last, made oath before one of the Magistrates in whose Court the case was brought, that the defendants were indebted to him the sum of one hundred and sixty-eight dollars besides interest and costs; and prayed a summons of garnishment to be directed to the said Joseph Pou, calling on him to appear at the May term following, and answer what he was indebted to the defendants, or either of them: that the said Joseph did appear, in obedience to the summons, and deposed, "that on the 5th Sept. 1840, one Richard Bailey drew an order on him in favour of Mrs. Ann McDonald, wife of the said James, for the sum of three hundred and thirteen dollars and seventy-five cents, to be paid out of a particular fund when collected, that the said Joseph accepted said order and that the said fund had been collected; that a short time after accepting said order, one Thomas Bailey presented an order, drawn by the said Richard on the said Joseph, for the whole of the fund, which order was dated one day earlier than the order drawn in favour of Mrs. McDonald, that the question had been before the Superior Court but was, as yet, unsettled. That Mrs. McDonald claimed the funds in his hands to the extent of her order, and that said Thomas Bailey claimed the whole of the fund:" that the said Magistrates thereupon entered six judgments \*against the said Joseph amounting to the sum of one hundred and sixty-eight dollars, besides interest and costs.

The petition assumes three grounds of error.

First. That the Magistrates had no jurisdiction of the debt claimed by the plain-

tiff, Mahone, in the affidavit which he made in order to procure the summons of garnishment.

Secondly. That the Justices entered six separate and several judgments against the petitioner, as garnishee, when only one summons of garnishment was issued and served.

Thirdly. That the Magistrates assumed to adjudicate the conflicting rights of parties not before them, and to subject the garnishee, thereby, to the hazard of paying the same debt twice or thrice.

That the Justices committed error, in the respects mentioned in the first and second grounds of complaint, is manifest. The debt sworn to by Mahone greatly exceeded their jurisdiction, which is limited by Law to demands not exceeding thirty dollars. The affidavit of Mahone, therefore, which originated the summons of garnishment, in itself, proved that he was not entitled to the summons. The sum due from the garnishee equally exceeded their jurisdiction. Nor could they rightfully possess themselves of jurisdiction over the indebtedness of the garnishee, by imaginary division of it into parts sufficiently small to be severally embraced within the scope of their authority. The mode of bringing in the garnishee with a view to his being charged with several judgments, viz. by a summons requiring him to appear and answer in a single case, was also informal and irregular.

It is useless to pursue the third assignment of error.

The motion to reverse the proceedings of the Court below, and to have a new trial ordered, is granted.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

156 \*Buckhanan and Hunt v. James G. Gamble.

September Term, 1842.

1. **Set-Off—Mutuality of Demands.**—Justices of the Peace before whom a set-off is pleaded, when the debts are evidently not mutual, ought not to refer the set-off to the Jury.

2. **Verdict—Several Plaintiffs.**—When there are two plaintiffs, the Jury cannot find against one, and in favour of the other.

The petition in this case and the return of the magistrates in obedience to the writ of certiorari, directed to them in the premises, shew, that the plaintiffs instituted an action upon an open account, for eleven dollars and twenty-five cents, against the defendant, to the April term, 1841, of the Justices' Court for the 689th District Georgia Mil. of the county of Talbot—that at the May term, 1841, of the Court, the defendant pleaded a set off which consisted of a promissory note made by one of the plaintiffs, Buckhanan, payable to one Elijah Reeder,

\*Set-Off—Mutuality of Demands.—See *Cash v. Cash*, Ga. Dec. pt. 1, p. 97, and *foot-note*.

and transferred to the defendant, which set off the Justices, on the trial of the action, rejected—that the defendant appealed to a Jury, and that upon the trial by the Jury, the Justices referred the plea and set off to them, but charged the Jury that the set off, in their opinion, could not be allowed the defendant without a breach of the Law; nevertheless, the Jury did so far allow the same as to find a verdict against Buckhanan, whose note was opposed to the action by the defendant, and found for the plaintiff, Hunt, one half of the account sued for.

Several errors took place on the trial which is under review. In the first place the Justices erred in referring the set off to the Jury. This, for the reason that the debts were not mutual; in other words, due to and from the same persons. The plaintiffs had a joint demand against the defendant, and the defendant a separate demand against one of the plaintiffs. The demands, then, were not adapted to the payment of each other. Secondly: the Jury committed error, both in allowing the set off to a partial extent, and in finding for one plaintiff and against the other. Such a form of verdict (other  
157 \*difficulties out of the way) is not sanctioned by the rules of Law and pleading.

For these several reasons I have granted the motion of the petitioner, and ordered a new trial below.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

158 \*MARION SUPERIOR COURT.

The State v. John Howell, John D. Howell & Jesse Worrell.

September Term, 1842.

**Assault with Intent to Kill—Indictment—Essential Averments.**—An Indictment for an assault with an intent to murder, must charge that the act was feloniously done with malice aforethought. It is not sufficient that this allegation is made, in the first part of the Indictment where the assault is charged.

This motion is placed on four grounds, derived from the face of the bill of indictment filed in the case. They are:

1. "Because it is not stated that the stabbing was done feloniously and with malice aforethought."

2. "Because it is not alleged, as a conclusion from the facts averred, that the defendants intended feloniously and of their malice aforethought to murder."

3. "Because the allegation contained in said will that the defendants cut, struck, and wounded, is not made with time and place."

4. "Because it is not alleged that the assault was made with a weapon likely to produce death."

The charging part of the bill of indict-



ment and that to which grounds of alleged error will be found to be applicable, is in these words, to wit: "for that the said John Howell, Stephen D. Howell and Jesse Worrell, on the fourteenth day of May, in the year of our Lord eighteen hundred and forty-two, with force and arms in the county aforesaid, in and upon one Col-

159 len R. Lockett, in the peace of \*the said State then and there being, feloniously, wilfully, unlawfully, and of their malice aforethought, did make an assault, and that the said John Howell, Stephen D. Howell and Jesse Worrell, with a certain knife of the length of three inches, of the value of seventy-five cents, which was then and there a weapon likely to produce death, did stab, cut, and wound the said Collen R. Lockett with intent then and there to murder the said Collen R. Lockett." The prosecution is instituted under the 43rd Sec. of the 4th Division of the Penal Code. See Prince's new Dig. 626—"An assault with intent to murder with a weapon likely to produce death, shall be punished by imprisonment in the penitentiary," &c. In order to make a case of legal guilt under this provision, it is apparent that something more than a simple assault with intent to murder is necessary. The wicked design must be supported by the use of a weapon likely to produce death. The bill of indictment, it is true, charges the defendants with having "feloniously, wilfully, unlawfully, and of their malice aforethought," made the assault; and also charges that, "with a certain knife of the length of three inches, of the value of seventy-five cents, which was then and there a weapon likely to produce death, they did stab, cut, and wound the said Collen R. Lockett." But, as it is seen, the bill does not charge that the felonious assault was made with the knife, nor that the stabbing, cutting and wounding mentioned, was done "feloniously and of the malice aforethought" of the defendants. The allegations of the assault, and of the use of the statutory weapon, as they take place in the bill, are separate and distinct averments. For aught that appears to the contrary in the bill, there may have been a complete remission or cessation of the felonious intention, between the moment of the assault, and the resort to the deadly weapon. That portion of the bill which more immediately describes the use of the weapon does not contain those words which are necessary in Law to characterize the offence for which the defendants are indicted. There is, then, no union shewn of the felonious motive which is involved in every attempt to murder, with the employment of the deadly weapon, without which the intent to murder cannot amount, under the statute, to the crime charged in the case at bar. "There are certain words which are usually inserted in the part of the indictment we are now examining, which mark out the colour of the offence with precision, and which are absolutely necessary

to determine the judgment. Thus, 160 every indictment \*for treason must contain the word "traitorously," every indictment for burglary, "burglariously," and "feloniously" must be introduced in every indictment for felony; and these words are so essential, that if the word feloniously be omitted in an indictment for stealing a horse, it will be only a trespass or misdemeanour of which the defendant may be convicted under such indictment."—1 Chit. Crim. Law, 242. But it is contended, that inasmuch as the term "murder" is used in the conclusion of the averment under consideration, that the previous defect in the description of the offence is thereby cured. Such is not the doctrine of the authorities on the subject. On the contrary, the conclusion of the averment which is thus relied on, is in its turn insufficient also—and for the reasons which have been given to shew that the previous part of the averment is defective. The statement in conclusion, that the "stabbing," &c. was done "with intent then and there to murder," &c. will be found on examination not to help the case at all. That the word murder embraces the motion of felony, of intent and malice in the heart of the offender, has not been considered a sufficient reason for dispensing with explicit averments of those specific and indispensable ingredients in the crime. It is the legitimate object of pleading to detail facts, not simply to state conclusions. And unless the facts and circumstances which are necessary to constitute a case of legal guilt, be stated, it is clear that no proof of them can be taken on the trial: This, on the familiar principle that pleadings and proofs must correspond and go together. As the crime of murder, therefore, can not be committed without felony of intention, and previous malice in the mind of the slayer, so these two ingredients must be alleged to have existed in the conduct of the accused—and this, too, irrespective of the term "murder," which must also appear in the bill. Otherwise the indictment is bad.

The second assignment of error in the indictment, although out of its order, arises here, and presents itself in the language of the authorities applicable to the point. "As a conclusion from the facts averred, if must be stated that, so the defendant feloniously of his malice aforethought did kill and murder the deceased: for without the terms 'malice aforethought' and the artificial phrase murder, the indictment will be taken to charge manslaughter only."—1 Chit. Crim. Law, 243. So it appears, that the crime itself, for an intention 161 \*to commit which the defendants are indicted, is not stated in those terms and in that language which are held to be necessary to define its existence in Law.

The course of reasoning by which the first ground taken in this motion has been ascertained to be well founded in Law, has also embraced the second and fourth. They, too, are adjudged good.

It is useless to pursue the third and only remaining ground.

The motion to arrest the judgment in the case is granted.

MARSHALL J. WELLBORN,  
J. S. C. C. C.

162 \*DE KALB SUPERIOR COURT.

James Willis v. George McIntosh, Defendant, and Henry B. Latimer, Claimant.

September Term, 1842.

1. Mortgages—Rights of Mortgagee after Foreclosure.—

A Mortgagee, after the foreclosure of his mortgage, cannot levy on the mortgaged property after a sale on another *fi. fa.*, though of a junior date. He must claim the proceeds of the sale.

2. Same—Redemption—Right Barred upon Foreclosure.—After the foreclosure of a mortgage, the mortgager's right of redemptions is gone.

In the above case, a rule was granted at the last term of this Court, requiring the plaintiff to shew cause why a new trial should not be granted, on the ground "that it appeared by plaintiff's own shewing, that the mortgage had been foreclosed and execution issued thereon before the sale of the property, and that plaintiff was present at the sale with his mortgage *fi. fa.* at the time of the sale of the property, and might and ought to have claimed the money. The property being sold by virtue of executions against the defendant."

On the trial of the above case, it was shewn that the property levied on was included in the mortgage, upon the foreclosure of which, the *fi. fa.* levied was issued—that at the time of the execution of the mortgage, the property belonged to the defendant in execution.

On the part of the claimant, it was shewn, that the same property had been previously levied on and sold by virtue of another *fi. fa.* against the defendant, of a later date than the mortgage, and that the equity of redemption in said mortgage had been foreclosed, and that the execution issued thereon was in the possession of the plaintiff, who was present at the sale, and who notified the crowd on the day of sale, that his mortgage was

163 foreclosed, that he would not claim the money arising from the sale, but would proceed to levy his mortgage *fi. fa.* upon and resell the property; and that at said sale, the claimant became the purchaser.

By the Court. The plaintiff cannot dictate the terms of Sheriff's sale. The rights of purchasers at such sales must be defined and controlled only by the Law. Upon the foreclosure of plaintiff's mortgage, the defendant's equity of redemption became barred, and the subsequent sale of the mortgage property, either by virtue of the mortgage *fi. fa.* or of any other *fi. fa.* passed the absolute title of the

property to the purchaser, and not the equity of redemption merely. The right of the plaintiff was to claim the money.

Ordered that the new trial be granted.

JUNIOUS HILLYER, J. S. C. W. D.,  
and holding Court in De Kalb County.

Calhoun, for Plaintiff.  
Floyd, for Claimant.

164 \*FAYETTE SUPERIOR COURT.

Josiah Chambers and John Chambers v.  
John C. Dickson.

September Term, 1842.

1. Certiorari—When Writ Lies—Objections Not Raised

Below.\*—No matter can be assigned as error in a certiorari of proceedings from a Justice's Court, which was not insisted on in the Court below.

2. Justices' Courts—Summons—Case at Bar.—The copy of a note sued on in a Justice's Court, need not be attached to the summons served on defendant.

This certiorari was brought to correct certain errors alleged to have been committed in four cases tried in the Court below, wherein the present plaintiffs were defendants. The errors complained of were two: that the notes were given for the same consideration and due at the same time, and therefore exceeded the Justice's jurisdiction. Second: That there were no copies of the notes attached to the summonses served on defendants. The return shews that no such plea as that contained in the first ground was filed or insisted on in the Court below, and therefore constituted no ground of error. The second is admitted by the return. But as there is no law making it necessary that a copy of the note should be attached to the summons, I do not consider the want of this a valid objection to the proceedings. It is therefore ordered, that the certiorari be dismissed, and the proceedings below confirmed.

WILLIAM EZZARD, J. S. C. C. C.

165 \*COBB SUPERIOR COURT.

Andrew McBride v. Arthur T. Whitehead.

March Term, 1842.

1. Conditional Sales—Conditions Precedent—Payment, +  
—When a chattel is sold on condition that the title

\*See *Dodson v. Donnally*, Ga. Dec. pt. 1, p. 132; *Jack v. Watson*, Ga. Dec. pt. 1, p. 168; *Gresham v. Landens*, Ga. Dec. pt. 2, p. 149.

+Conditional Sales—Conditions Precedent—Payment.

—In support of the proposition that the sale and delivery of personal property on condition that the title is not to vest in the vendee until the purchase money is paid, does not pass title to the property until the condition be performed or waived, see *Flanders v. Maynard*, 58 Ga. 56; *Jowers v. Blandy*, 58 Ga. 379; *Walters v. Americus Jewelry & Music Co.*, 114 Ga. 564, 40 S. E. Rep. 803.



is not to vest until paid for, and time is given for the payment, the property is not changed until the payment, though the possession is delivered at the time of sale.

**2. New Trial—Verdict Contrary to Evidence.**—A new trial will be granted when the verdict of the Jury is contrary to evidence.

This is an action of trover, brought for the recovery of a certain brown mare, proven to be worth from \$75 to \$90, and upon the final trial, the Jury found a verdict for the defendant. And thereupon, the plaintiff's counsel moved for a new trial, upon the following grounds:

1st. Because, the Jury impanelled to try said cause, found contrary to law.

2d. Because, the Jury found contrary to the evidence.

The testimony of several witnesses establishes the fact, that the mare was the property of the plaintiff originally, and that he raised her, and had her in his possession until sometime in the year 1837—at which time she went into the possession of one Tristram Betha, who loaned her to the defendant, by whom she was swapped off. The whole case must turn upon the nature of this transfer of possession, for if it was not such a contract as to change the property, then it must still be in plaintiff; and if so, he has the right to recover, provided the evidence establishes a conversion by the defendant. Let us then examine the testimony upon this point. Tristram Betha

himself has been examined as a witness by both parties: in his testimony on the part of the plaintiff, he states that the mare belonged to plaintiff, and that in the year 1837, he, witness, took said mare out of plaintiff's possession, on an agreement between witness and plaintiff, by which witness was to take the mare, at ninety dollars, provided he paid for her by the 25th day of Dec. 1838, if not, he was to return the mare to plaintiff. He further states, that he never paid for her, and that in the forepart of the year 1839, he carried the mare to Cobb County, and also that he went in company with defendant, that he afterwards loaned the mare to defendant, and also that he told defendant the mare belonged to plaintiff, and that defendant afterwards swapped said mare off. He further states, that defendant had told him, that plaintiff had told him, defendant, that the mare was his, plaintiff's property. So, it appears from the testimony of Betha, that the contract between plaintiff and him was conditional, and that the mare was to be his, Betha's property, provided he paid ninety dollars by a certain time, which he says he did not do—then, this being a condition precedent upon which the title was to vest in him, Betha, and the condition never having been performed, it is clear the title did not vest at all, but that the mare still continued to be the property of McBride, the plaintiff. The testimony also fully establishes the conversion by defendant.

But the motion for a new trial is resisted by defendant's counsel upon the ground, that where there is positive evidence on both sides, the Court will not grant a new

trial upon the ground that the verdict is contrary to evidence, although in the opinion of the Court, the verdict is contrary to the weight of evidence, and relies upon the authority as laid down in the case of the Executors of Jane McKane v. John Bonner, 1 Bailey's S. C. Repts. 113, and Scanlan v. Turner, 421, of same work. I am willing to allow the doctrine contained in these authorities to the fullest extent, but the question is, whether they are applicable to the case under consideration. It is contended that the testimony of Betha, as taken by defendant, is contradictory to his testimony as taken by the plaintiff, and that there is therefore evidence on both sides as to the fact of property in plaintiff. It is true he states in his testimony that he bought the mare from plaintiff, and claimed her as his own property, and that he loaned the mare to Whitehead, the defendant, and authorised him to trade her, and he farther states, that he had never received any thing for the mare.

Now, this testimony cannot properly be considered as contradictory of his testimony as taken by the plaintiff, but he has stated the fact of the sale of the mare, &c. without stating all the facts of the trade, to wit, the condition as to the payment of the money; if then this was the evidence of another witness, and not of the same witness, most of it might be reconciled, but if it is conceded that this latter testimony is contradictory of the other, then what is the effect of it—is it to be considered in the same light in which we would view the testimony of a different witness contradicting his testimony on the part of the plaintiff? Certainly not. But the effect would be to destroy his testimony altogether, for we would not know which part of it to believe. Then there being no other testimony going to prove the property out of the plaintiff, and the conversion having been fully proven, I am of opinion, that the verdict was not only contrary to the weight of evidence, but there does not appear to be any evidence by which the verdict can be supported. And where a verdict is clearly contrary to evidence, the Court will grant a new trial. See the case of Cockfield v. Daniel, Constitutional Repts. 1 vol. 193. The verdict is therefore set aside, and a new trial granted.

WILLIAM EZZARD, J. S. C. C. C.

Case & Knight, for motion.  
Alexander, contra.

168 \*FAYETTE SUPERIOR COURT.

William Jack and John T. Davis v. John Watson, John Simmons and Josiah N. Elder, Justices, &c.

September Term, 1842.

**I. Certiorari—When Writ Lies—Objections Not Raised Below.**—Where several cases are brought in a

\*See Dodson v. Donnally, Ga. Dec., pt. 1, p. 132; Chambers v. Dickson, Ga. Dec., pt. 1, p. 164; Gresham v. Landens, Ga. Dec. pt. 2, p. 149.

Justice's Court, upon notes given as the consideration of the same contract, the Superior Court will not interfere, unless it were set up as a matter of defence.

2. **Same—Same—Same.**—If the defendant to actions in a Justice's Court, intends to rely on a former recovery in defence, he must plead it, and if not insisted on in the Court below, this Court will not interfere.

The facts in this case, as they appear by the petition of the defendants in the Court below, and the return of the Justices of the Peace, do not, in the opinion of the Court, call for its interposition.

The grounds upon which it is alleged that error was committed, are:

That the aggregate amount of the notes sued on, exceed the sum of thirty dollars; and,

That the notes sued on have been prosecuted to judgment between the same parties in a former suit.

What may be the opinion of the Court in regard to the first ground, is not now material: because it does not appear from the return of the Magistrates, that a defence of that sort was relied on at the trial. If the defendants in the Justices' Courts rely on the want of jurisdiction of sums amounting in the aggregate to more than thirty dollars, which spring out of the same contract and between the same parties, as they insist was the case here, they should have pleaded \*their exceptions in a regular and legal way. It does not appear by the return of the Magistrates that they relied on any such defence.

In regard to the second ground: it was competent for the defendants to have pleaded the former recovery, in bar of the second actions, but it does not appear from the return, that they did rely upon any such plea.

The certiorari is therefore dismissed, and the proceedings below confirmed.

WILLIAM EZZARD, J. S. C. C. C.

## 170 \*MUSCOGEE SUPERIOR COURT.

William D. Carnes and Lucy E. Carnes, His Wife, and Others, v. Seaborn Jones, and John C. Mangham, Sheriff.

October Term, 1842.

1. **Settlement of Decedent's Estates—Assets in Hands of Surety of Administrator—Right of Distributee to Pursue—Case at Bar.**—Distributees of an intestate's estate, after having obtained a decree against the administrator, who is insolvent, may, in Equity, pursue into the hands of the security, who is also insolvent, a note given for property sold, as a part of intestate's effects, and transferred to him to protect him on his suretyship, though it has been reduced to judgment, and have it applied in part or whole satisfaction of the decree.

2. **Same—Same—Application to Debt Due Distributee—Effect.**—The security in such case is a trustee for

creditors and distributees, and by having the judgment so applied, it is paying so much of his liability on the bond, and therefore only giving effect to the contracts between him and his principal.

3. **Same—Same—Same.**—It is no objection that the action at law on the note was not defined. This does not change the nature of the trust.

4. **Same—Same—Same—Rights of Creditors.**—As it does not appear from the proceedings that there are creditors who have a higher claim than distributees, their rights cannot be discussed.

5. **Same—Same—Same—Same.**—Creditors have the same rights as distributees on the bond, and they may pursue their remedy.

This bill states, that Lucy E. Carnes, formerly Lucy E. Dillingham, and George W. Dillingham, an infant son, are the heirs and representatives of George W. Dillingham, late of said County, deceased; that John Dillingham became the sole administrator of the estate of George W. Dillingham, deceased, and gave the defendant Jones and one Eli S. Shorter, as his securities, in the sum of two hundred thousand dollars, on his administration bond; that the said John Dillingham wasted the estate, and had paid nothing to the complainants,

Lucy and George, nor the complainant 171 and William D., \*who, by virtue of intermarriage with the said Lucy, became entitled to her distributive share; that at the sale made by the administrator of the property of the deceased, Mrs. Carnes, then Mrs. Dillingham, the widow, became the purchaser of some of the articles of furniture, &c. amounting to the sum of eighteen hundred and seventy-four dollars and five cents, for which she gave her note to John Dillingham, the administrator, with the endorsement of her mother, Mrs. Tickner, one of the complainants, as security, supposing the same would be given up to her in part payment of her distributive share; that the administrator, without any other consideration than upon the pretence of indemnifying the defendant Jones against his liability as security to the administration bond, transferred the said note, with a large amount of other assets of the estate, to the said Jones, who received the same, well knowing that they were not the property of the said administrator, but belonged to the estate of which he was the representative; that the said Jones subsequently commenced suit upon the said note in the Superior Court of the said County, and at October term, 1841, obtained a judgment against the complainants, Lucy E. Carnes and William D. Carnes, with whom she had in the meantime intermarried, and complainants, Lewis C. Allen and Edward Taylor, securities on appeal, and against Harriet C. Tickner, as endorser, and the said Allen and Taylor as the securities of said Harriet on appeal; that upon said judgment, *fi. fas.* had been issued, and placed in the hands of the defendant Mangham, as Sheriff, to be levied and collected. The bill further states, that the complainants, Mrs. Carnes and the infant child



George W., filed a bill for an account and distribution, against the administrator, John Dillingham, which was prosecuted to final trial at October term, 1841, of Muscogee Superior Court, and on which trial the complainants, Lucy E. and Wm. D., by virtue of marriage, and the said George W., recovered a decree for seven thousand four hundred and twenty-five dollars and eighty-three cents, with cost of suit; that upon that decree a *fi. fa.* has been issued, and returned by the sheriff, with a report that he can find nothing on which to levy it. The bill further states, that the administrator is insolvent, and has removed from the county, that Jones is insolvent, and that the estate of Shorter, the only co-security of Jones, so far as it lies in the State of Georgia, is insolvent; that the complainants, William D., Lucy E. and the

172 infant child George W., "have commenced suit against the said John Dillingham, and that the defendant Jones, and the representatives of the estate of Shorter, on the administration bond, which suit is now progressing in the Superior Court of said county, for the recovery of the amount of the decree already rendered in their behalf against the administrator, in the bill heretofore filed against him, and that complainant Carnes has proposed to the defendant Jones, to enter the amount of the judgment held by him, Jones, as a credit upon the demand now in suit, in favor of himself, his wife and the infant child, upon the administration bond, which proposition the said Jones has rejected. The bill prays that the defendant Jones may be enjoined from levying his *fi. fas.* and collecting them out of the property of the defendants in *fi. fa.* and that they may be appropriated by a decree of the Court of Chancery, in part payment of the recovery already had against the administrator by the heirs and distributees, and for general relief. Such are the facts, and such the prayer of the bill, and by way of defence to it, a general demurrer, for want of equity in the bill, is filed.

The demurrer admits the facts charged to be true; and we are, with this admission before us, to determine whether they contain sufficient equitable matter to justify the retention of the bill, and of the injunction. Many objections to the admissibility of the application of the complainants to have the demand in favor of Jones, the defendant, entered as a credit, or partial payment, upon the one established by a portion of them against the administrator, are taken by defendants' counsel. It is contended, that, by the Laws governing the subject of set off, these demands cannot be opposed to each other for that purpose. It is unnecessary to pass upon each of these various objections in detail. As they take effect at Law, the objections are good. There is, upon the face of these demands, evidently no adaptation of the one to the payment of the other. In the decree rendered against the administrator, Wm. D. Carnes, Lucy E. Carnes, and George W.

Dillingham, (by his guardian,) are the complainants, and John Dillingham is the defendant; in the case which is the subject of this injunction, Seaborn Jones is plaintiff, William D. Carnes, and Mrs. Lucy E. Carnes, and Mrs. Harriet C. Tickner, with their securities on appeal, are the defendants. Now, by the strict rules of the Law, other difficulties out of 173 the way, even "a joint and separate debt cannot be set off against each other."—Montagu on Set off, 25. This is, however, not all decisive of the power of a Court of Chancery in the premises. Indeed, that the party seeking relief is remediless by the rules of the Law proper, is a leading—nay, in many cases, an indispensable ingredient in the jurisdiction of a Court of Chancery. Are there any equitable facts in the case made by this bill which will relieve the application of the complainants from the operation of the rules which obtain, ordinarily, in cases of set off? is the question. As we have seen, the note sued by Jones is represented in the bill to have been given by Mrs. Dillingham, the widow, and one of the distributees, to the administrator, in payment for a portion of the estate of her deceased husband, that it was transferred to Jones, with other assets, as a prospective indemnity against his liability as security on the administration bond, and without any other consideration; that Jones received the same with knowledge of the fact that it did not belong to the administrator, but to the estate which he represented; that complainants, Carnes, his wife, and the infant child, as the heirs and distributees of the administrator's intestate, have recovered of the administrator, as their portion of the estate, seven thousand four hundred and twenty-five dollars and eighty-three cents, with costs; that the Sheriff is unable to make the money thus recovered; that the administrator, and Jones the defendant, who is also one of the securities, and the estate of the only remaining co-security, so far as it is subject to the judgment of the complainants, are also insolvent, and that suit is now in progress against Jones, on his bond, predicated on the recovery had against his principal, the administrator. The mode in which Jones acquired the note in question, is relied upon to subject him to the relation in equity, of a trustee of this fund for the heirs and distributees, who are seeking to have it appropriated to the partial payment of their demand now in suit on the administration bond. It is certainly true, that the note held by Jones, was, upon the execution of it, the right and property, in Law, of John Dillingham, to whom it was given. The circumstance of its having been passed in exchange for property of the estate of his intestate does not vary the usual consequence of the execution and delivery of it to him: it was still a contract to pay John Dillingham the sum specified in the paper. It is the property for which the note was given, that the

administrator, and his securities, are, or would be alone liable in ordinary  
 174 \*circumstances; and the legitimate consequence of that fact, is the right of the administrator to have and use the note taken by him in the course of his administration as his own.—3 McCord, 371; 1 Hill's Ch. 25; 2 Hill's Ch. 268; 1 Bail. 599. At the same time, this right of dominion over even the proceeds of property held in trust, by the administrator, is subjected in Chancery to wholesome restraints, "It is true that the proceeds of such choses in action are in equity regarded as assets, and will be so treated, and considered in the hands of the executor or administrator to whom they were made payable, or any of his immediate representatives."—1 Hill's C. R. 25. "So too, in all such cases they would be protected from being made liable by the process of the Law for the debts of the executor or administrator."—Glass v. Bexter, 4 Rep. 154; Talbot v. Harrison, 1 Bail. 599. "And in all cases of fraudulent alienation, the Court would follow, and treat them as assets of the estate."—2 Hill's Ch. 271. And again: "I have already said that an alienation of the bonds or notes payable to an executor or administrator ought not to be overreached or defeated, but by a Superior Equity, or by fraud." Same: "An abuse of a trust can confer no rights on a party abusing it, or on those who claim in privity with him. In Courts of Equity it (this principle) is adopted with a universality of application."—Story's Com. on Equity, 503. "Persons colluding with the executor or administrator in a known misapplication of the assets of the estate, are made responsible for the property in their hands."—2 Story's Com. on Equity, 502; 7 Johns. Ch. 150. "This author, so very full to the point, too, that it matters not how many, nor what mutations the trust property may have undergone, so long as its identity can be traced, it will be held responsible to the claim of whomsoever may in Equity be entitled to receive it."—Same vol. 503. Can the claim of Jones to the fund in dispute, viewed in its most favourable light, be regarded as equal, in equity, to that of a portion of the complainants, taking as true all which is contained in this bill of complaint? I think not. But it is said, that the rendition of judgment on the note held by Jones, precludes all inquiry into the subject of its consideration, or the nature of the transfer of it to Jones; that the complainants in the bill, who were sued upon it, are estopped by the judgment, from denying that they owe to Jones, both in Law, and Equity, the sum involved in this injunction. Estoppels are said in  
 175 Law "to be odious," as lying in \*the way of enquiry. But I think the doctrine has been stretched too far in the argument, which has been made by the defendants' counsel in the case under consideration. That the adjudication of a cause by a Court clothed with competent jurisdiction, of the facts and principles involved

in it, is, as a general rule, a bar to subsequent litigation touching the same matter between the same parties as certainly true. And by the comity of Courts of Justice this bar or estoppel is not only respected in the Court, where the adjudication takes place, but equally by all other Courts: This, that there may be an end of controversy. "Courts of Equity will not relieve against a judgment at Law, where the case in equity proceeds upon a defence equally available at Law; but the plaintiff ought to establish some special ground for relief."—2 Story's Equi. 178; 5 Paige Ch. Rep. 219; 7 Cranch 332; 1 Johns. Ch. 49; Dev. Equi. 289; 2 Ch. Ca. 93; 3 Atk. 223. The language of these cases, however, does not extend the estoppel to other instances than those in which relief in equity is sought, on a ground of defence that was good and available in a case at Law. They do not purport to comprehend those cases in equity where the ground of relief against the judgment at law, is of a nature, cognizable alone in a Court of Chancery. It is clear, that in the event that the application for relief in Chancery against the judgment at Law, is placed on a ground that could not have been recognized in the Court, whose judgment is in question, that the first trial cannot be regarded as a bar or estoppel in the logical and proper acceptation of that term, to the consideration of the ground taken in the last resort in Chancery: This, for the obvious reason that the Court whose action in the premises is quoted as a bar, had not jurisdiction over the subject matter sought to be litigated in the second suit. Certain it is, that the authorities cited leave the doctrine within the limits I have defined, and on the contrary, numerous cases are to be found in which relief has been granted in Courts of Chancery, against judgments at Law on considerations of a kind exclusively equitable, which existed at and prior to the time of rendition of the judgment at Law. The cases of French v. Garner, and others, 7 Port. 549; Gales v. Buchanan & Pollock, 2 Murph. 145; Simpson v. Hart, 14 Johns. 63, are of this class. Now, at the time of trial of the actions at Law that were brought by Jones, there existed no means, so far as the bill discloses, by which judgment could have been prevented.

There was in fact no defence at Law  
 176 to the \*cases pending. Receiving the note as he did from the legal owner of it, Jones was in order, being in a Court of Law, to have demanded judgment, had the paper sued upon been simply given to him. Nor should it be overlooked, that the demand of the complainants, now in judgment against the administrator, and in suit on his bond, up to the final trial of the cases in favor of Jones, had not been investigated at Law, and found to exist. The prayer of a bill is greatly strengthened by an additional and material element of equity, viz: the alleged insolvency, and consequent inability of the defendant, Jones, and the estate of his co-security, so far at least as it is liable to the Laws and



process of the Courts of this State, to respond to the recovery already had against the administrator, and which is now in suit, as the bill states, against this defendant, and the other parties to the administration bond. Insolvency has been very often made the ground in equity for parting with the rules by which Courts of Common Law are governed in relation to the subject of set off, and the good sense and justice of it, are at once seen. The difference in the strength of the case of that man who is merely seeking to avoid the inconvenience of mutual payments, and of him who is threatened with the loss of his money if he be required to part from it, is a very marked one.—2 Paige's Ch. 581. This case embraces a very extensive selection of authorities in support of the proposition. The cases quoted from and cited, are, 2 Eq. Cas. Abri. 10; 2 Vern. 117; 1 Peere Williams, 325; 4 Com. Rep. 302; 2 Ham. Ohio R. 320; 1 Litt. 153; 1 Monroe Rep. 194; 4 Bibb R. 356; 14 Johns. 63. The case last quoted bears, too, on other points of the bill before me, and to the extent to which it does so, is favorable to it. It was the language of the Chief Justice Marshall, in delivering the opinion of the Supreme Court, in the case of the Marine Insurance Company of Alexandria v. Hodgins, "that without attempting to draw any precise line, to which Courts of Equity will advance, and beyond which they cannot pass, in restraining parties from availing themselves of judgments obtained at Law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of Law, or which he might have availed himself at Law, but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents, will justify an application to a Court of Chancery."

Judge Story adopts the language of 177 \*this case in his Com. on Equity—(See 2 vol. 173)—I regard the case at bar as falling within this proposition: Upon the supposition that all which is stated in the bill is true, the execution of the judgment, now the subject of injunction, would be "against conscience," and for reasons of which the injured parties could not have availed themselves in a Court of Law. If, however, all inquiry into the consideration for which the note in dispute was given be dismissed, it is remarkable that, while the granting of the prayer of the bill would be but the rendering partial payment to the distributees of a claim already established in their behalf, and for which Jones is represented as being liable, it will be at the same time in its effect on the defendant, but the fulfilment of the very object of the transfer of the note to him, to wit: the diminution of his liability on the administration bond, to an extent in precise correspondence with the fund thus appropriated. It has been urged, in defence, that if Jones be liable to the extent of this fund, as trustee at the suit of the distributees of George W.

Dillingham, that he is liable in the same manner to the creditors of George W. Dillingham also, and that their claim upon the proceeds of the note in question is paramount to that of the complainants. It should be observed, that, stripped of incidental parties, the motion is to have a subsisting judgment in favor of John Dillingham, or one who holds in privity with him, and who rests for this purpose on his title against Wm. D. Carnes and his wife, paid by the entering it as a credit upon a judgment for a large sum outstanding in favor of Carnes and wife against Dillingham. The general rule in cases of application to have a set off declared, or mutual demands credited on each other, is, that the equities existing between the parties must be adjusted and satisfied before the claims of third persons can be inquired into or heard. The principle is illustrated by reference to the case of mutual demands between an insolvent intestate and another. In an action brought by the representative upon the demand of his intestate, it is no reply to the counter claim of the debtor, that all the assets of the insolvent intestate will be needed to pay debts of higher dignity than that held by the debtor of whom a collection is sought to be made. The uniform course has been to regard the right of the debtor to a discount of the one demand upon the other in such a case, as superior to the claims of all other persons. It is the excess alone, if any after balance struck, to which those persons

are entitled. This is the rule equally 178 \*at Law and in Equity, and this too, without reference to the relevancy of the respective demands to each other in their origin. Should the case at bar be regarded as not falling within the general rule, however, yet the motion for the dissolution of the injunction ought not to prevail. It is observable, that the creditors are not now in pursuit of this fund. The argument does not come from them. It comes from one over whom the argument admits the complainants have a superior equity. The evidence too, which shews there were outstanding claims in favor of creditors, unsatisfied at the time the decree in favor of the distributees was rendered, shews also that those claims were allowed the administrator in the account taken with him by the distributees. The counsel for the defendants have erroneously supposed too, that the bill alleges the estate of George W. Dillingham to have been insolvent. The bill alleges that John Dillingham, against whom the recovery of the distributees took place, and to whom the title to the fund in dispute is traced, and his sureties, are insolvent. Certainly as between the legal title of John Dillingham to the fund in controversy, and the rights of the complainants in the case made by the bill, the latter should be preferred. Nor should it be forgotten that Jones is not seeking to make this collection, so far at least as appears for the present, as trustee for the creditors or others, but for himself and on his own account: and the pecuniary irresponsibility of Jones, is one of the leading features of equity in the bill. Certainly with the interest, which even the

argument itself admits the complainants have in the correct appropriation of the money due on Jones' fi. fa., it should not, in the circumstances detailed in the bill, be permitted to go into the hands of the defendant Jones. Another reason given for the dismissal of the bill, is, that the complainants have not asked for an injunction of their own fi. fa., and suit on the administration bond also, pending the injunction of the fi. fa., of the defendant Jones: and this reason is placed upon the supposed injustice and inequality of allowing one case to proceed while the other is locked up on complainants' motion. No authority is quoted in support of this position. I shall not stop to enquire into the utility or regularity of an injunction in favor of one to arrest the progress of one's own case, but will content myself with observing, that should facts now exist, or hereafter transpire, having the effect of rendering unjust the prosecution by complainants of their fi. fa. against Dillingham, or their

179 action on the administration \*bond,

that the Courts of justice are open to those who are likely to be injured thereby. The bill certainly discloses for the present no wrong to the defendant in fi. fa. or to others thereby, and it may be, with safety and propriety, left to those interested in an injunction of the fi. fa. which complainants have obtained, or the suit they are carrying forward, to apply for it on a proper shewing. Other arguments have been urged in defence, not so much affecting the equity of the bill as bringing to the attention of the chancellor certain difficulties which are supposed to lie in the way of giving effect to it. I have considered them, and they are regarded as not insuperable. Upon the whole, I am of opinion, that this bill should be answered. The motion for its dismissal is accordingly denied.

MARSHALL J. WELLBORN,

J. S. C. C. C.

Holt & Alexander, and Foster & Howard,  
for Complainants.

Jones & Benning, for Defendants.





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2. After the foreclosure of a mortgage, the mortgager's right of redemption is gone. Ibid.

### MULTIFARIOUSNESS.

A bill for one year's maintenance of a decedent's family, and praying an account of the co-partnership against his executors and a surviving partner, and charging a combination, is multifarious, and one of the causes of complaint will be stricken out. 24

### NEW TRIAL.

1. The Court will not hear a motion for a new trial at the next term after judgment was rendered, unless there was some action of the Court to stay the proceedings, although the counsel give notice of the application and the grounds. 1

2. The affidavit of a Juror in a civil case, cannot be received to shew what transpired in the Jury room, for the purpose of impeaching a verdict returned by him under oath and to which he must have assented. 2

3. A new trial will not be granted when a mass of conflicting evidence has been submitted to the Jury. 22

4. In actions sounding in tort, the 186 damages must be so outrageously \*excessive as to raise the presumption that the Jury acted more from prejudice than sound judgment. 26-39

5. It is no ground for a new trial that a part of the Jury separated from the rest without the knowledge of the Court, or the presence of an officer, unless there was evidence that they were tampered with, which might be presumed if the absence was for a considerable time. 35-46

6. Whether the facts of a case make it murder or voluntary manslaughter, being a question for the consideration of the Jury, the Court will not, except in a clear case, interfere. 46

7. No matter can be urged as a ground of error in the proceedings before a Justice's Court, that was not urged in that Court. 132-164

8. That a Jury had spirits in their room of which they did not drink, is no ground for a new trial. 142

9. When the principles of Justice require that a new trial should be granted, the Court will look into the evidence, and decide upon the consideration it is entitled to. 150

10. When circumstances of guilt are slight, in a high criminal case, the Court will grant a new trial. 150

11. That the verdict of a Jury is contrary to evidence, is ground for a new trial. 165

### OPEN ACCOUNT.

1. An open account is not assignable so as to authorize the assignee to maintain an action in his own name. 63

2. A promise to pay an account to the assignee is a nudum pactum. Ibid.

### PARTNERSHIP.

1. A surviving partner is entitled to the control of the partnership effects for the payment of debts, and for the residue he is responsible, not to the widow and children of the deceased partner, with whom there is no privity, but to the executor or administrator, who alone can demand his part of the partnership effects, after the payment of debts. 1

2. A surviving partner is liable to the representative of his deceased partner for a moiety of the profits of the partnership effects used in trade; or if he employs them and makes interest, for the interest on his share, deducting necessary expenses. 2

3. If one of two parties plaintiff being partners in trade, take the benefit of the Insolvent Laws, and return on his schedule, a debt due by judgment to the firm, and no trustee is appointed in terms of the Law, to take charge of the assets returned, no process can be issued for the collection of the judgment. 69

4. If one of two partners take the benefit of the Insolvent Law, the other partner has no authority to collect such of the debts of the firm as are placed on the insolvent's schedule. 69

187

### \*PLEADINGS.

See Evidence, 3.

1. In an Indictment of a slave for a capital offence, it is necessary to set forth the preliminary proceedings before the Magistrates. 46

2. An Indictment for an assault with an intent to murder, must charge that the act was feloniously done, with malice aforethought. It is not sufficient that this allegation is made in the first part of the Indictment where the assault is charged. 158

### SEAL.

An instrument having a scrawl annexed to the signature is a sealed instrument, though it contain no words, signifying the intention of the party to make it one. 126

### SECURITY.

1. In an action of assumpsit for the recovery of money paid by a security, he will be entitled to recover interest, if he was liable to it on the demand which he paid. 22  
See Chancery, 4. 104

### SET OFF.

1. In a suit against an executor on a demand against the testator in his life time,



he may set off a debt created with him as executor by the plaintiff since the testator's death, though the converse of this proposition will not hold good. 30

2. Debts must be mutual, i. e. due between the same parties, to be set off against each other. 97

3. A debt of \$272 75cents, cannot be pleaded as a set off in a Justice's Court. Ibid.

4. Justices of the Peace before whom a set off is pleaded, when the debts are evidently not mutual, ought not to refer the set off to the Jury. 156

#### STRAYS.

1. The Justice of the District where a stray is tolled, and the Clerk of the Inferior Court, have the right to determine the amount of compensation due for keeping the same. 131

2. They have power to refuse compensation when the stray has been put to work. 131

#### TITLE TO PERSONAL PROPERTY.

1. Between purchasers of personal property, the elder title must prevail, unless it be infected with fraud. 37

2. When a chattel is sold on condition that the title is not to vest until paid for, and time is given for the payment, the property is not changed until the payment, though the possession is delivered at the time of sale. 165

#### \*TROVER.

See Title to Personal Property, 2.

#### TRUSTEE.

1. Property, wrongfully purchased with the trust fund, may, at the option of the cestui que trust, be pursued in the hands

of the trustee, or those in privity with him, and be held subject to the terms of the original trust. 109

2. An express trust against which the statute of limitations does not run, may be created by parole. 109

3. The possession of the executors of a trustee is the continuation of the trustee's possession, and the statute does not run in their favour. 109

4. A security of an administrator, to whom a note is transferred, that was given for part of intestate's estate, is a trustee, quoad hoc, for creditors and distributees. 170

5. If the note be sued to payment by the security in his own name, he is still a trustee, and it is no ground of objection that the action of Law was not defended. Ibid.

6. It is not ground of objection to a decree in favour of distributees that there may be creditors having a higher claim. They have the same remedy on the bond that the distributees have. Ibid.

#### USURY.

On proof that usurious interest is added into and constitutes a part of the consideration of a note sued on, a verdict cannot be rendered for the whole amount. The interest must be deducted. 73

#### VERDICT.

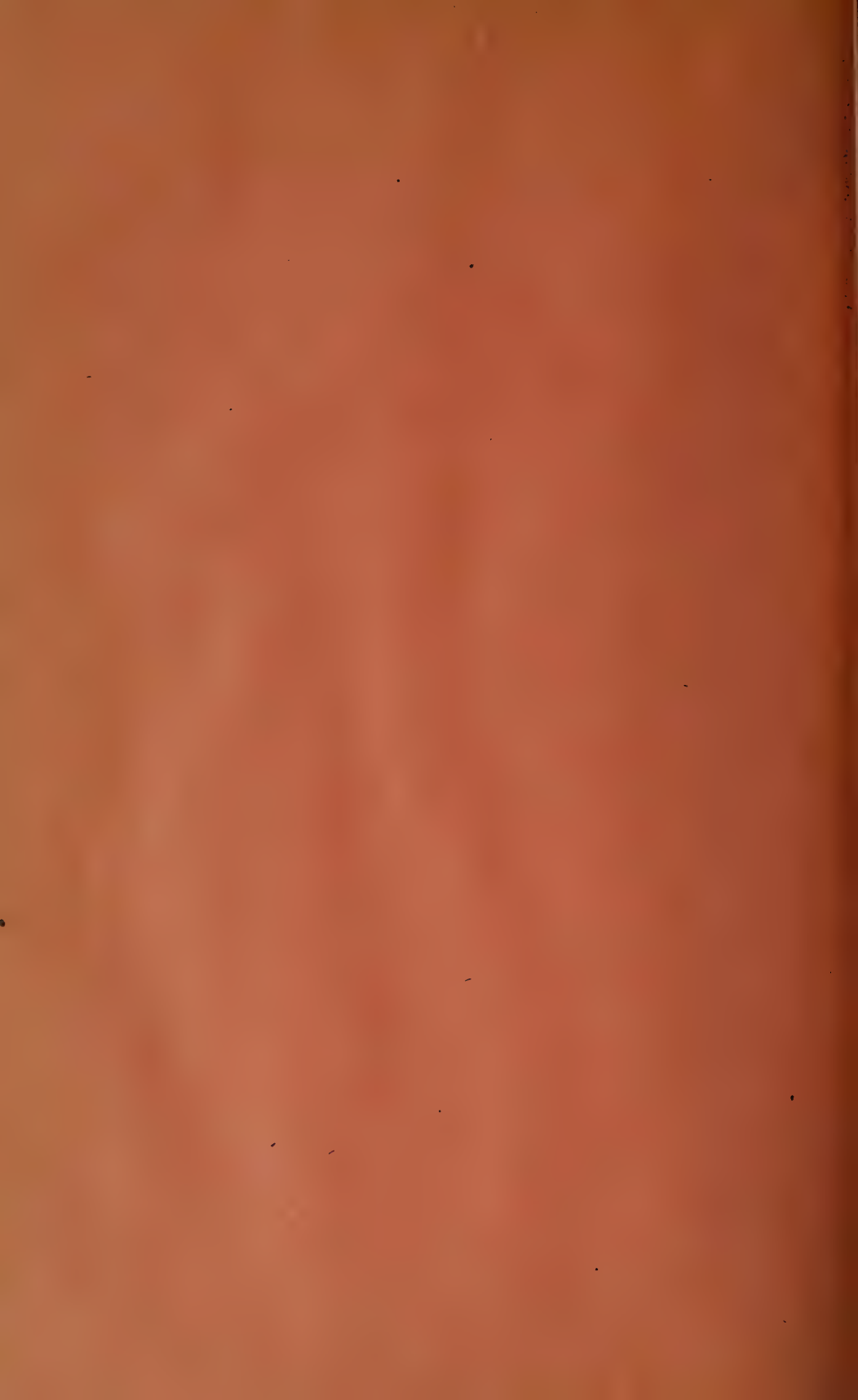
When there are two parties plaintiff, the Jury cannot find a verdict against one and in favour of the other. 156

#### WIDOW.

Under the act of 1838, the widow and children of a testator, or an intestate, are entitled to one year's maintenance from his estate without reference to its solvency. 24







DECISIONS  
OF  
THE SUPERIOR COURTS  
OF THE  
STATE OF GEORGIA.

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PUBLISHED IN COMPLIANCE WITH THE ACT  
OF DECEMBER 10, 1841.

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PART II.

CONTAINING DECISIONS RENDERED DURING THE YEAR 1842-3.





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# DECISIONS IN THE EASTERN CIRCUIT.

CHARLES S. HENRY, JUDGE.

## CHATHAM SUPERIOR COURT.

Alexander W. Wyly v. R. & W. King.

January Term, 1841.

### 1. New Trial—Errors in Instructions—Harmless Error.\*

—A new trial will not be granted, merely for error in the charge of the Court, where justice has been done between the parties.

### 2. Factors—Lien of Factor.—A factor's lien for a general balance, accrued in the life time of his principal, does not attach to property, coming into the factor's possession, after the principal's death, by order of his representative.

### 3. Executors De Son Tort—Validity of Acts of.†—An Executor de son tort can give to a third person no legal control of the decedent's property.

### 4. Executors and Administrators—Contracts—Power to Bind Estate.‡—An Executor or Administrator cannot create a lien on property of the estate, for a debt due in the life time of the decedent, to the injury of other creditors.

### 5. Same—Actions by—Personal or Representative Capacity.§—On a cause of action accruing after decedent's death, his executor or administrator

#### \*New Trial—Errors in Instructions—Harmless Error.

—In support of the proposition, that a new trial will not be granted merely for error in the charge of the court, where justice has been done between the parties, and the defendant could not have been injured by the erroneous instruction, see *Maynor v. Lewis*, 68 Ga. Dec. pt. 2, p. 205; *Atlanta, etc., Ry. Co. v. Tanner*, 68 Ga. 384; *Central R. R. v. Smith*, 74 Ga. 112; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. Rep. 806; *Brunner v. Black*, 92 Ga. 497, 17 S. E. Rep. 767; *Charleston, etc., Ry. Co. v. Green*, 95 Ga. 362, 22 S. E. Rep. 540; *Edgar v. Walker*, 106 Ga. 454, 32 S. E. Rep. 582; *Cooper v. Delk*, 108 Ga. 550, 34 S. E. Rep. 145.

But in *Shadwick v. McDonald*, 15 Ga. 392, it was held, under a statute providing that it should be obligatory on the court to grant a new trial in all cases where the presiding judge might deliver an erroneous charge against the applicant, that the court would grant a new trial for such error, although harmless in view of the verdict.

†*Executors De Son Tort—Validity of Acts of—Disposition of Assets to Third Persons.*—See *Wiley v. Truett*, 12 Ga. 588, and *foot-note* to *Semmes v. Porter*, *Dud.* 167.

‡*Executors and Administrators—Contracts—Power to Bind Estate.*—See *McFarlin v. Stinson*, 56 Ga. 396.

§*When Representative May Sue in Either Representative or Individual Capacity.*—When the cause of action, whether in contract or in tort, accrues after the death of the testator or intestate, and the money, if recovered, will be assets, the plaintiff may declare in his representative character, or in his own name, at his option. 8 *Enc. Pl. & Pr.* 658; *Daniel v. Hollingshead*, 16 Ga. 190; *Kenan v. DuBignon*, 46 Ga. 258. See also, *Macon, etc., R. Co. v. Davis*, 18 Ga. 679; *Wheelus v. Long*, 73 Ga. 110.

may sue, either in his own individual, or representative, capacity, at his option.

This was an action brought by plaintiff against the defendants to recover the sum of \$2168.60, for so much money had and received to the plaintiff's use, and upon an account stated.

The Special Jury, before whom this cause was tried at the present term, returned a verdict in favor of the plaintiff, for the above sum and costs.

A motion is now made, on the part of defendants, for a new trial, on the following grounds:—

1. Because the verdict is contrary to the evidence.

2. Because the verdict is contrary to Law.

8 \*3. Because his Honor the Judge misdirected the Jury upon the Law, in this:—that he instructed them that the factor's lien, claimed by the defendants in their defence, could not attach, because their possession was acquired after the death of their debtor. And also in this:—that he instructed the Jury that the authority of the plaintiff to the defendants, to apply the cotton to their debt, as shown by the evidence, could not avail for their protection, against the demand, by action, in the individual name of the plaintiff.

The merits of this motion are presented under the last ground above stated; and it is for an alleged misdirection on the part of this Court, in its charge to the Jury, on the Law of this case as applicable to the facts. This, if true, is, without doubt, a good ground to sustain a motion for a new trial; but in determining the question, whether or not a new trial should be awarded, I may here remark, that it is not every error a Court may make in its charge to the Jury, which is deemed sufficient for that purpose. It must clearly appear that injustice has been done the party moving for the new trial, in consequence of the instruction given by the Court to the Jury. But if the Court, looking to all the facts, as they were in evidence before the Jury, is satisfied that Justice and Equity has only been done between the parties, and that the defendant could not have been injured, by the instruction given by the Court to the Jury; it will not set aside the verdict and grant a new trial, merely on the ground of misdirection.—3 *East*, 129; 3 *John.* 528; 10 *John.* 447.

The facts, then, as they were in evidence before the Jury, were, briefly, as follows:—That the defendants, R. & W. King, during the year 1838, were the factors of one John A. Wyly, deceased; and as such factors,



were in advance to him, on 30th November, 1838, including interest, \$1868.81. That John A. Wyly departed this life, on 3d December, 1838—and that letters of administration on his estate were granted the plaintiff, on 4th March, 1839. That some time in February, 1839, the plaintiff, before obtaining his said letters of administration, took possession of all the estate of John A. Wyly, deceased, and shipped to the defendants twenty-one bales of cotton belonging to said estate, which were subsequently received and sold, by the defendants, for the sum of \$2186.60. This amount the defendants, in their account current, acknowledged to have received

9 \*from the sale of this cotton—but claim to retain the same, as the factors of John A. Wyly, deceased, to pay and satisfy their general balance of account, due by him in his life time, for advances made. It is for the recovery of this amount, received upon the sale of this cotton, that the present action has been brought.

Now, I have given these facts, and the Law as applicable to them, my most deliberate consideration, since the argument of this motion, and I cannot bring my mind to the conclusion, that the instruction which I gave the Jury, on the question presented under the facts, was erroneous, or that I misdirected them in relation to their duty. I still am of the opinion, that a factor's general lien, for a general balance of account, incurred in the life time of his principal, does not attach on property which may have belonged to the principal in his life time, but which property did not come into the possession of the factor, until after the death of his principal—and then, by the order and direction of the personal representative of the principal. The reasons which were advanced in support of this opinion, on the trial of this case before the Special Jury, were—That to entitle a factor to enforce his right of general lien, for a general balance of account, he must have received and become possessed of the property of his principal, in his character of factor, and during the life time of his principal—the right itself being founded in usage and custom, and upon the idea of a privity of contract, express or implied, existing between the factor and his principal in his life time.—(Green v. Turner, 4 Burr. 2221; Wilkins v. Carmichael, Douglass, 97; Kirkham v. Shawcross, 6 T. R. 14; 1 Brevard's S. C. R. 497; 3 Kent Com. 639.)—That death dissolves the relation of principal and factor, or agent, as it does every other relation in life, (8 Wheat. 174,) and consequently, any property which he may subsequently receive, from the hands of the personal representative of his deceased principal, he cannot receive in his character of factor to the deceased, but in his character of factor or agent to the personal representative—as against whom, or the general creditors of the estate which he represents, no such right of general lien can be claimed or enforced.—That general liens for a general balance of account, even as between factor and principal in his life time, had always been

watched with jealousy, and their extension strictly construed; and that to allow this right to attach to the property, or proceeds received by the defendants, \*under the facts of the present case, would manifestly be against every principle of Justice and Equity, as it would unsettle the due and legal administration of the estates of deceased persons, especially if insolvent, and be violative of the rights of the creditors of the deceased, whose debts were of superior dignity.—That whatever particular lien the defendants might have, in the property placed in their possession by the personal representative, for their commissions and charges, or advances made to him, on the faith of the property which he had placed in their possession; they could have no legal right to retain the proceeds, for a general balance of account due them by the intestate, in his life time, upon the ground of a general lien. These reasons, and others which might be stated, were it necessary, appear, to my mind at least, conclusive, against the claim of the defendants to a general lien on the money in their hands, for a general balance of account, incurred in the life time of their principal, John A. Wyly; and I cannot, therefore, affirm, that the verdict of the Jury, so far as it has reference to that question, is, in the least, contrary to Law or evidence, or the Justice and Equity of this case.

The only authority which has been brought to the notice of this Court, by the counsel for the defendants, and which would seem, at first sight, to conflict with the views which have just been presented, is the case of Hammonds, et al., executors of Blight v. Barclay and others, assignees of Fentham, a bankrupt.—(2 East, 227.)—I have carefully examined this case, and cannot but think that the principles, which are decided by it, have no application to the question presented by the facts of the present case. The question, of a factor's right to enforce a general lien, for a general balance of account, incurred in the life time of his principal, to property which comes into his possession subsequently to the death of his principal, and by the orders of the personal representative, is not presented by the facts of that case—neither is any such question, as it seems to me, decided by the Court. The principle affirmed by that decision, as I apprehend, is, that the assignees of the bankrupt, Fentham, were entitled to be reimbursed out of the proceeds in their hands, for the advances made by the bankrupt, upon the ground of a particular lien: the bills having been drawn by the testator, in his life time, upon the faith of the particular ship and cargo consigned—the advances having been made on the faith of that consignment, notwithstanding the property

11 \*came into the possession of the bankrupt, Fentham, subsequently to the death of Blight; but that, even were there a doubt on that point, still the executors, as executors, having, subsequently to the death of their testator, expressly ratified and confirmed his acts, and placed the ship and cargo into the possession of the bankrupt, that he, or his assignees, as against them in their

representative character, would be entitled to enforce this particular lien, against the proceeds in their hands. All the elementary writers on the doctrine of Lien, place the decision of this case, of *Hammons v. Barclay*, upon this ground, and not upon the ground of a factor's right of general lien, for a general balance of account; and to that extent I do not feel disposed to question the correctness of that decision.—*Montague on Lien*, 68; *Whit. on Lien*, 101, 105, 106; 2 *Livermore on Prin. & Agent*, 37, 38, 48—See also, to the same point, *Richardson v. Goss*, 3 Bos. & P. 123.

The only remaining ground, assumed in support of this motion, is this:—That this Court instructed the Jury, that the authority of the plaintiff to the defendants, to apply the cotton to their own debt, as shewn by the evidence, could not avail for their protection against the demand, by action, in the individual name of the plaintiff. This ground is clearly a virtual abandonment of the claim, which the defendants set up to retain the money in dispute, as founded in their right of general lien, and is an objection to the justice of the verdict, as rendered by the Jury, of a technical character to the form of the action as it has been brought, more than to the merits of the cause, as presented by the testimony. It assumes the fact, First—that it was clearly shewn, by the testimony, that the plaintiff had given the defendants express direction and authority to appropriate the money in their hands, to the extinguishment of the pre-existing debt due them by the intestate in his life time; and, secondly—that having brought the present action in his individual, and not in his representative, capacity, that the plaintiff was not, therefore, entitled to recover.

In reference to the first point, just stated, it is here proper to remark—that the Jury, being the exclusive judges of the testimony, and its weight, were the proper persons to determine, under the facts before them, whether any such express authority, as that contended for, was ever given by plaintiff to defendants, or intended to be given, 12 \*in relation to the proceeds of the cotton now in dispute. They have clearly, by their verdict, negatived the fact that any such express authority was given; and after having duly considered the language and terms of the plaintiff's letters, to defendants, of 23d and 28th February, 1839; and also that of 1st June, 1839, which were in evidence before the Jury, I cannot arrive at any different conclusion. In the first of these letters the following language is used:—"Will you do me the favor to say, what the prospect is as to price, that I may judge what amount I can draw after paying up your account, as demands are coming in." In the second of these letters, the following language is used:—"I truly regret to learn that there is any dullness in Sea Island cotton, and particularly on account of my brother's debts, all of which I was in hopes of paying." And in a postscript to this letter, he says:—"As soon as the cotton is

sold, please charge your own account, and send it with account sales." In a postscript to the letter of 1st June, 1839, is the following expression:—"The principal part of the amount in your hands was, after paying your portion, intended for Mrs. McNish." Now, taking the language as contained in these letters, which were in evidence before the Jury, in connexion, and placing upon it any fair construction, it does seem to me, at least, extremely doubtful, whether, in point of fact, any such authority as that contended for, on the part of the defendants, was ever given, or intended to be given, by the plaintiff. The language of their letters would clearly seem to negative any such direction or authority; and this the Jury have affirmed by their verdict, from which I cannot dissent. But were we to admit, that the plaintiff's letters to defendants, of 26th and 28th February, 1839, and 1st June, 1839, had contained an express direction and authority to defendants, to appropriate the proceeds of the cotton, in dispute, to the general balance of account due them by John A. Wyllly, in his life time, so as to leave no room for doubt, or construction; still, the question presents itself, had he, then, any legal authority to make such payment, or appropriation, in violation of the rights of the general creditors of the deceased—and would such payment, if made, be binding upon him in the present action? I think not. First: because, according to the facts, he did not obtain letters of administration on the estate of the deceased, until the 4th March, 1839, and by intermeddling, in any manner, with the estate of the deceased, previous to that time, he made himself, 13 in the eye of \*the Law, an executor, de son tort, and consequently his acts, as such, were neither binding upon himself, nor the estate. On the 26th and 28th February, 1839, he could have given the defendants no legal power or authority to appropriate the proceeds of the cotton, in the manner contended for by them.—(*Leigh's Nisi Prius*, 958; *Mentford, adm'r of Holland, v. Gibson*, 4 East, 439-441; *Howland, Ward, & Spring v. Dews*, R. M. Charlton R. 388; *Doe v. Glenn*, 1 Adol. & El. 49; 28 *English C. L. R.* 33.) But the second reason is, that an executor or administrator, or other person, acting in a fiduciary character, cannot, by any contract of his own, create a lien, or charge, upon the estate which he represents, in favor of one creditor, for a debt due in the life time of his testator, or intestate, to the injury of the other creditors of the estate, when such charge, or lien, did not exist in the life time of the testator, or intestate.—*Cumberland v. Coddington*, 3 John. Chan. 273; *Executors of Fisher v. Executors of Tucker*, 1 McCord's Ch. 175; *O'Neal v. Abney*, 2 Bail. S. C. R. 317; *Foster v. Fuller*, 6 Mass. R. 59.

The evidence, then, which was before the Jury, being insufficient for the purpose of showing any express direction, or authority, from the plaintiff to the defendants, to appropriate the monies in their hands, to the extinguishment of the pre-existing debt, due



them by the intestate, in his life time; the form in which the present action has been brought, cannot, as it seems to me, be any insuperable objection to the plaintiff's right to recover, or be of itself a sufficient ground to authorize the granting the present motion. The rule, I apprehend, is well settled, that where the cause of action accrues, not in the life time of the testator, or intestate, but subsequent to his death, and the money, if recovered, would be assets in the hands of his personal representative, for the payment of debts; he has his option, in bringing an action for its recovery, to declare, either in his own name, or in his representative character; and some of the authorities seem to go so far, as to affirm, that when the cause of action accrues subsequent to the death of the testator, or intestate, the action can only be maintained by the personal representative, in his own name and right.—Leigh's *Nisi Prius*, 997, 998, Note (1); 14 Peters' S. C. R. 33. The plaintiff's cause of action, in the present case, if any, accrued subsequent to the death of his intestate;

14 and it is not disputed, \*but that the money in the hands of the defendants, when recovered, will be assets in the hands of the plaintiff, for the payment of the intestate's debts, according to law. It does not therefore seem to me, that the objection to the form of the present action can, or ought to be, sustained. It is a purely technical objection, which is seldom listened to, on a motion for a new trial.

Without extending the reasons for the refusal of the present motion further, I may, in conclusion, remark that, from a review of all the facts and circumstances of the present case, I feel satisfied that the verdict, which has been rendered by the Jury in the present case, is in accordance with the principles of Justice and Equity, and that Justice has been done between the parties.

The motion for a new trial, therefore, in this case must be refused; and it is accordingly so ordered.

Charlton & Ward, for Plaintiff.

William & Wm. T. Law, for Defendants.

15 \*James A. Cornwise, Comp't v. Benedict Bourgum, Deft.

January Term, 1842.

1. Chancery Practice—Injunctions—Continuance.—A Court of Chancery, in its sound discretion, may

\*Injunctions—Continuance after Equity of Bill Denied in Answer.—Where the equity of the bill is fully denied, or "sworn off," by the answer, the general rule is that the defendant is entitled to have the injunction dissolved. Read v. Dews, R. M. Charl. 358; Shellman v. Scott, R. M. Charl. 380; Moore v. Ferrell, 1 Ga. (1 Kelly) 7; Hemphill v. Ruckersville Bank, 3 Ga. 435; Clark v. Cleghorn, 6 Ga. 220; Field v. Howell, 6 Ga. 423; Dennis v. Green, 8 Ga. 197; Ford v. Tison, 8 Ga. 466; Jones v. Joyner, 8 Ga. 562; Holt v. Bank of Augusta, 9 Ga. 552; Dent v. Summerlin, 12 Ga. 5; Swift v. Swift, 13 Ga. 140; West v. Rouse, 14 Ga. 715; Mahone v. Central Bank

continue an injunction, after all the Equity of the Bill has been fully denied, in the defendant's answer.

2. Trust Estates—Changing Investments—Power of Trustee.—A Guardian, or other Trustee, may change the investment of the trust estate, where it is manifestly for the interest of the cestuy que trust. But if he does so without an order of court, it is at his own risk, and he will be held accountable for all the consequences.

3. Same—Encroachment on Principal—When Equity Will Permit.—A Court of Equity will not permit a Trustee to encroach on the capital of the trust estate, for the maintenance of the cestuy que trust, except under very peculiar circumstances.

This is a bill, filed by the complainant, against the defendant, as his guardian, charging him, amongst other things, with having wasted and mismanaged his estate, and praying that an account may be taken as to defendant's actings and doings, in reference to said estate. The bill, further, prays, that a writ of Injunction do issue, to restrain the said defendant from selling, under the order of the Honorable the Court of Ordinary for the County of Chatham, nine slaves, and five hundred acres of land, being part of the capital of the state, belonging to said complainant, in the hands of said defendant, to satisfy an alleged indebtedness to said defendant, for advances made by him, which said indebtedness the complainant, in his bill, denies to exist, upon a fair settlement of the accounts.

An Injunction having issued, and the

of Georgia, 17 Ga. 111; Edmondson v. Jones, 19 Ga. 19; Boring v. Rollins, 20 Ga. 623; Beckham v. Newton, 21 Ga. 187; Miller v. Maddox, 21 Ga. 327; Weaver v. Garner, 28 Ga. 503; Gravely v. Southerland, 29 Ga. 335; Williams v. Garrison, 29 Ga. 503; Howard v. Marine Bk., 30 Ga. 841; Applewhite v. Baldwin, 30 Ga. 915; Louis & Co. v. Bamberger, 36 Ga. 589; Thrasher v. Partee, 37 Ga. 392; Connally v. Cruger, 40 Ga. 250. But a court of equity has jurisdiction under peculiar circumstances, to retain an injunction, even when the equity of the bill is sworn off. See the principal case cited to this effect in Smith v. Bryan, 34 Ga. 66. And see in accord, Shellman v. Scott, R. M. Charl. 380; Coffee v. Newsom, 8 Ga. 444; Holt v. Bank of Augusta, 9 Ga. 552; Dent v. Summerlin, 12 Ga. 5; Swift v. Swift, 13 Ga. 140; West v. Rouse, 14 Ga. 715; Crutchfield v. Danilly, 16 Ga. 432; Rodahan v. Driver, 23 Ga. 352; Howard v. Marine Bk. of Ga., 30 Ga. 841; Wooding v. Malone, 30 Ga. 979; Durham v. Sessions, 34 Ga. 282; Louis & Co. v. Bamberger, 36 Ga. 589; Upson County R. Co. v. Sherman, 37 Ga. 644. As to what are such circumstances rests in the sound discretion of the court. Holt v. Bk. of Augusta, 9 Ga. 552; Dent v. Summerlin, 12 Ga. 5; Swift v. Swift, 13 Ga. 140; Loyless v. Howell, 15 Ga. 554; Crutchfield v. Danilly, 16 Ga. 432; Cox v. Mayor, etc., of Griffin, 18 Ga. 728; Horn v. Thomas, 19 Ga. 270; Semmes v. Mayor, etc., of Columbus, 19 Ga. 471; Buchanan v. Ford, 29 Ga. 490; Wooding v. Malone, 30 Ga. 979; Rhodes v. Lee, 32 Ga. 470; Durham v. Sessions, 34 Ga. 282; Edwards v. Banksmith, 35 Ga. 213; Webb v. Wynn, 35 Ga. 217; Johnson v. Allen, 35 Ga. 252; Howell v. Lee, 36 Ga. 76; Douglass v. Thomson, 39 Ga. 134; Connally v. Cruger, 40 Ga. 259; Gullatt v. Thrasher, 42 Ga. 429; Hollis v. Williams, 43 Ga. 214; Howard v. Lowell Machine Co., 75 Ga. 325.

defendant having filed his answer to said bill, now moves this Court to dissolve the said Injunction, on the ground, that the whole Equity of the bill has been denied by the defendant's answer. This motion has been opposed by the counsel for complainant, on the ground that, admitting the facts, as stated in the defendant's answer, to be true, they by no means swear away the Equity, which is contained in the complainant's Bill of Complaint, and this upon several grounds, which may be noticed hereafter.

16 \*As a general rule, it is undoubtedly true, in a Court of Equity, that, if the answer of a defendant denies all the Equity contained in the complainant's bill, an Injunction, if permitted to issue, will be dissolved, upon the coming in of the answer; otherwise it will be continued to the hearing.—Eden on Injunct. 86; Hoffman v. Livingston, 1 John. Chan. 211. But there are some particular cases, in which the Court of Equity will continue an Injunction, even although the defendant may have fully answered the Equity set up in the bill. But this must rest in the sound discretion of the Court, and is governed by the peculiar nature and circumstances of the case.—Roberts v. Anderson, 2 John. Chan. 205; R. M. Charlton's R. 381.

The question presented, under the present bill and answer, is—Has the defendant sworn away, or denied, in his answer, all the Equity, as contained in the complainant's bill? To decide this question, we must refer to a few of the leading facts, admitted by the defendant, in his answer, in reference to the charges, as contained in the complainant's bill.

Now, the defendant, in his answer, admits, that on, or about, the fifteenth day of March, one thousand eight hundred and thirty-three, having intermarried with the sister of the complainant, he did procure, from the Honorable the Court of Ordinary of Chatham County, letters of guardianship, of the person and property of the said complainant; and that, by virtue thereof, he possessed himself of twenty-six negro slaves, eight hundred and six acres of land, and three thousand six hundred and sixty-seven dollars and twenty-two cents, in cash, as the property belonging to said complainant: That this estate, at the time he took possession thereof, was free and clear of any incumbrance, or demand: That shortly after taking possession of said estate, he invested, as guardian, with the consent of the complainant, as he alleges, (who was then an infant, about the age of fourteen years,) three thousand and six dollars of the cash on hand, in the purchase of eight hundred and six acres of land, contiguous to, and adjoining, that then owned by complainant: That this purchase and investment was made by him, without the sanction or authority of this Court, or of the Honorable the Court of Ordinary for Chatham County. Now, it is this purchase, or investment, against which the complainant, in his bill, amongst other things, principally complains;

17 \*and having arrived at his majority, objects to it, on the ground, that his guardian, the defendant, had no power, or authority, to change the nature of his estate, without the sanction, or authority, of this Court, or some other tribunal, competent to give him that authority, and that the same has manifestly been to his injury, and that of his estate. It is, undoubtedly, true, that a guardian may, under particular circumstances, where it is manifestly for the benefit and interest of the infant, change the nature of his estate, and a Court of Equity will support his conduct, if the act be such as the Court itself would have done, under the like circumstances, by its own order. But where a guardian, or trustee, undertakes to change the nature of the estate committed to his care and management, without proper authority for that purpose, he does so at his peril, and when brought to account for the act, he must clearly make it appear to the Court, that the same was for the manifest benefit, interest and advantage, of the infant, or he will be held accountable for the act, and all the consequences flowing from it.—2 Story's Eq. 585, 586, 587. Now, the only excuse set up by the defendant, in his answer, for the foregoing purchase and investment, is, "that it would have been highly detrimental to the interest of the complainant, who owned the other half of said tract of land, so purchased by defendant, as guardian as aforesaid, from the said Robert Lundy, to have permitted any other person to have become the owner, especially as the Lundy half was the most valuable, and contained the greater part, and the best timber on the said tract, and the best land thereof." It is not, in the remotest degree, necessary, in deciding the present motion, that any impurity of motive should be attributed to the defendant, in the purchase of the land in question; and so far as the same is charged against him, by the complainant, in his bill, it is, I think, satisfactorily denied by the answer. But the point to be now considered, is—Has this purchase and investment been for the manifest benefit, interest and advantage, of the complainant, and his estate? If not, the Equity of the complainant's bill, so far as that purchase and investment is involved in the present controversy, has not been denied, or sworn away, by the answer; and, consequently, the defendant would not be entitled to have the Injunction dissolved. Now, so far as appears on the face of the defendant's answer, and his accounts filed, the land purchased from Lundy has, ever since the purchase, been almost wholly unproductive, and was not absolutely required for cultivation, by the small

18 \*force owned by the complainant, and has been the principal cause of all the difficulty, now existing between the complainant and defendant. It manifestly appears too, from the defendant's own showing, that, instead of this purchase having turned out for the manifest benefit and advantage of the complainant, it has been to his injury, and that of his estate; for it has compelled the defendant to sell three of the complain-



ant's negroes, being a part of the capital of his estate, to meet the alleged necessary and annual expenditure, and that there still remains against him a balance of eighteen hundred and forty-nine dollars and thirty-one cents, which the defendant is now seeking to satisfy, by a further sale of a portion of the capital of the estate belonging to the complainant. There is not a doubt on the mind of this Court, after a careful examination of the accounts, as filed by the defendant, that, if the sum of three thousand and six dollars had been originally loaned out at interest, by the defendant, upon good real security, instead of being invested in the purchase of the land from Lundy, notwithstanding the loss of crops, &c. as alleged by the defendant, in his answer, and giving him credit for all his advances, instead of there being now a balance in favor of the defendant, as guardian, amounting to the sum of eighteen hundred and forty-nine dollars and thirty-one cents, there ought to be in his hands a large balance of cash, due the complainant. And had such been the course pursued by the defendant, in the management of the estate committed to his care, I apprehend that, with a due regard to expenditures, for the maintenance of the complainant during his minority, there would have been little or no necessity to have sold, or sacrificed, any portion of the capital of the estate. If this investment, then, made by the defendant, cannot be justified, or sanctioned, upon Equitable principles, it is clear, that the whole character of the defendant's accounts, and their results, must be changed; and that it would be, therefore, unjust and inequitable, to permit him to proceed and sell a further portion of the capital of the complainant's estate, under the order of the Honorable the Court of Ordinary for the County of Chatham, until this point can be fairly submitted to the consideration of a Jury, under all the facts and circumstances of this case.

But there are other grounds, which have been presented to the consideration of this Court, by the counsel for the complainant, why this Injunction ought not now to be dissolved. These grounds are, that the defendant, under the order of the honorable the Court of Ordinary, 19 \*for the County of Chatham, is endeavoring to sell a portion of the capital of the estate belonging to the complainant, for an alleged indebtedness to him, for advances made, beyond the income and profits of the estate, as appears from his accounts as filed, which, it is contended, a Court of Equity will never permit, and that he has charged the complainant interest on these advances. That a Court of Equity will not suffer or permit a trustee to invade upon the capital of the Trust estate, for the maintenance of his cestuy que trust, except under very peculiar circumstances, is a principle now too well settled to be the subject of the least doubt. It will not even permit a creditor to do it, much less the trustee himself, who has been specially appointed to protect it,

and the interests of his cestuy que trust. If so, these are strong additional reasons, as it seems to me, in reference to the defendant's accounts, why this injunction ought not to be dissolved, and why the whole actings and doings of this defendant ought also to be submitted to the consideration and scrutiny of a Jury.

Without extending, therefore, the reasons for this decision further, I am of opinion, after a careful examination of the bill, answer, and exhibits, as filed, that all the Equity of the complainant's bill has not been denied, and sworn away, by the defendant's answer, and that, consequently, for the reasons given, I must refuse to grant the present motion. The complainant, however, must take care that he speed his cause to trial.—Motion denied.

Francis S. Bartow, William Law and Henry Williams, for Complainant.

Charlton & Ward, and McAllister & Cohen, for Defendants.

## 20 \*Adrian N. Mayer v. Peter Wiltberger.

January Term, 1842.

1. **New Trial—Special Jury—Verdict Contrary to Evidence.**\*—The Verdict of a Special Jury must be manifestly contrary to evidence and the principles of Justice, to justify the Court in granting a new trial. In case of doubt, the Court will not interfere, especially after two concurrent verdicts.
2. **Same—Admission of Incompetent Witness.**—The admission of an incompetent witness is not ground for a new trial, where all the facts, testified to by him, are proved by other testimony.
3. **Executory Devises—Estate in Fee—Subsequent Qualification.**—The devise of an absolute estate in fee may be qualified, by a subsequent limitation upon contingency, in the same will.
4. **Same—Limitation upon Indefinite Failure of Issue.**+ —But if such contingency be an indefinite failure of issue: it is void, and the absolute estate vests in the first devisee.
5. **Same—Same—Construction.**‡—Where a will con-

\***New Trial—Conflicting Evidence.**—See *Knight v. Mantz*, Adm'r. Ga. Dec. pt. 1, p. 22, and *foot-note*; *Bagshaw v. Dorsett*, Ga. Dec. pt. 2, p. 42, and *foot-note*.

‡**Executory Devise—Indefinite Failure of Issue.**—In *Hertz v. Abraham's Adm'r.* 110 Ga. 707, 723, 36 S. E. Rep. 409, the principal case is cited as authority for the statement that, as the terms *definite* and *indefinite failure of issue* were understood at the time of the decision of it, the principal case, a devise limited upon a definite failure of issue was valid in a will taking effect in 1850 (that is, prior to the enactment of the statute of 1854), while a devise limited upon an indefinite failure of issue was void as being too remote.

‡**Same—Same—Construction.**—The principal case is cited by *LUMPKIN, J.*, in his dissenting opinion in *Gray v. Gray*, 20 Ga. 804, 825, as supporting a *dictum* announced by him in *Benton v. Patterson*, 8 Ga. 146, 151, to the effect that in every case of a devise over to a person or persons then in life, *as survivor*,

tains a limitation, on a definite failure of issue; the Court will not, after verdict, construe a subsequent limitation of the same property, as intended to be on an indefinite failure of issue, unless that intention is clear and manifest, from the expressions of the will.

6. **Same-Same.**—A limitation to J. S. as "survivor," indicates an intention to limit on a definite failure of issue.
7. **Same—Legal Limitation Not Defeated by Subsequent Illegal.**—A limitation, on a legal contingency, which has happened, will not be defeated by a subsequent limitation on an illegal contingency.
8. **Same—Construction—Intent of Testator.**—In deciding whether a limitation in a will is on a definite, or indefinite, failure of issue; the question is, which did the testator intend?
9. **Deeds—Wills—Recordation—Notice to Subsequent Purchasers.**—Recording a deed, required by law to be recorded, is constructive notice of the conveyance, to all subsequent purchasers.—Rule same as to a will. Semb.
10. **Same—Bona Fide Purchasers—Estate Acquired.**—A bona fide purchaser acquires, by purchase, no larger estate in the subject, than that of his vendor.

This was an action of Trover, brought by the plaintiff, against the defendant, to recover a negro boy, named Peter, or his value and hire.

On the trial of this cause before the  
21 Petit Jury, as also before the \*Special Jury, at the present term, verdicts were returned by each, in favor of the above named plaintiffs, with costs of suit.

And now the defendant moves for a new trial, on the following grounds:

First: Because his Honor, the presiding Judge, erred, in admitting John Hover, to be sworn as a witness; he being incompetent, by reason of his interest, as executor of the will, under which the plaintiff claimed.

Second: Because, by and under the will of Cyrenus Mayer, the elder, the property, the subject of dispute in the above case, vested, absolutely, in Cyrenus A. Mayer, the younger, under and through whom the defendant claims title.

Third: Because the defendant, being a bona fide purchaser, for a valuable consideration, was, under the proofs in the case, entitled to protection, against the claim of the plaintiff.

Fourth: Because the evidence in the case authorized the presumption of marriage, between Cyrenus A. Mayer, under whom the defendant claims, and the female with whom he lived, the mother of his children; and, consequently, that he left lawful issue.

that it ought to be construed as importing a failure of issue at the time of the death of the first devisee, and not as a limitation upon a general or indefinite failure of issue.

In *Hertz v. Abrahams* Adm'x, 110 Ga. 707, 36 S. E. Rep. 409, there is a review of all the previous Georgia cases, including the principal case, construing executory devises limited upon a "dying without heirs," or "without issue," or like expression. See also, *Atwell's Ex'rs v. Barney*, Dud. 207, and  
foot-note.

Fifth: Because the verdict is against Law and evidence.

Having given the foregoing grounds of this motion my best reflection, since the argument of the same, in connexion with the facts, as they were in evidence before the Special Jury, I cannot come to the conclusion, that the verdict, which is complained against, is so clearly contrary, either to the evidence, or to the principles of Justice and Equity, as will authorise me, upon the present occasion, to grant the defendant the new trial asked for, especially after the rendition of two concurring verdicts.—*Prince D. 432; Cumming v. Fryer, Dudley R. 182.* Before this Court is justified in setting aside the verdict of a Special Jury, it must clearly appear to it, that the same is manifestly contrary to the evidence, and the principles of Justice and Equity, or a new trial will not be granted.

22 \*But, as the reasons for this opinion are required to be stated, I will proceed to do so, in as brief and condensed a manner as possible.

The first ground of this motion, is—That this Court erred, in admitting John Hover to be sworn as a witness, he being incompetent, by reason of his interest, as executor of the will under which the plaintiff claimed. It is true, this Court did admit the witness, John Hover, to be sworn on the trial, upon the production, by the plaintiff's counsel, of a release of all his interest in said suit, duly executed and delivered by him. And, in doing so, it is by no means satisfied, that error was committed. But, admitting such to be the fact, still, the answer which may be given to this ground, is conclusive, as it seems to me, against its sufficiency; and it is this—That all the material facts, which were sworn to by this witness, were as clearly and distinctly proved, by all the other witnesses in the cause, and particularly, by the defendant's own witness, Mr. Hiram Roberts—If, then, there was other testimony in the cause, to establish the same facts, which was competent and credible, and upon which the Jury could have relied, to sustain their verdict; the admission of the witness, Hover, to testify, admitting him to be clearly an incompetent witness, can form, I apprehend, no good or sufficient ground, why this Court should set aside the verdict of the Special Jury, and award to the defendant the new trial asked for.—*Graham on New Trials*, 246, 247, 249. But, as little reliance seems to have been placed on this ground of the motion, by the counsel for the defendant; for the reasons above given, I must overrule it, without further remark.

And this brings us to the consideration of the second and third grounds of this motion. These grounds present the real merits of the present motion. We will examine and dispose of them, in the order in which they stand.

The second ground of this motion, then, is—That by, and under, the will of Cy-



renus Mayer, the elder, the property, the subject of dispute, in the present action, vested, absolutely, in Cyrenus A. Mayer, the younger, under and through whom the defendant claims title. If this be true, upon principle and authority, clearly established, then it must follow, as an inevitable consequence, that the verdict, which has been rendered by the Special Jury,

23 in favor of the plaintiff, is \*contrary both to Justice and Equity, and that a new trial ought, therefore, to be awarded the defendant, on this ground alone. But, before we arrive at this conclusion, it becomes necessary to examine the language and terms of the will, under which the plaintiff claims his title to the negro in dispute; and, then, ascertain whether the legal proposition, which is presented by this second ground of the motion, can be sustained, upon the footing of authority, so as to vest, under the language and terms of said will, an absolute estate in the boy Peter, in Cyrenus A. Mayer, the younger, under and through whom the defendant claims title.

Now, the plaintiff, in the present action, founds his title to the negro in dispute, under the will of his uncle, Cyrenus Mayer, the elder, executed and published in the Parish of St. Peter, State of South Carolina, and bearing date the 13th December, 1817. This will was admitted to probate and record, before the Honorable the Court of Ordinary for the County of Chatham and State of Georgia, at May term, 1823. That portion of it, upon which he relies for his recovery, in the present action, reads as follows:

"Item: I give, devise, and bequeath, unto my nephews, Adrian Napoleon Mayer and Cyrenus Augustus Mayer, sons of my brother, Philip Mayer, and to their heirs and assigns forever, the negro slaves hereinafter named," (among whom is the boy Peter, the subject of the present action,) "together with the future issue and increase, equally to be divided between the said Adrian and Cyrenus, share and share alike."

"Item: I give and devise to my said nephews, Adrian Napoleon Mayer and Cyrenus Augustus Mayer, all the residue and remainder of my estate, real and personal, whereof I may be possessed, at the time of my decease, equally to be divided between them. To have and to hold to the said Adrian and Cyrenus, their heirs and assigns, forever."

"And, in case the said Adrian and Cyrenus, or either of them, shall die without lawful issue, living at the time of his death, or if the said issue die, without leaving lawful issue, then, and in that case, I devise that part of the said slaves, and all the residue of my estate, devised to the one who may die without issue, unto the survivor, his heirs and assigns."

24 \*Now, there are two facts, apparent upon the face of that portion of the testator's will, which we have given above, which it may be proper here to no-

tice, because much stress seems to have been placed upon them, by the defendant's counsel, in the argument of this motion. The first fact is: That under and by virtue of the language, as contained in the first two clauses above recited, the testator has given and devised to his two nephews, Adrian and Cyrenus, jointly, a fee simple estate, in the property therein described, as tenants in common. The second fact, is: That under the terms, as contained in said will, he has not given, directly, to the issue, either of the said Adrian or Cyrenus, as issue, any part of the estate therein given and devised to them; and that, consequently, whatever interest they may be entitled unto under said will, they take it by descent, and not by purchase. But, notwithstanding these two facts do appear in the face of this will, still, I apprehend, it is true, that a testator may, by a subsequent clause of his will, so qualify and restrain the previous estate given or devised in fee, that a limitation over of the same in fee, to a survivor, or any other person, upon a contingency which is restricted within the rule of Law, of a life or lives in being, twenty-one years and a fraction of a year, within which time issue may, by possibility, be in esse, will be held good and valid, by way of executory devise, if not technically a contingent remainder.—2 Mod. 289; Lord Ray. 28; Fearne on Cont. Rem. 398, 429, 444, 467; 2 Bl. Com. 173, 334; 4 Kent Com. 267, 269; 12 Wheat. 268; Anderson v. Jackson, 16 John. R. 399. This legal proposition, I do not understand, is denied by the defendant's counsel; but it is contended by him, that, under the terms of said will, which we have given above, the limitation over to the survivor, the present plaintiff, is too remote, being dependent upon the contingency of an indefinite failure of the issue of Cyrenus A. Mayer, and therefore void; and that consequently, Cyrenus A. Mayer took an absolute fee simple estate in the boy Peter; and as such owner, had the right to dispose of him, absolutely, when, and to whom, he pleased. His argument in support of this general proposition, is founded exclusively upon these words of the will: "or, if the said issue die without leaving lawful issue, then, and in that case, I devise that part of the said slaves, and all the residue of my estate, devised to the one who may die without issue, unto the survivor, his heirs and assigns." On the other hand, he admits, in most unqualified terms, that

25 if this testator's \*will had stopped, after the words, "In case the said Adrian and Serenus, or either of them, shall die without lawful issue, living at the time of his death," there could not be a doubt, but that the limitation, over to the plaintiff, as a survivor, would have been good by way of executory devise. The counsel for the plaintiff contends, that the limitation over to him, as survivor, created by the terms of this will, is not a limitation dependent upon the contingency of an indefinite, but a definite, failure of the issue

of Cyrenus A. Mayer; and that, therefore, the limitation, over to him, is good, by way of executory devise. That, whenever the words, "die without lawful issue living at the time of his death," are to be found on the face of a will, they have always been held as clearly ascertaining the intention of the testator to fix the limitation over, upon a definite, and not an indefinite, failure of the issue of the first taker, and to free the case from all difficulty, or doubt, on that point.—That, even were these words not to be found in the face of this testator's will, but simply the words "die without leaving lawful issue," still, he contends that the term, "survivor," will have a controlling effect over the isolated words above stated, take the case, without the operation of that rule of law, which is contended for by the defendant's counsel, and make the limitation over good, by way of executory devise. In support of this latter proposition, he relied upon the following authorities:—*Fosdick v. Cornell*, 1 John. R. 440; *Jackson v. Blanshaw*, 3 John. R. 292; *Moffatt v. Strong*, 10 John. R. 12; *Jackson v. Stuarts*, 11 John. R. 337; *Anderson v. Jackson*, 16 John. R. 397; *Wilkes v. Lion*, 2 Cowen, 333. We shall probably have occasion to refer to these authorities, in support of this decision, should it become necessary.

Now, the general legal proposition, contended for by the defendant's counsel, cannot be disputed, viz: That where, by the terms of a deed, or will, an estate is limited over to another, dependent upon the contingency of an indefinite failure of issue, in the first taker, the limitation over, in such case, is void, as being too remote; and the first will take an absolute estate in fee. If such were not the rule and policy of the Law, property might be tied up for generations.—*Shelly's case*, 1 Coke, 104; *Fearne on Ex. Dev.* 444; 4 Kent's Com. 273. But the question which is presented, under this second ground of the motion, is—

Does the limitation over to the  
26 \*plaintiff, as survivor, under the terms of the will we are now considering, fall within the operation of that principle of Law? After the best reflection which I have been enabled to give the language of the testator, in the will we are now considering, I cannot come to that conclusion: for one of the plainest examples to be found in the books, expressive of the intention of a testator to make a limitation over dependent upon a definite, and not an indefinite, failure of issue, in the first taker, are the very words which are found upon the face of this testator's will, viz: "That in case the said Adrian and Cyrenus, or either of them, shall die, without lawful issue living at the time of his death—then the estate to go over."—*Fearne on Ex. Dev.* 468; 4 Kent Com. 273; *Anderson v. Jackson*, 16 John. 399; *Williamson v. Daniel*, 12 Wheaton, 568. These words, when found upon the face of a will, have uniformly been held to take the case without the operation of the rule of Law, contended for by the

defendant's counsel, and to make the limitation over, by way of executory devise, good and valid. I am not aware of a single authority, to the contrary.—Nay, it is conceded, by the defendant's counsel, as already remarked, that, if the limitation over, to the plaintiff, as survivor, had been made, exclusively, to depend upon the force and effect, which must be given to these words, his right to recover, in the present case, could not be controverted, provided there was no other impediment in his way. Now, those words in a will, which have been held to fix a contrary intention in the testator, are as clearly to be ascertained, by reference to authority. They are, generally speaking, "heirs of the body, dying without issue"—"dying without leaving issue"—or, "on failure of issue"—and similar expressions, which stand alone in a will, and which are not qualified, explained, or enlarged, by any previous or subsequent words. The cases of *Daintry v. Daintry*, 6 T. R. 307; *Hodgson*, and wife, v. *Ambrose*, Douglas, 337; *Forth v. Chapman*, 1 P. Wm. 663; *Patterson*, Appellant, v. *Ellis' Executors*, Respondent, 11 Wendel, 295; 5 Randolph, 273; 2 McCord's Com. R. (S. C.) 66-75; *Con v. Porter*, 1 McCord's Ch. R. 79—which have been so strongly relied upon by the defendant's counsel, are all cases of that character, and in neither of which are the words, "die without lawful issue living at the time of his death," or any similar expressions, to be found. The great struggle, as manifest from all the cases, on this point, has been to con-

fine, and tie up, the generality of the  
27 expressions, "dying \*without issue," —"dying, without leaving issue," and the like, to the time of the death of the first taker; and, by laying hold of some slight expression, in the will, to construe these words, as equivalent to the expression, "dying, without lawful issue living at the time of the death," and thus sustain the limitation over, as good, by way of executory devise. For this purpose, much stress has been laid on the words, "dying without issue living,"—"leaving issue behind him,"—"dying without children," and "survivor;" and a distinction has been taken, by some learned Judges, between a bequest of personal, and a devise of real, property—so as to restrain the rigid application of the rule, as it regards the former. This distinction has been recognized by Lord Macclesfield, in *Forth v. Chapman*, 1 P. Wm. 663; and by Lord Hardwick, Lord Mansfield, Lord Eldon, and Chancellor Kent, in 3 Atk. 288; 2 Ves. Sen'r 610; Cowp. 410; 9 Ves. Jun'r 197, 203; and 16 John. 409, 419. The solidity of this distinction has, however, been questioned, by other Judges of, possibly, equal ability; and it is, therefore, somewhat difficult to determine, upon which side of this question is the weight of authority. But if there be no such substantial distinction, as to the application of the rule we are now considering, in reference to a bequest of personal, and a devise of real, property;



still, I am inclined to think, there are cases, in which a Court would not feel itself so strictly bound down, in its application of the rule to personal property, but would be justified in laying hold of any expressions a will, which, clearly manifesting the intention of a testator, would tie up the generality of his expressions, and confine them to a dying without issue, living at the death of the first taker.—*Brummel v. Barber*, 2 Hill's S. C. R. 551; *Roe v. Jeffrey*, 7 T. R. 589; *Hughes v. Sayer*, 1 P. Wm. 534. As to the term, "survivor," even in relation to real estate, it is now the settled doctrine of the State of New-York, that it has such a controlling effect upon the isolated words, "dying without issue," as will take the case without the operation of the rule, and make the limitation over good, by way of executory devise. The authorities, in support of this doctrine, have been mentioned above, and might be applied to the present case, with great force, were it necessary. But, with the words which are written to the face of this testator's will, viz: "in case the said Adrian and Cyrenus, or either of them, shall die, without leaving lawful issue, living at the time of his death," it surely cannot be necessary,

28 that \*I should resort to, and lay hold of, any other expressions in his will, for the purpose of fixing his intention, as to the character and legal effect of the limitation over, created by these words. They seem, to me at least, to be clear and explicit, and as making the limitation over, to the present plaintiff, to depend upon the contingency of a definite, and not an indefinite failure of the issue of Cyrenus A. Mayer; and, unless the subsequent words and expressions, which are also found on the face of this testator's will, can so manifestly control their legal effect, as to bring this case within the operation of the rule, as contended for by the defendant's counsel; I apprehend it will be the duty of this Court, to sustain the verdict of the Special Jury, and carry into effect what seems to it to be the manifest intention of the testator.

And this brings me to the consideration of those words in this will, which have been so strongly relied upon by the defendant's counsel, for the purpose of sustaining the proposition, that the limitation over to the present plaintiff is void, being too remote, and dependent upon an indefinite failure of the issue of Cyrenus A. Mayer. These words are, "or if the said issue die, without leaving lawful issue, then, and in that case, I devise that part of the said slaves, and all the residue of my estate, devised to the one who may die without issue, unto the survivor, his heirs and assigns." Now, did these words stand alone on the face of this will, and unconnected with any previous words, manifesting the intention of the testator; there might be great room to question the validity of the limitation over to the plaintiff, as survivor; but, when taken in connexion with the words, immediately preceding them. I see not how otherwise they can be properly construed,

but by a reference to these words. If thus construed, the intention of the testator, as it appears to me, would still be plain and manifest, and the limitation over made to depend, not upon an indefinite, but a definite, failure of the issue of Cyrenus A. Mayer. But, if a reasonable doubt can be entertained on that point, then it must be recollected that, by the terms of this will, the limitation over is made directly to the plaintiff, as survivor; and that limitation is made to depend upon two contingencies, either of which, being legal and having happened, would, I apprehend, entitle the plaintiff to recover. We have already endeavored to shew that the first of these con-

29 tingencies, upon which the limitation over \*is to depend, is good and valid, and within the rules of Law, and has happened, as proved by the testimony. Can, then, the subsequent contingency, admitting it to be clearly illegal, so control the previous contingency, which is conceded to be good and valid, as to render that illegal, also? I cannot think so; for if the limitation over, in its commencement, is dependent upon a contingency, which is clearly good, and within the rules of Law; no subsequent contingency, distinct in its character, but which may be illegal, can so alter and control the effect of that which is good, as to make the limitation over, dependent upon it, void and of no effect. But, after all, it is the intention of this testator, clearly expressed in the face of his will, which must at last decide this point. Whatever may be said to the contrary, this is emphatically the polar star, by which all Courts have, and must be, governed, in giving a construction to the language of a testator, as used by him in his will, and to which all other rules must bend.—3 Peters' S. C. R. 377; 6 Ib. 68. This intention, it is true, must be gathered from the words and language of the will itself, and when ascertained and found consistent with the rules of law, it should be supported, and carried into effect, even although the testator may not have expressed his intention, in clear and technical language; but, when such intention is expressed in clear and technical language, little room is left, either for doubt or construction. Taking, then, the whole clause of this testator's will together, which we have been considering, can there be a reasonable doubt entertained, but that he intended the limitation over to the present plaintiff, as survivor, was to depend upon a definite, and not an indefinite, failure of the issue of Cyrenus A. Mayer? It seems to me, he has so expressed himself, in clear and technical language, and having submitted that point, fairly, to the Jury, on the trial, and having given the same my best reflection, since the argument of this motion, I can discover no sufficient reason why I should now set aside their verdict, as being contrary either to the evidence, or the Justice and Equity of this case. And this brings me to the consideration of the third ground of this motion. That ground

is: Because the defendant, being a bona fide purchaser, for a valuable consideration, was, under the proofs in the cause, entitled to protection, against the claim of the plaintiff. Now, that the defendant, in the present action, was a bona fide purchaser of the boy Peter, for a valuable consideration, without any actual notice of the

existence and contents of the will of Cyrenus \*Mayer, the elder, is a fact, not disputed by the plaintiff's counsel. But it is, nevertheless, contended by him, that, as such purchaser, he had constructive notice of the existence and contents of said will, the same having been duly proved and recorded in the Clerk's office of the Court of Ordinary, for the County of Chatham, at the time of his purchase, and where the defendant then resided. How far, therefore, the defendant, although a bona fide purchaser, for a valuable consideration, can and ought to be affected with constructive notice, as to the existence and contents of said will, under the facts and circumstances of this case, is a question which, I apprehend, upon legal and equitable principles, is not free from difficulty and doubt; and, when that is the case, a court will seldom set aside the verdict of the Jury, especially so, after the rendition of two concurring verdicts. In England, the doctrine seems now to be settled, in Equity, that the mere registration of a deed, or other instrument, which is recorded in conformity to Law, shall not be considered as constructive notice to a subsequent purchaser; but that actual notice, amounting to fraud, must be brought home to him. Mr. Sugden, in his *Law of Vendors*, 460, remarks, that the protection and relief afforded to purchasers appears to arise, either from positive statutes, or from the rules of Equity; and Lord Mansfield held, that, in every case, between purchasers for valuable consideration, a court of Equity must follow, and not lead, the Law. That, accordingly, all the great Judges, who have succeeded Lord Mansfield, have determined that the legal estate must prevail, at Law. Chancellor Kent, in his *Commentaries*, vol. 4, page 179, remarks: "It is, indeed, difficult to define, with precision, the rules, which regulate implied or constructive notice, in England; for they depend upon the infinitely varied circumstances of each particular case. The general doctrine, unquestionably, is, that whatever puts the party upon enquiry amounts, in judgment of Law, to notice, provided the enquiry becomes a duty, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding." But, in this country, a different doctrine has been held, as to the extent of constructive notice, and one which, I cannot but think, is most in accordance with Justice and sound policy. It is this—That all deeds, or other instruments, which are authorized and required by Law to be recorded, and which are recorded, in compliance with Law, shall operate as constructive notice, to all subsequent purchasers of \*any estate,

legal or equitable, in the same property. And the reasoning, upon which this doctrine has been founded, is the obvious policy of the registry acts, and the duty of the party, purchasing under such circumstance, to search for prior incumbrances, the means of which search are within his power, and the danger there is of letting in parol proof of notice, or want of notice, as to the actual existence of the instrument or its contents.—1 Story's *Eq.* 391, 392, 393; 4 Kent Com. 173, note (a). Is a will, then, such an instrument as is authorized and required by Law, to be recorded, so as to bring home, to a subsequent purchaser, implied or constructive notice of its contents? I am strongly inclined to believe that, both at Common Law, and under the fair construction to be given to our own Statutes, it is such an instrument, as is authorized and required to be recorded, and if so, the principles stated above would be applicable to the present case, in all their force. But I do not desire to be understood, as expressing any decided opinion, on that point; because I think, that this third ground of the motion, under the facts as they were in evidence before the Special Jury, may be disposed of, upon another independent, but well settled, principle of Justice and Equity—it is this: That even admitting that Cyrenus A. Mayer, in his lifetime, sold a greater interest in the boy Peter, than that to which he was legally entitled, under the will of his uncle, but which fact the testimony no where discloses; still, the purchaser from him could not become vested with any better title, than he then possessed, as against the rights of the present plaintiff, and this upon the well known maxim of the civil Law, "*nemo plus juris in alium transferre potest, quam ipse habet.*"—Ferne on *Executory Devises*, 421, sec. (3); Long on *Sales*, Story's *Ed.* 167, 168; *Stevens v. Ellwell*, 4 Manl. & Selwyn, 259; *Ventress v. Smith*, 10 Peters, 160; 10 John. R. 12; 16 John. R. 159; 6 Wendel, 603; 11 Wendel, 80. Nor would any subsequent purchaser be in a better situation. It was upon this principle, I apprehend, that the Special Jury came to the conclusion, that the defendant ought not to be protected, notwithstanding he may have been a bona fide purchaser, for a valuable consideration; and in coming to this conclusion, I am not satisfied that any injustice has been done the defendant, especially as he has taken care to protect himself, by an express warranty of title, which the Law always implies, on the sale of personal property.

32 \*The fourth ground of this motion presents a question of fact, which was the peculiar province of the Jury to determine, under the testimony. By their verdict, they have determined, that Cyrenus A. Mayer departed this life, without leaving any lawful issue, living at the time of his death; and so far as that fact is dependent upon the testimony, I can see no sufficient reason, why I should question the correctness of their verdict.

Upon the whole case, therefore, and for



the reasons above given, I am not satisfied that the verdict, which has been rendered by the Special Jury, in favor of the plaintiff, is contrary either to the evidence, or the principles of Justice and Equity; and I must, therefore, refuse to grant the defendant the new trial prayed for. The supersedeas heretofore granted is set aside, and the motion for a new trial is hereby over-ruled.

Charlton & Ward, for plaintiff.

William Law and Millen & Kollock, for Defendant.

### 33 \*The State v. John Loper.

In Chambers—February 23, 1842.

**Fugitive from Another State—Detention\*—Habeas Corpus.**—A fugitive from justice, from another State, may be arrested here, and, on sufficient evidence of guilt, be detained in custody for a reasonable time, in order to give the foreign Executive an opportunity to make a regular demand for his delivery, under the Constitution of the United States.

The prisoner, John Loper, having been arrested, on the 16th inst. under a warrant, issued by Isaac Russel, Esq. a Justice of the peace in and for the County of Chatham, charged, on the oath of one Daniel Goldsmith, with having committed, on the 10th day of January last, a larceny of his goods, to the value of seventeen hundred dollars, in the town of Micconopy, Territory of East Florida, and with being a fugitive from the laws and justice of said Territory. The said Justice, after having taken the deposition and examination, in writing, of sundry persons, in reference to the said charge, and a portion of the stolen property having been found upon the person of the prisoner, concealed in the lining of his coat; he committed the said prisoner to the common jail for the City of Savannah, there to remain for the space of sixty days, to afford the prosecutor a reasonable time, to apply to the constituted authorities of the Territory of Florida, to demand him from the Executive authority of Georgia, as a fugitive from justice, in pursuance of the Constitution and Laws of Congress, in such case made and provided.

A writ of Habeas Corpus having issued at the instance of said prisoner, alleging his said arrest and confinement, under said warrant and commitment, and under the facts above stated to be alleged, and he having been brought before me, on the re-

**\*Criminal Law—Fugitive from Justice—Detention.**—A fugitive from justice, charged with felony in another state, may, upon a principle of comity, which obtains in such cases between sovereign states, be detained for a reasonable period in the state in which he is found, for the purpose of affording time for an application to the governor of the state where the felony is charged to have been committed, to make demand for his return, as provided in the Federal Constitution. *State v. Howell*, R. M. Charl. 120.

turn thereof; his counsel moved for his discharge, upon the three following grounds:—

First: Because the facts, stated on the face of the depositions, are not, of themselves, sufficient to have authorized the arresting and committing Magistrate, to arrest and commit the prisoner, for the \*offence of larceny, even if that larceny had been charged to have been committed in the County of Chatham and State of Georgia, instead of, as is alleged, in the Territory of East Florida.

Second: That if this Court should be of a different opinion; still, that the arresting and committing Magistrate had no power or authority, either under the Constitution and Laws of the United States, or under the Common Law of this land, to arrest and commit the prisoner to the common jail, for a violation of the Laws of said Territory, and as a fugitive from the justice thereof, for the purpose of affording a reasonable time to the prosecutor, to make application to the constituted authority of the Territory of Florida, to demand, of the Executive authority of Georgia, his delivery, in pursuance of the Constitution of the United States and the Laws of Congress, or the Common Law of the land.

Third: That the Act of Congress, passed the 12th February, 1793, to carry into effect the 2d Section of the 4th Article of the Constitution of the United States, as to fugitives from justice, so far as it extends its provision to the Territories of the United States, is unconstitutional—a Territory not being a State, in the sense in which that term is used in the Constitution. —2 Wheat. 94; R. M. Charlton R. 375.

I have given the above grounds, assumed by the prisoner's counsel for his discharge, my best reflection; and without intending to be understood, as expressing any opinion in reference to the third ground above stated—there being, in the present case, according to my judgment, no necessity for the expression of any opinion, on the question therein raised—I must refuse his discharge, for the present. Whether the Territory of Florida be, or be not, in legal contemplation, a State, within the spirit and meaning of that term, as used in the 2d Section of the 4th Article of the Constitution of the United States; or whether she is held to be and considered as a foreign State, or Territory, in reference to the States of this Union; still, I am of opinion, that the arrest and detention of the prisoner, under the commitment, and under the facts, as set forth in the depositions, as a fugitive from justice, can be clearly justified and held legal, under the Law of nations, and the Common Law of this

land. I desire to be understood, \*however, as confining this decision and opinion, to the case now before the Court, and to cases similarly situated. The reasons for this decision will be found, by reference to the following authorities:—Act of 25th February, 1784, Prince D. 570; 4 Burr, 2016; 3 Burr, 1481; 1 Kent Com. 35, 36; King v. Hutchinson, 3 Keb. R. 785; Col. Lunday's

case, 2 Vent R. 314; King v. Kimberly, Strange 848; Mure v. Kaye, 4 Taunt. R. 43; King v. Bull, & al.—1 American Jurist, 297; 1 Chitty C. L. 12; Washburn's case, 4 John. Chan. R. 106; State v. Anderson, 1 Hill's S. C. R. 327.

It is, therefore, ordered, that the motion of the prisoner to be discharged from his present confinement and arrest, as a fugitive from justice, be, and the same is hereby refused.

Solicitor General, and Charlton & Ward, for State.

L. S. DeLyon, Esq., for Prisoner.

36 \*Edmund Stites, Complainant, v. Noah B. Knapp, Seth B. Jones, Christopher C. Thompson, James A. Clifford, et al. Defendants.

March 10, 1842.

1. **Equity Jurisdiction—Restraining Judgment.**—A Court of Equity will not restrain a judgment at common law, on the ground of irregularity in obtaining it, or on the ground of want of jurisdiction in the common law court.

2. **Same—False Return of Service—Remedy at Law.**—A Sheriff's return of service cannot be impugned, by a bill filed to set aside the judgment; but, if false, the remedy is by action against the officer.

3. **Same—Jurisdiction of Defendant's Person—When Question May Be Raised.**—The question of jurisdiction of the defendant's person belongs to the court, where the suit is brought; and may be raised at any stage of the proceedings, if defendant is not in laches.

This is a bill of complaint, which was presented to my consideration, on the 17th February last, praying an Injunction, to restrain the defendants, in the use of certain executions, founded upon judgments, which they had recovered against the complainant, in the Court of Common Pleas and Oyer and Terminer, for the City of Savannah. Having, then, great doubts as

\***False Return—Impeachment.**—At common law a sheriff's return on process is conclusive and not liable to collateral impeachment except for fraud or collusion. Higgs v. Huson, 8 Ga. 317; Tillman v. Davis, 28 Ga. 497; Brown v. Way, 28 Ga. 531; Davant v. Carlton, 53 Ga. 491; Sindall v. Thacker, 56 Ga. 51. The return of a United States marshal should be treated as conclusive by the state court. Sindall v. Thacker, 56 Ga. 51.

The date of a return may, however, be inquired into. Welch v. Butler, 24 Ga. 445.

**Same—Remedy—At Common Law.**—At common law the remedy of a party injured by a false return was by action against the sheriff. Craig v. Maltbie, 1 Ga. (1 Kelly) 544, 547; Duncan v. Webb, 7 Ga. 187, 189; Higgs v. Huson, 8 Ga. 317, 321; Davant v. Carlton, 53 Ga. 491.

**Same—Same—Georgia Statute.**—By Act of 1840. Hotchkiss, 527. returns made under or by virtue of any rule or order of the court, and under oath, were traversable. This did not extend to the ordinary returns made by a sheriff on process in his

to the power of this Court, to interfere and restrain said executions, by its process of Injunction, under the allegations as contained in this bill, I granted a rule for the defendants to shew cause before me, why the Injunction, as prayed for, should not be issued.

The principal allegations, as contained on the face of this bill, are: That, at the time of the service of the original petitions and process, issued at the instance of the defendants, from the Court of Common Pleas and Oyer and Terminer for the city of Savannah, he, the complainant, was a resident of the County of Laurens, in the State of Georgia, and not a resident of the City of Savannah; and that, therefore, the said Court had no jurisdiction over his person, in the subject matter of said suits. That the return, made by the Deputy Sheriff of said Court, as to the service of said writs, is illegal and

37 \*void. That he was not apprised of the existence and progress of said suits, until after the judgments had been recovered against him, and that then application was made to the Judge of said Court, for relief, which was refused. In these facts, consists the whole Equity of this bill.

Having heard the argument upon the rule nisi, from the counsel on both sides, the question, which is presented for my decision, is—assuming the above facts to be true, can this Court, by its process of Injunction, interpose and restrain the defendants, in the use of their executions, founded on the said judgments; or, if not, has the complainant any adequate remedy at Law, which can afford him relief?

Now, that the complainant, if, in truth and in fact, a resident of the County of Laurens, at the time of the service of said writs, was entitled, as a constitutional privilege, to be sued in the County of his residence, is not questioned. But this fact is denied, by the defendants; and, in support of that denial, I am referred to the original returns, made by the Deputy Sheriff of the Court of Common Pleas and Oyer and Terminer, for the City of Savannah, as to the legality of the service of the process upon the complainant. Having ex-

hands. Craig v. Maltbie, 1 Ga. (1 Kelly) 544, 545; Higgs v. Huson, 8 Ga. 317, 321; Tillman v. Davis, 28 Ga. 497; Brown v. Way, 28 Ga. 531; Dozier v. Lamb, 59 Ga. 461.

But by Act of 1866, Ga. Code, § 4988, it is provided that: "The entry of the sheriff, or any officer of the court, or his deputy, may be traversed by the defendant at the first term after the notice of such entry is had by him, and before pleading to the merits; but this shall not deprive the defendant of his right of action against the sheriff for a false return." Under this act the return is still conclusive unless traversed at the time and in the manner prescribed. Pittman v. Jones, 53 Ga. 134; Maund v. Keating, 55 Ga. 396; Lamb v. Dozier, 55 Ga. 677; Sindall v. Thacker, 56 Ga. 51; Davant v. Carlton, 57 Ga. 489; Elder v. Cozart, 59 Ga. 199; Cheshire v. Milburn, Wagon Co., 89 Ga. 249, 15 S. E. Rep. 311; Sanford v. Bates, 99 Ga. 145, 25 S. E. Rep. 35.



amined these original returns, I find them, each, to be in the following words:—"City Sheriff's Office, Savannah, January 22, 1842. I have served a copy of the within, by leaving the same at the residence of Mrs. Tullegant, where the defendant's family usually resides. The return of M. S. DeLyon, Deputy Sheriff." That the Courts of Common Pleas and Oyer and Terminer, for the City of Savannah, with such a return before it, made by its officer, under his oath, would have a right to entertain jurisdiction of the causes, and proceed to award judgment, I cannot doubt. (See Act 29th Dec. 1828, Pamphlet laws, 1828, p. 203.) Now, admitting the above returns, made by the Deputy Sheriff, in the Court below, to be false, can this Court now interpose, after judgment, by its process of Injunction, and restrain the proceeding, under the executions issued therein? I think not; and no case, I apprehend, can be found, which will sanction such an exercise of power, on the part of this Court. The truth or falsity of that return, the regularity, or irregularity of the service complained against, is a question, I apprehend, which belongs, exclusively, to the Court assuming original Jurisdiction of the

38 \*cause; and that question must be tried and decided, by such Court alone, by a motion founded on a proper statement of facts, under oath. It may be made, at any stage of the proceedings in the cause, provided the party, affected by such irregularity, is not guilty of laches, and takes advantage of it, by proper application, as soon as known to him.—1 Dunlap's P. 332, 333; Tidd P. 538. That the Court below had the power to hear and determine such a motion, on the part of the complainant, if the same had been made in proper time, and supported by a proper shewing, I have little doubt; for it is the duty of every Court, to correct its own errors, when made to appear, and to see that its proceedings are regular, and in pursuance of Law.—The cases of Robb & Nelson v. Moffatt, (3 John. R. 257; 4 Taunt. 545, 818,) are, it seems to me, conclusive, as to this point. Now, that the complainant could not have taken advantage of the irregularity of the service of the writs, issued against him from the Court below, by a plea to its jurisdiction, is manifest from the fact, as sworn to by him in his bill, that he was entirely ignorant of the existence and progress of said suits, until after judgments were obtained against him. That he did not make any special motion to the Court below, during the term in which said judgments were obtained against him, and as soon as he was apprised of the same, for the purpose of setting aside said judgments, on the ground of irregularity, is conceded by his counsel, on the argument of this motion. But, even if he had made such motion, and had been denied relief by the Court below; I doubt the power of this Court, to interfere and restrain the proceedings, under the judgments obtained in the Court below; for

the complainant would still have a clear remedy at Law, against the Sheriff of said Court below, for a false return, if such be the fact. In the case of Shottenkirk v. Wheeler, 3 John. ch. R. 280, Chancellor Kent affirms the doctrine, in unqualified terms, that "there is no case, in which Equity has ever undertaken to question a judgment in a Court of Law, for irregularity." "The power," he says, "of a Court of Law, is always exercised in such cases, in sound discretion, and the relief is frequently granted upon terms. This Court cannot impose any such terms, or take any such cognizance of the case; and the title, set up under the judgment and execution, must be received here as a conclusive bar." The cases of Barker v. Morgan, (2 Dow's R. 526,) decided in the English House of Lords in 1824, lays down, he says, the same rule.

If this be the rule of a Court of 39 Equity; upon \*what principle is it, then, that this Court can be called upon, in the present case, to restrain the proceedings in the Court below, by its process of Injunction? I can perceive none. But, were this case, on the face of the returns made by the Sheriff to the Court below, much stronger in favor of the complainant, than it in fact appears to be; even were it manifest to this Court, from the face of the returns themselves, that the Court below had assumed jurisdiction and proceeded to judgment, upon a manifestly illegal and void return; still it would be doubtful, if this Court could interfere by injunction. Even in such case, I apprehend, there would be a clear and adequate remedy at Law, by writ of prohibition; and, when such appears to be the fact, a Court of Equity can entertain no jurisdiction of the cause of complaint, but must dismiss the same, and remit the complainant to his remedy at Law.

For these reasons, I must refuse to grant the complainant the Injunction as prayed for, and must dismiss his bill.

40

### \*The State v. Mary Bandy.

May Term, 1842.

**Criminal Law—Mittimus—Validity.**—A mittimus, not specifying the time, place, nor subject of an alleged larceny, is illegal upon the face of it.

The defendant, Mary Bandy, was arrested, under a warrant, issued by Uriah H. Bevins, a Justice of the Peace, on the affidavit of George Sturtevant, administrator of the goods and chattels of Thomas Sturtevant, charging and accusing the said Mary Bandy, with having, on or about the first day of June, 1842, feloniously taken, and carrying away, the personal property of the said Thomas Sturtevant, to the value of one hundred and forty-five dollars, as appears by a copy of the original affidavit, furnished by said magistrate, to the said prisoner.

Upon her arrest, the said magistrate com-

mitted the said prisoner to the common jail of Chatham County, under a commitment, of which the following is a copy:

State of Georgia—Chatham County. To any lawful Constable of said County, and to the keeper of the common jail thereof:—I herewith send the body of Mary Bandy, charged with having committed the offence of Larceny—And I do hereby command you, the body of the said Mary Bandy into your custody to take, and her safely to convey to the common jail of the said County; and you, the keeper of the said jail, the said Mary Bandy into your custody to receive, and her safely keep, until she shall have been discharged, according to Law. Hereof fail not.

Given under my hand and seal, this 11th day of June, 1842.

U. H. Bevins, J. P.

Upon the foregoing statement of facts, the prisoner applied to the Court for the writ of Habeas Corpus, alleging her said imprisonment to be illegal; which was granted, returnable before me, this day, at ten o'clock.

41 \*Upon the return to said writ, the original commitment, of which the foregoing is a copy, is returned by the jailor, as setting forth the cause of the caption, and detention, of the prisoner. The committing magistrate has also produced to this Court, what he alleges to be the original affidavit, upon which the prisoner was arrested; but which affidavit differs, materially, from the copy furnished by him, to the defendant. Whether there has, or has not, been any alteration of the original proceeding, as had before the magistrate, I am unable to ascertain, from the papers before me. But, without placing the defendant's discharge upon that ground, I am of opinion, in the present case, that she is entitled to her discharge, upon the illegality, apparent on the face of the original warrant of commitment. It neither states the time, nor place, when, or where the said offence was committed; nor the property of any person, upon which said offence has been committed by the prisoner. These facts, I apprehend, must be stated on the face of the commitment, in order to make it a legal one; and such would seem to be the clear spirit and intention of the Act of the Legislature, passed 22d Dec. 1808.—Prin. 616.

I have been requested, by the prisoner's counsel, to hear testimony, for the purpose of satisfying this Court, that the accusation against this prisoner is entirely groundless. This, I apprehend, I cannot do, on the return to this writ. The Court must be, alone, governed by the face of the papers, as they are returned, and their legality, or illegality.

Being of opinion, then, that the warrant of commitment, in the present case, is, on its face, manifestly, informal and illegal—it neither stating the time when, nor the place where, the alleged larceny was committed, nor of whose goods and chattels—it is ordered, that the prisoner be discharged

from her said imprisonment, under the same, upon the payment, by her, of her jail fees, and the costs of this proceeding.

Solicitor General, for the State.  
Henry R. Jackson, for Defendant.

## 42 \*Catharine Bagshaw v. John Dorsett.

May Term, 1842.

**New Trial—Conflicting Evidence.\***—Where there is conflicting testimony, it is the province of the Jury to weigh it. And a new trial will not be granted, on the ground that the verdict may, possibly, be against the weight of evidence.

This action was instituted before Justice M. O. Dillon, by the above named plaintiff, against said defendant, to recover the sum of eighteen dollars and fifty cents, upon the following account:

Mr. Dorsett,

To Catharine Bagshaw,	
For wages of Edward, 8 weeks	
and 3 days, \$4.50 pr. week,	\$38.50
To Cash,	20.00
	18.50

Upon the trial of said cause, before the magistrate, a judgment was rendered by him, in favor of the plaintiff, from which judgment there was entered an appeal to a Jury; and, upon the trial of the said appeal, a verdict was rendered in favor of the plaintiff, for the sum of eighteen dollars and fifty cents, and costs.

Upon the rendition of this verdict, the defendant's attorney took the following exceptions, which were over-ruled by the Magistrate: 1. Because there was no evidence before the Jury, to prove any contract, between the parties plaintiff and defendant, for the service of the servant, Edward, for which the plaintiff has brought her action. 2. Because there was no evidence before the Jury, to prove that the services of the said Edward were worth four dollars and fifty cents, per week. 3. Because there was no evidence before the Jury, to prove when the services of the said Edward commenced, and when the same terminated; the bill of particulars having no date. 4. Because the verdict of the Jury is for an amount of money,

43 greater than \*at the rate of four dollars and fifty cents per week, which is the price, or sum, per week, sued for. 5. That the verdict of the Jury is contrary to Law and evidence.

**\*New Trial—Conflicting Evidence.**—If there is sufficient evidence to support the verdict, and no principle of law has been violated, the court will not grant a new trial, though the evidence may preponderate against the verdict. See *Knight v. Mantz*, Adm'r. Ga. Dec. pt. 1, p. 22, and *foot-note*; *Mayer v. Wiltberger*, Ga. Dec. pt. 2, p. 20; *Davis, Guardian, v. Hale's Ex'rs*, Ga. Dec. pt. 2, p. 22; *Bonds v. Gray*, Ga. Dec. pt. 2, p. 136; *Walker v. Tatum*, Ga. Dec. pt. 2, p. 161; *Pendleton & Co. v. Mills*, Ga. Dec. pt. 2, p. 166.



Upon these exceptions, this Court granted the defendant a writ of certiorari. The Magistrate, in obedience to this writ, has made the following return of facts, as they were in evidence before the Jury, on the trial:

John B. Bacon, a witness sworn on the part of the plaintiff, testified: That he called on Mr. Dorsell, the defendant, at the request of Mrs. Bagshaw, for the payment of the bill—Dorsett said, if Mrs. Bagshaw would give him credit for what Mr. Cant owed him, Dorsett; that he would settle the balance—Dorsett stated to witness, that he believed the negro belonged to Cant, and that his demand against Cant was about \$14.00, and unless that amount was deducted from the bill, that he would not pay it, unless compelled by Law—Witness offered the bill to Dorsett, and he refused to receive it.

Edward Hollis, another witness on the part of the plaintiff, testified: That he presented the bill of Mrs. Bagshaw, upon which this suit was commenced, to Mr. Dorsett, for payment—The amount of the bill was \$38.50—Dorsett said he would pay it, and never disputed the bill. Dorsett, however, did not read the bill.

This was all the testimony, which was submitted to the Jury, in the Court below, on the part of the plaintiff.

On the part of the defendant, his time book, as it is called, was admitted in evidence, before the Jury. This book is now before me: and from the entries, which appear to have been made in it by the defendant, the time, when the services of the boy Edward commenced, and when they terminated, as well as the quantity of time, which he worked, are distinctly stated. Whatever defect, then, there may have been, in the plaintiff's proof, in this particular, has been supplied, by the defendant himself; as these entries, being made against his interest, are good evidence against him. Such, then, being the state of the testimony before the Jury, it presents a conclusive answer, to the third exception, stated above, which was taken to their verdict, by the defendant's counsel.

44 \*James Skinner was then sworn, on the part of the defendant—He testified, that the book, which had been introduced in evidence, was the correct time. The monies were all paid in his witness's, presence. The negro had a ticket from his mistress, to work out and receive his wages.

Such was the testimony, both upon the part of the plaintiff, as well as the defendant, on the trial of this cause, in the Court below, and as returned to me by the Magistrate, in obedience to this writ of certiorari. And I am now asked to set aside, or reverse, the verdict, which the Jury have rendered, in favor of the plaintiff. This I cannot do, in the present case, as it seems to me, without invading upon the peculiar province of the Jury. It is true, that a verdict, manifestly against Law and evi-

dence, will not be permitted to stand; but when there has been conflicting testimony, on both sides, which it is the peculiar province of the Jury to weigh, a new trial will not be granted, because the verdict may, possibly, be against the weight of the evidence. In this case, however, I do not perceive that the verdict, which has been rendered by the Jury, is manifestly against the weight of any competent testimony, which was before them. If the testimony does not establish an express contract, between the plaintiff and defendant, for the hire of the boy Edward; it clearly establishes, as it seems to me, an implied contract, arising from his acknowledgment of an indebtedness to the plaintiff; and from the fact that he actually had the services of the boy Edward, according to his time book, for more than the time specified in the plaintiff's bill of particulars. This book, as I have above remarked, having been admitted in evidence before the Jury, is good evidence, against the defendant, of all entries, which have been made therein, by him, defendant, contrary to his interest. But it does not therefore follow, that it is good evidence for him, as to any other entries, which may have been made, of a different character. The only doubt, therefore, which can possibly arise, as to the justice of the verdict, rendered by the Jury, is in reference to the payments, which are alleged to have been made, to the boy Edward, by the defendant. That was a fact, however, peculiarly the province of the Jury to decide. If the negro, as is testified to by Skinner, had a ticket from his mistress, to work out and receive his wages; that ticket ought to have been taken, by the defendant, and produced at the trial, as a \*justification for his payments, if, in truth and in fact, the payments, alleged to have been made, were made. If he had no such ticket; then the defendant has no just cause of complaint, against the verdict of the Jury.

Being of opinion, therefore, for the reasons above given, that the verdict, rendered by the Jury, is neither contrary to Law, nor to the evidence which was before them; I must dismiss this certiorari, with costs—and it is accordingly so ordered.

46 \*Robert Habersham & Son, Complainants v. Samuel Miller Bond, James P. Scriven, & al. Defendants.

May Term, 1842.

1. Equity Jurisdiction—Ouster—Remedy at Law.\*—To oust the jurisdiction of Equity, a party's remedy

\*Equity Jurisdiction—Ouster—Remedy at Law.—In order to oust the jurisdiction of equity on the ground that there is an adequate remedy at law, it is not sufficient that there is merely *some* remedy at law, but such remedy must be as ample, adequate, and well adapted to secure the relief sought as the remedy in equity. Scott. Admx. v. Scott, 33 Ga. 102; Harper v. Whitehead, 33 Ga. 138; Pope v. Solomons,

at common law must be adequate, complete, and adapted to the exigency of the case.

**2. Mortgages—Foreclosure—Effect on Junior Lien.**—The lien of a junior mortgage, on the premises, is destroyed, by a sale under foreclosure of an elder one.

**3. Same—Same—Same.**—But the junior mortgage has an equitable claim on the fund, raised by the sale, after the elder mortgage is satisfied.

**4. Same—Same—Distributing Proceeds at Law.**—A court of law cannot, on mere motion, order the proceeds of property to be paid to a mortgage, not foreclosed.

**5. Same—Same—Same.**—A court of law will distribute a fund, by rule, only where the rights of the parties are so clearly ascertained, that no resort to Equity is necessary.

The Bill, filed in the above cause, sets forth the following facts:—That Samuel Miller Bond, of the county of McIntosh, and one of the above named defendants, on the fifth day of May, one thousand eight hundred and thirty-seven, made and signed his certain promissory note, in writing, whereby he promised, sixty days after the date thereof, to pay to the complainant, Robert Habersham, the sum of two thousand four hundred and twenty-seven dollars, and twenty cents; and that, on the 24th day of May, one thousand eight hundred and forty, he made and signed his certain other promissory note, whereby he promised, on the first day of January, one thousand eight hundred and forty-one, to pay to the said complainants, Robert Habersham & Son, the sum of four thousand three hundred and sixty-seven dollars and eighty-two cents—that to secure the payment of the first mentioned note, and all debts then due by him to said complainants, by any note, draft, bill of exchange, acceptance, open account, or balance of account, and all such other debts, as might then be due, owing, and payable, or which might, thereafter, become due and payable, to the complainants, by the said Samuel Miller Bond, \*on any other note, draft, bill of exchange or acceptance, which might be given or drawn, by the said Samuel Miller Bond, to or on the complainants, &c. the complainants being the factors and agents of the said Samuel Miller Bond, for the sale of his crops, and being, in that character, frequently called on by him, for advances and supplies; he, the said S. M. Bond, did, on the eighth day of April, one thousand eight hundred and forty, make and execute a mortgage to complainants, upon all that rice plantation, in McIntosh County, known as Ceylon, the residence of

the said Samuel M. Bond, and upon a summer residence, in said County, called Grass Knoll, and also upon ten negro slaves; which said mortgage appears to have been duly recorded, in the Clerk's office of the Superior Court, for the said County of McIntosh, on the 9th day of April, 1840—That there is now due and unpaid, upon the note first above mentioned, the sum of two thousand five hundred and fifty-five dollars and three cents, principal and interest; and, on the note last above mentioned, the sum of two thousand four hundred and fifty-four dollars and eighty-five cents, principal and interest, making, in the aggregate, five thousand and nine dollars and eighty-eight cents.

That prior to the making and executing the said mortgage, to said complainants, the said Samuel M. Bond had made and executed a mortgage, on the said plantation called Ceylon, to secure a large debt, due by him to the Trustees of the General Assembly of the Presbyterian Church, in the United States of America. That this last mentioned mortgage was foreclosed, upon the said plantation called Ceylon, and the same was levied upon, under an execution upon said foreclosure, by the Sheriff of McIntosh County, and exposed to sale, on the first Tuesday in February last, and was then sold, for the sum of thirteen thousand dollars. That, after paying and satisfying the execution, issuing upon the foreclosure of the last mentioned mortgage, under which the said plantation called Ceylon was sold, there remains a large balance, say about nine thousand dollars. That one James P. Scriven, of the County of Chatham, and a corporation, known as the "Female Asylum of the City of Savannah," and one Susan Couster, administratrix with the will annexed of Lucas Lucena, have respectively claimed the said balance, so arising from said sale, and have given notices to the Sheriff of McIntosh County, to that effect, under various executions of fieri facias, issued upon judgments

at \*Law, recovered by the said claimants, against the said Samuel Miller Bond, all of which judgments are conceded by counsel to be junior, in point of date, to the mortgage executed to the complainants. That, in consequence of said notices, so given to the said Sheriff, and claims so interposed, the said Sheriff, as complainants are informed and believe, has deposited the said balance of money, arising from said sale, in the Planter's Bank of the State of Georgia, in the City of Savannah, subject to the order of this Court, for its distribution, among those who might be entitled to receive the same—That complainants had also caused a claim for the said money to be interposed, and a notice to be served on the said Sheriff, to that effect, under the lien, created on said plantation, by their mortgage—That the said plantation, so mortgaged to the complainants, having been sold by the foreclosure of an older mortgage, and the oldest lien upon it; a good title was procured to the

36 Ga. 541; Markham v. Huff, 72 Ga. 874; New England Mortgage Sec. Co. v. Robson, 79 Ga. 757, 4 S. E. Rep. 251.

**Same—Same—Same—Georgia Statute.**—The rule that courts of equity will not entertain a bill as long as the plaintiff has an adequate remedy at law was abolished in Georgia by the uniform procedure act of 1887 (Act 1887, p. 64). DeLacy v. Hurst, 83 Ga. 223, 9 S. E. Rep. 1052; Conley v. Buck, 100 Ga. 187, 191, 28 S. E. Rep. 97.



purchaser, who was the defendant, James P. Scriven, and that, therefore, the complainants' right, to follow the land with their mortgage, for the enforcement of its lien, was destroyed.—That unless the complainants are paid, out of the proceeds of the sale, now in the Planter's Bank for distribution, their lien will be entirely lost to them, on the said plantation, and younger judgments will be satisfied, in preference to their said mortgage.—That complainants have caused their mortgage to be foreclosed, on the personal property conveyed in it, execution to issue, and the said negroes to be levied on and advertised for sale, on the first Tuesday in June next. These are the principal facts, as alleged in the face of complainants bill. The prayer of their bill, is—That, by the decree of this Honorable Court, the complainant's mortgage and lien may be respected, and enforced, and that their debt against the said Samuel M. Bond, secured by the said mortgage, may be paid out of the fund, raised upon the sale of said plantation, and now deposited in the Planter's Bank, for distribution as aforesaid, in preference of the said judgments, under which the said defendants claim. And that the said complainants may be decreed to have a lien, upon the said fund, to the extent and amount of the debt, due them in their said mortgage and for such other and further relief, as shall seem meet, and agreeable to Equity and good conscience.

To this bill, the defendants have filed a general demurrer, for want of Equity. This demurrer admits all the facts, as 49 stated in the bill, \*to be true—And the question, which is, therefore, presented, for the decision of this Court, is—Is there, or is there not, sufficient Equity, stated and alleged in the face of the complainant's bill, so as to give this Court jurisdiction of the matters therein contained? If there is; then this demurrer must be overruled—If there is not; it must be sustained.—Story's Eq. Plead. 351, 352, 354. 355. And here, it may be stated, as a general rule, subject to but few exceptions, that where a complainant can have as effectual, and complete, a remedy, in a Court of Law, as in a Court of Equity, and that remedy is direct, certain, and adequate; a demurrer, which is, in truth, a demurrer to the jurisdiction, will hold. But where there is a clear right, and yet there is no remedy, in a Court of Law, or the remedy is not plain, adequate, and complete, or adapted to the peculiar exigency; then, and in such cases, Courts of Equity will maintain jurisdiction.—Story's Eq. Plead. 373, 374.

Let us, then, apply these plain principles of a Court of Equity, to this demurrer, and ascertain, whether the same ought to be sustained, or overruled. This bill, then, has been filed for relief; and the first question, therefore, which presents itself, is, what is the nature and character of the complainant's claim, to the fund in dispute? Is it an equitable, or is it a legal claim? For if the claim, which is set up by the com-

plainants, in their bill, be a purely equitable, and not a legal, claim, and they have no effectual, adequate, and complete, remedy, at Law, for the enforcement of their rights, or if that remedy be doubtful; I take it for granted, that a demurrer, for want of Equity, if that Equity appears upon the face of the bill, cannot be sustained. To determine this point, we must bear in mind, according to the facts, stated in the face of the complainants bill, that, previous to the recovery of the judgments, obtained by the defendants, James P. Scriven, "The Female Asylum of the City of Savannah," and Susan Couster, as administratrix with the will annexed of Lucas Lucena, against the defendant, Samuel Miller Bond, he had executed and delivered two mortgages, on his plantation called Ceylon, in the County of McIntosh, the one, in favor of the "trustees of the General Assembly of the Presbyterian Church," in the United States of America, and the other, in favor of the complainants, to secure certain debts, then due and owing to them by him. That the mortgage, first above mentioned, being the eldest lien upon the prem- 50 ises, was foreclosed, \*according to Law, previous to the obtainment of said judgments, and the premises were sold, under said foreclosure, by the Sheriff of McIntosh County, on the first Tuesday in February last—That at such sale, James P. Scriven, one of the defendants, and a junior judgment creditor, became the purchaser, for the sum of thirteen thousand dollars—That, after paying and satisfying, from the proceeds of said sale, the amount due on the first above mentioned mortgage, there remains a large surplus for distribution, which is now claimed, under the above facts, both by the complainants, as well as the defendants; but which fund is insufficient to satisfy these claims, in full—That, at the time of said sale, under the senior mortgage, the mortgage, given to the complainants on the same premises, remained unenclosed, but was duly recorded, in the Clerk's office of the County of McIntosh, within a few days subsequent to its execution.

Now, from these facts, it is manifest, and so the complainants charge in their bill, that the sale, which has been made of the mortgaged premises, under the foreclosure of the senior mortgage, in favor of The Trustees of the General Assembly of the Presbyterian Church in the United States of America, has vested in the purchaser a good title to the premises, freed and discharged from all subsequent liens and incumbrances. The lien, then, which the complainants originally had upon the premises, by virtue of their mortgage, and prior to the recovery of either of the judgments, in favor of the defendants, was, by that sale, destroyed. They can no longer follow the land, either in a Court of Law, or Equity, in the hands of the bona fide purchaser, for the satisfaction of their debt. But, does it therefore follow, that they have no claim, either legal or equitable,

upon the surplus monies, which may have arisen from the sale of the very premises, upon which their lien once existed, in full force, as against junior judgment creditors? I apprehend not. For, if so, there would indeed be little or no use, for any creditor to take such a lien, as a security. That the complainants have an equitable claim, upon the fund in dispute, for the payment and satisfaction of their debt, provided the same be bona fide, and not tainted with fraud, is a point, upon which, under the facts as stated in their bill, it seems to me, there cannot be entertained a reasonable doubt; and the simple question, therefore, which is presented by the present demurrer, is—Have they any plain, adequate, and effectual, remedy, at Law, for the enforcement \*of that claim? Indeed, so far as this court understands the argument of the defendants counsel, in support of the present demurrer, it is conceded by them, that, if the complainants have any claim, to the fund in dispute, it must be an equitable, and not a legal, claim—and that, therefore, a court of Law, in the distribution of the fund in dispute, as opposed to the legal claim of the defendants, who are judgment creditors of the said Samuel Miller Bond, must treat the complainants, as strangers to that fund. If this position be true—and I apprehend that it is so—a Court of Law, as a general principle, taking notice only of legal, and not equitable, suits or claims; then, ex concessis, the complainants, in a Court of Law, have no plain, adequate, and complete, remedy, for the enforcement of their rights, but can only be protected, in a Court of Equity, where matters of that nature are properly cognizable, and relievable.

Now, a Court of Law, in the distribution of money, which has been made from the sale of the property of a mortgagor, or defendant in execution, which is in the hands of its officer, generally proceeds to distribute the same, upon notice, and mere motion. As a general principle, it will, as already remarked, take notice, only, of legal claims, to the fund in dispute. The rule, by which these claims are to be governed, as it respects priority, has been fixed, by the act of our own Legislature.—Prince D. 435. These cases, generally speaking, are where there are several executions of various dates, without any other lien, or encumbrance, on the land, or where there is a senior judgment and execution, and a subsequent mortgage and the land is sold under the judgment; or where there is an unencumbered senior mortgage, and the land has been sold, under a junior judgment. The cases of *ex parte City Sheriff*, 1 McCord R. 399; *Jewell v. McGowen*, R. M. Charlton's R. 391; *Bell v. Ryers*, 3 Caine's R. 84, are cases of that character.

In these, and similar cases, it is clear, that a Court of Law may, upon mere motion, proceed and distribute the fund, among the judgment creditors, without doing injustice to the rights of any other

person, who may pretend to claim the same fund.

There are, however, other cases, of a totally different character, which are not unfrequently presented to a Court of Law, involving \*legal, as well as equitable, rights to the fund in dispute; and in which, a Court of Law cannot do justice between the conflicting rights, upon mere motion. In such cases, a Court of Law will refuse, as properly it may, to decide upon the rights of the claimants, to the fund in dispute, upon mere motion, but will leave them to settle their conflicting claims, by suit, as they shall be advised. The cases of *The State v. Laval*, *City Sheriff*, 4 McCord's R. 336; *Williams v. Rogers*, 5 John. 167; 18 John. R. 163; *Dawkins v. Pearson*, 2 Bailey's S. C. R. 619; are cases, strong to this point, and to which many others might be added, if necessary. And such, I cannot but think, is the case, which is now presented, by the complainants, under the facts, as stated in their bill, to the consideration of this Court. It seems to me, that, under the facts, as stated in this bill, a Court of Law, upon a mere motion, for the distribution of the fund in dispute, (the complainants never having foreclosed their mortgage, on the premises,) could not do justice, between the conflicting rights of the claimants; and that, in a Court of Law, the complainants would have no adequate remedy, for the protection of their rights. In confirmation of the foregoing principle, I will here merely quote a few lines in point, from 2 Dunlap's N. Y. P. p. 783: "Where there are overplus monies (says he) in the hands of the Sheriff, after satisfying the first execution, although they cannot, as seems, be levied upon, by virtue of a second execution, yet the Court, in a case where the rights of the parties are so clearly ascertained, that there is no necessity of resorting to a Court of Equity, will, on motion, direct the application of the surplus, to the payment of subsequent judgment creditors, according to their priority, to be determined, where the proceeds arise from the sale of the lands, by the time of docketing their respective judgments, or if from the sale of goods and chattels, by the delivery of their executions to the Sheriff." The question, then, as to the distribution of a sum of money, in the hands of the Court, or its officer, is not a strictly legal question, belonging exclusively to a Court of Law, as has been contended for, by the defendants counsel. It is a question which, when presented upon a mere motion, is addressed to the sound discretion of the Court, and upon which the Court may, or may not, act, as to it shall appear most in accordance with right and justice. If, by proceeding to distribute the money, upon mere motion, a Court of Law perceives, that manifest injustice is about to be done, by it, \*to the rights of any party having rights; it will refuse its aid, and leave the parties to ascertain their rights, either in a Court of Law, or Equity, as they



shall be advised. And it is only in cases, where the rights of parties are so clearly ascertained, that there is no necessity of resorting to a Court of Equity, that a Court of Law will proceed to distribute the fund in dispute, upon mere motion. But, is such the character of the claim to the fund in dispute, as presented by the complainants, in their bill? I apprehend not; and therefore, a Court of Equity is the only jurisdiction, where they can hope to obtain a proper protection, as to their rights.

I might proceed, and confirm these views, by an examination, as to the nature and character of the claims, which have been set up, to the fund in dispute, by the defendants themselves, under the peculiar facts of this case, as presented by the complainants' bill. But, as this is not the proper time, when such an examination should be entered into, I shall refrain from remark, on that point.

For the reasons now given, I am of opinion, that the demurrer, which has been filed by the defendants, to the complainants' bill of complaint, for want of Equity, ought to be over-ruled, and they be required to answer the same: and it is accordingly so ordered.

William & William T. Law, for Complainants.

McAllister & Cohen, for Defendants.

54 \*John Whelan, Plaintiff in Error, v. Owen Sherron.

January Term, 1843.

1. **Security on Appeal.**—Entering security, on an appeal, is a matter of record.

2. **Same—Authority to Bind Another.**\*—An authority, to bind one as security on an appeal, can be given only under seal: and dubitatur, whether it can be given at all.

3. **Same—Same—Verbal Authority to Magistrate.**—In a Justice's Court, a security on appeal, not signing or sealing the recognizance, is not bound by

\***Surety on Appeal—Authority to Bind Another.**—The signature of the party appearing to an appeal bond, put there by his attorney, is binding if he subsequently recognize and ratify the act. Nisbet v. Lawson, 1 Ga. (1 Kelly) 275.

Where under the statute of 1839, Hotchkiss 601, allowing one party plaintiff or defendant to appeal although his codefendants or plaintiffs may decline or refuse to do so, the party appealing will not be deprived of the benefit of his appeal because the names of his codefendants or plaintiffs on the appeal bond were signed by their attorney. Weeks v. Sego, 9 Ga. 199.

**Same—Failure of Appellant to Sign.**—Under the 26th section of the Judiciary of 1799, which enacts that "that in case either party shall be dissatisfied with the verdict, they may enter an appeal in the clerk's office (as matter of right), provided they pay all costs, and give security for the eventual condemnation money,"—it is not essential that the party appealing should himself sign the bond at all: it is sufficient that the surety signs. Pettee v. Flewellen, 2 Ga. 236.

an entry of his securityship, made by the magistrate, on his verbal authority.

In obedience to the writ of certiorari, issued in this cause, Leonidas Wyly, Esq. a Justice of the Peace in and for the County of Chatham, certifies to this Court, the following facts and proceedings, as had before him, in the Court below—viz: That, on the second day of November, 1842, he was called upon, by Justice James H. Wade, and requested to attend, at his office, that afternoon, to preside, in his stead, and try a cause, which had been returned to said Justice Wade's Court, on the ground of illegality of execution—That he did attend, at the hour set apart for the hearing of the case, and did preside, and pass upon the same—That the case was Owen Sherron v. John Whelan, security of William Patterson; in which case, the defendant had filed an affidavit of illegality to the execution, which had been issued against him, on an appeal, on the ground, first: that no appeal had ever been entered, by the original defendant, William Patterson; second: that if such appeal was entered, in conformity to law, he, the said John Whelan, never became the security of the said William Patterson, either in fact, or in Law.

In support of this affidavit of illegality, the docket of Justice Wade's Court was introduced in evidence, before said presiding Magistrate, by which it appeared, that the name of John Whelan had been written thereon, as the security on an appeal, in the case of Owen Sherron v. William Patterson.

55 \*William Patterson was then called, and introduced as a witness, on the part of the complainant, to prove that the name of John Whelan, as it appeared on the said docket of the said James H. Wade, was not the hand writing of the said John Whelan. This testimony the said Justice overruled, as incompetent, on the ground of his being a party to the record, and interested in the result. The defendant, or complainant, then introduced John Jones, as a witness, who proved that the name of John Whelan, as it appeared on said docket, was not the hand writing of the said John Whelan.

The plaintiff in execution then introduced, as a witness, the Magistrate, James H. Wade, before whom the original cause was tried.—He testified, that the said John Whelan did call on him, at his office, and tell him, that he, Whelan, had called, for the purpose of becoming the security of the said William Patterson, for an appeal, in the aforesaid case, and that he, Whelan, did request him, the said James H. Wade, Esq. to sign his name to the docket, as the security of said William Patterson, which he said he did do, agreeably to said request.

This was all the testimony, which was introduced, on both sides; and the presiding Magistrate certifies to this Court, that, upon this testimony, he decided that the execution was legal, and should be enforced.

Exceptions having been taken, to this decision of the Magistrate, by the counsel of the said John Whelan, as being contrary to Law, and he having complied with the statute; applied to this Court, for the writ of Certiorari, which was granted to him.

And now the question, which is presented, for the consideration and decision of this Court, under the foregoing facts and proceedings, in the Court below, is, has, or has not, the Magistrate, in overruling the defendant's affidavit of illegality, and in sustaining the execution, issued against him, as security on said appeal, on principles of Law, committed error, under the facts, above stated? This question, in the present case, becomes important and interesting, in point of Law, inasmuch as it is suggested to this Court, that a practice prevails, with some Magistrates of this county, of signing the names of individuals, upon their docket, where an

56 appeal has been demanded, \*upon the authority of loose and verbal declarations of such individuals, and binding them, for the payment of the eventual condemnation money, on the appeal, without any authority in writing, for that purpose—a practice, which, if it in fact exists, to say the least of it, is of dangerous tendency, as it must inevitably lead, either to gross fraud, or perjury. We have a striking instance of this, in the case now before the Court. The defendant, Whelan, in his affidavit of illegality, under oath, denies that he ever gave the Magistrate, James H. Wade, any authority to sign his name, as security on said appeal;—on the other hand, the Magistrate as expressly states, under his oath, that such authority was given, by the said John Whelan, to him, personally. Both cannot be right. It therefore becomes important, under the facts above stated, to enquire, first: admitting the fact, that such parol authority was given, by the said John Whelan, to the said James H. Wade, to sign his name, on the docket of said Wade, as a security on the Appeal of William Patterson; whether the act done, as it appears on the face of said docket, has been done in such a manner, as can legally bind the said John Whelan for the eventual condemnation money; or, in other words, whether the act, as done, purports, on its face, to have been done, in pursuance of such authority. For, I apprehend, it is a well settled principle, that where an act, done for another, is done in pursuance of a previous written, or parol, authority, it must appear, upon its face, to have been done, in pursuance of such authority, or it will not bind the principal.—Story on Agency, 137. If this does not appear, the strong presumption of fact would be, that no such authority had been previously delegated. Second: Whether, in point of Law, a power or authority, to sign the name of another, as a security upon an appeal, can be delegated by parol; or whether, from the very nature and dignity of the contract, that power must not be delegated, by writing, and under seal, in or-

der to make the act binding, and legal.

Now, in reference to the first point above stated, I would simply remark, that, from the return, made to me by the presiding Magistrate, in the Court below, it does not appear, that the name of John Whelan, as written on the face of the docket of the said James M. Wade, and as security on the Appeal of the said William Patterson, is written thereon, by any person, claiming to act, as the attorney of the said Whelan.

The act, on its face, purports to be 57 the individual \*act of the said Whelan, and not his act, by virtue of any power, or authority, delegated by him, to any person, for that purpose; and, as already remarked, such being the fact, the strong presumption, in Law, would be, that no such authority had been previously given, or delegated, by him, to any person. It may, therefore, well be questioned, as it seems to me, whether the presiding Magistrate, in the Court below, when he received the testimony of the said James H. Wade, for the purpose of adding to, and explaining, the facts, as they were apparent, on the face of that record, did not commit error in Law.

But, without placing this decision, on that point, as ground of error, there is another, and much more important question, involved, under the facts of the case, which demands serious consideration. It is this: Whether, in point of Law, a power, or authority, to sign the name of another, as a security upon an appeal, can be delegated by parol; or whether, from the very nature and dignity of the contract, such authority, if delegated, must not be delegated, by writing, under seal, in order to make the act valid, and binding, upon the principal, or security. This question is one of importance, whether considered, in reference to the construction, which is to be given the Statute, regulating appeals, in Justice's Court, and the mode and manner, in which such appeal may be legally perfected in such Courts, as well as in reference to the liability of the securities, upon such appeal. As its decision, in the present case, may possibly prevent, in future, at least in cases like the present, both fraud and perjury, if it produce no other beneficial effect; I proceed to give the conclusion, to which my own mind has arrived, in relation to it, as briefly as practicable.

The language of the Statute, regulating appeals, in our Justice's Courts, is as follows:—"That from and after the passing of this Act, the Justices of the Peace, in the respective districts, or any one or more of them, shall have authority and jurisdiction, to hear and determine all suits, on any liquidated demand, or account, for any sums of money, not exceeding Thirty Dollars, by summons or warrant. And the said Justices are hereby authorized and empowered to give judgment, and award execution thereon. Provided, nevertheless, that either party, being dissatisfied, shall be allowed an appeal, on payment of costs, and giving security, for the eventual



58 \*condemnation money, within three days after judgment &c.—But no stay of execution shall be allowed, after an appeal trial, for a longer term than twenty days; in which case, the security on the appeal, together with the security for the stay of execution, shall be liable for the debt and costs.” Now it is contended, by the counsel on the part of the plaintiff in execution, that, inasmuch as the above Statute, regulating appeals in Justice’s Courts, does not, on its face, prescribe, in terms, the manner and form, in which such appeal is to be entered, or the security given, for the eventual condemnation money; therefore, the Magistrate, in the Court below, had the right to enter the same, and take the security for the eventual condemnation money, in any manner and form, he pleased. The first answer, which I have to make to this proposition, is—that so thought not the Magistrate himself, in the Court below, when he wrote the name of John Whelan, as the security of William Patterson, on appeal, on the face of his docket. For, by that act, he has treated the security, required by the Statute, as a security of Record; and thus given us his own exposition and construction of the Statute. That this exposition and construction of the above Statute is the correct one, will, I think, be manifest, if we, for a moment, consider the nature and character of an appeal, the spirit and language of the above Statute, regulating appeals in Justice’s Courts, and the cotemporaneous construction of other Statutes, in *pari materia*, and the practice under them. And first, what is an appeal? Is it not the act of a party on record, where by a judgment of a Court of Record, upon security being given, by him, as under the above Statute, for the eventual condemnation money, is permitted to transfer, or lift up, that judgment, from an inferior to a superior tribunal, either for reversal or affirmance? If so, is it not manifest, both upon reason, and common Law principles, that the act of appealing, as well as every other act, which is required by the Law, in order to perfect that appeal, must, of necessity, be of as high a character and dignity, as the act, which is appealed from; or, in other words, that they must be matter of record? Now, it is true, that the Statute, regulating appeals in Justice’s Courts, does not, in terms, prescribe the form, in which the security, upon an appeal from the judgment of the Justice to that of a Jury, shall be taken by him, or entered. Neither does the Statute, regulating appeals to this Court, from the Inferior Courts, or from the verdict of a Petit Jury to that of a Special Jury,

59 in this Court. \*The language of the Statute, regulating appeals to this Court, is almost precisely the same, with that regulating appeals, in a Magistrate’s Court, from the judgment of the Justice to that of the Jury. It is as follows: “That in case either party shall be dissatisfied with the verdict of the Jury; then, and

in all such cases, either party may, within four days after the adjournment of the Court, in which such verdict was obtained, enter an appeal, in the Clerk’s office of such Court, (as matter of right) and if such verdict shall be obtained in the Inferior Court, it shall be the duty of the Clerk thereof to transmit such appeal, to the Clerk of the Superior Court, of the County in which such verdict shall be obtained, who shall enter the same on the appeal docket, which appeal shall be admitted and tried by a Special Jury: Provided, the person or persons, so appealing, shall, previous to obtaining such appeal, pay all costs, which may have arisen on the former trial, and give security, for the eventual condemnation money; except executors or administrators, who shall not be liable to give such security.”—Prince D. 426. The Judges of this Court, in giving a construction to the above Statute, have uniformly held, that the act of appeal, as well as the act giving security for the eventual condemnation money, as required by the Statute, are acts of record, which must appear on the minutes of the Court; and, by a rule of this Court, they have prescribed the form of a recognizance, under seal, which is to be given, before such appeal can be legally perfected. And such is the uniform practice, in this Court. The cotemporaneous exposition of Statutes is always a safe rule of construction, to apply to similar Statutes, in *pari materia*. And although it would not be required, that an appeal, entered in a Magistrate’s Court, to make it legal, should, *verbatim et literatim*, follow the form, prescribed in the rule of this Court; still, I apprehend, it should appear, on the face of the record, in the Court below, that an appeal was demanded, by the dissatisfied party, and that a recognizance, under seal, for the eventual condemnation money, had been taken and acknowledged, by the security, before the magistrate, as matter of record.

The security, required for the eventual condemnation money, under the above Statutes, regulating appeals in our own Courts, is precisely analogous to that security, which is required under the English Statutes, for the prosecution of a writ of error: for an appeal is but \*another name for the writ of error. By the Statute 3 James 1, Ch. 8, made perpetual by the Statute 3 Charles 1, Ch. 4, Sec. 8, to restrain unnecessary delays of execution, it is provided, that, in actions thereon specified, no writ of error shall be allowed, unless the party, bringing the same, with two sufficient securities, shall first be bound, unto the party, for whom the judgment is given, by recognizance, to be acknowledged in the same Court, in double the sum to be recovered by the former judgment, to prosecute the said writ of error, to effect, and also to satisfy and pay, if the said judgment be affirmed, all the damages and costs, adjudged upon the former judgment, and all costs and damages, to be awarded, for the delaying of the execution; and so absolute and unconditional is this recog-

nizance held in England, that it is an established rule, there, that such bail cannot divest themselves of their responsibility, by surrendering their principal, to the plaintiff in error, or be relieved from that responsibility, upon the ground that their principal has become bankrupt, pending the appeal.—3 Blac. Com. 410, note (4); Petersd. on Bail in Error, 470. That such also is the nature and character of the security, required to be given under our own Statutes, in cases of appeal, for the eventual condemnation money, and such their responsibility, there cannot, it seems to me, be a doubt; and especially so, if we refer to the provisions, as contained in the second section of the Act of 20th December, 1826.—Prince D. 46. I think, therefore, from what has now been said, it will appear sufficiently manifest, that the proposition, as contended for by the counsel, on the part of the plaintiff in execution, cannot be maintained, even in a Justice's Court, under any proper construction of the Statute, regulating appeals in that Court. I have dwelt longer on this point, than, possibly, necessity may have required; but I have deemed it important, that we should distinctly ascertain the nature and character of that security, which is required to be given, for the eventual condemnation money, in cases of appeal, under the Statute, that we may be the better prepared, to decide the question, whether, in point of Law, a power or authority, to sign the name of another, as a security upon an appeal, can be delegated by parol, so as to make the act valid and binding, upon the security? The decision of this question will determine the point, whether the Magistrate, in the Court below, when he overruled the defendant's affidavit of illegality, and sustained the execution, which had been issued against him, as a security on the

61 \*appeal of Owen Sherron, has, or has not, committed error, in Law? Now it is true, that an agent, or attorney, may ordinarily be constituted, and appointed, by a parol authority, in the broad sense of that term, at the common Law—that is, he may be constituted such, by a verbal declaration, or by a writing not under seal, or by acts and implications. But agencies of this character are exclusively confined, upon legal principles, to commercial transactions, and others of a like character. There is, however, to this general rule, one exception of great practical utility. And it is this: That whenever any act of agency is required to be done, in the name of the principal, under seal; the authority to do the act must be conferred, by an instrument under seal; or, otherwise, the act done cannot be held valid, and binding upon the principal. This exception has its foundation, in the strict principles and solemnities, required by the common Law, in regard to the transfer of real estate, and the creation of formal obligations and covenants; and applies, as it seems to me, with all its force, to the facts of this present case.—Story on Agency

49, 50; Reed v. Van Ostend, 1 Wend. 424; Blood v. Goodrich, 9 Wendel, 68; Hunford v. McNair, 9 Wendel, 54; Blood v. Goodrich, 12 Wendel, 535; Cooper v. Rankin, 5 Binn. 613; Gordon v. Bulkley, 14 Searg. & Rawle, 331; Harrison v. Jackson, 7 Term R. 203. Admitting, then, that a security to an appeal can legally delegate, to another, the power and authority to subscribe his name, as such security, to a recognizance for the payment of the eventual condemnation money, which is an act to be performed of record, and under seal—which I exceedingly doubt—the question arises: can that authority be delegated, by parol, in the common Law acceptance of that term; and will the act, thus done, bind the security? From the best reflection, which I have been enabled to give this question, I am of opinion, that such power or authority cannot be delegated, by parol; but, if delegated, must be delegated by writing, under seal, or the act of the agent will not bind his principal. The authority, therefore, given in the present case (if such authority in fact ever was given) by the defendant, Whelan, to the Magistrate, James H. Wade, being, according to the testimony of said Wade, a verbal, and not a written, authority, under seal, in my opinion, vested in him no power, to perform the act, which he appears to have done, so as legally to bind the said Whelan, as a security on said appeal, for the eventual condemnation money; and consequently, as it appears to

62 \*this Court, the presiding Magistrate in the Court below, in overruling the affidavit of the said Whelan, as to the illegality of the execution, which was issued against him, as security on said appeal, and sustaining said execution, has committed error in Law, and his judgment ought, therefore, to be reversed.

It is therefore ordered, that the judgment of the Court below, in the case of Owen Sherron v. John Whelan, security of William Patterson, overruling the affidavit of illegality of said Whelan, be, and the same is hereby, reversed; and the said affidavit of illegality is hereby sustained, with costs. And it is further ordered, that the Clerk of this Court do certify to the said Leonidas Wyly, Esq. and James H. Wade, Esq. the judgment of this Court, in the premises.

McAllister & Cohen, for Plaintiff in Error.

T. E. Loyd, for Defendant in Error.

63 \*Francis H. Welman, Pl'tt in Error, v. Harris & Reilly, Def'ts.

January Term, 1843.

1. Personal Property—Act to Quiet Possession—Strict Construction.—The Act of 1821. "to quiet the possession of personal property," is to be construed strictly.

2. Same — Same — Voluntary Delivery—Recovery.—Property, voluntarily delivered to another person,



cannot be recovered back from him, by the process, provided for in this Act.

In obedience to the writ of Certiorari, issued in the above cause, the Magistrate, in the Court below, to whom it was directed, makes the following return of his proceedings therein:—That, on the 1st July, 1842, Philip Reilly, one of the firm of Harris & Reilly, of the City of Savannah, made, before him, the following affidavit, under which he prayed a warrant, against the said Francis H. Welman, as also for the seizure of certain seven bales of cotton, which was granted him, upon said affidavit.—That said affidavit and warrant are in the following words:

State of Georgia—Chatham County. Before me, Robert Raiford, a Justice of the Peace for said County, personally appeared, Philip Reilly, of the firm of Harris & Reilly, of the City of Savannah, who, being duly sworn, deposeth and saith, that certain personal chattels, to wit: Five round bales of Upland Cotton, marked "H. H." one round bale of Upland Cotton, marked "J. R." and one other bale of Upland Cotton, marked "T. Wicker," have been recently in the quiet and peaceably acquired possession of the said Harris & Reilly, have disappeared, and without their consent, and as deponent believes, have been taken possession of, and detained, by one Francis H. Welman, under some pretended claim, and without lawful warrant or authority. And that said Harris & Reilly, bona fide, claim an interest in the said seven bales of cotton.—Wherefore they pray that a warrant may issue, as well for the apprehension of the said Francis H. Welman, as for the seizure \*of the said seven bales of cotton, and such further relief as the Law directs.

Sworn to before me, }  
this 1st July, 1842. } Philip Reilly.  
R. Raiford, J. P. }

State of Georgia—Chatham County. To any lawful constable of said County:—Whereas, it is set forth, in the foregoing affidavit, that certain seven round bales of Upland Cotton have been recently in the quiet and peaceably acquired possession of Harris & Reilly, have disappeared without their consent, and have been taken possession of, and detained, by one Francis H. Welman, under some pretended claim, and without lawful warrant or authority; These are therefore to command you, to apprehend the said Francis H. Welman, if the said seven bales of cotton are to be found in his possession, and bring him, with the said cotton, before me, or some other Magistrate of said County, that proceedings may be had, in this matter, as the Law directs, in such cases made and provided.

Given under my hand and seal, this 1st day of July, 1842.

R. Raiford, J. P. [L. S.]

Under this affidavit and warrant, the said Francis H. Welman was arrested, and brought before said Magistrate, 5th July,

1842—who proceeded to hear testimony, in reference to said complaint.

The testimony, as returned by the Magistrate, is as follows:—Walter Harris, the Clerk of Harris & Reilly, being sworn, states, that he is the Clerk of Messrs. Harris & Reilly; that he knows Harris & Reilly have seven bales of Upland Cotton, which were stored with Mr. Welman. One bale, marked I. Wicker, re-entered 21st May last. Five bales, H. H. and one bale; J. R. were stored, 25th May last, at the store of Welman & Waugh. Has seen notice in the newspapers, of the dissolution of the co-partnership of Welman & Waugh, but does not know of such dissolution, of his own knowledge. Carried order of Harris & Reilly, on Mr. Welman, 27th June last, and demanded the seven bales of cotton. Demanded a bill of storage, and this cotton. Both were refused. As well as witness recollects, he, Mr. Welman, would not deliver the cotton, nor make out the bill. Harris & Reilly had a claim on the cotton. They were in the habit of storing cotton there. The store, (where the cotton was

stored) was on the top of the bluff, in the City of Savannah, \*and remote from any wharf. Mr. Welman, as well as witness recollects, refused to deliver the cotton, until a former bill (of Harris & Reilly) for storage, was paid. The cotton, for which this old bill had accumulated, had been delivered some time, and had been taken away; the last of which was on the 21st May last. The one bale, re-entered 21st May, was of a lot of about one hundred bales. That bale was rejected, as false packed, or for some other cause, by the purchaser. The bill of storage, up to the 21st May, was rendered. The other six bales formerly belonged to W. Wray; but now, the whole seven are the property of Harris & Reilly. The bill of the re-entry of the one bale was rendered. The cotton was ordered to Mr. Welman's store, by witness. Harris & Reilly do a commission business, so far as the selling of cotton. The cotton was placed in the store of Mr. Welman, by the consent of Harris & Reilly. The cotton was usually turned in and out, by Mr. Welman. Harris & Reilly did offer to settle their bill. Witness tendered, in specie, for the storage of the seven bales. Mr. Reilly offered to settle with Mr. Welman, if he would settle Welman & Waugh's acceptance, in favor of Harris & Reilly. Witness told Mr. Welman, that Harris & Reilly would settle the old bill. The acceptance was not due, on the 21st May. As far as witness recollects, the acceptance was in the way of a settlement, and fell due 25th June, and was not paid. The demand, made by Harris & Reilly, of the 27th June, was because they wished to remove the cotton.

Joseph Cumming, Esq. (called by the Court to state what was the usage among merchants, in such cases,) stated, that there is no doubt, that all property is liable, for its own storage. Is well acquainted with the history of the case before the Court. Knows of no case, like the present

one. In general, when an article is turned out of store, it is considered a delivery. If I turn out one hundred bales of cotton, and one is returned, by the act of the first party; I think it is liable for the storage of the whole. Has often known cotton detained, to pay a former bill of storage.

This was all the testimony, before the Court, upon the trial of this writ of possession; and upon this testimony, the Magistrate, in the Court below, ordered and directed, that the said seven bales of cotton be forthwith delivered to the complainant, and that the defendant be discharged, on the payment of costs.

66 \*To this judgment of the Court below, the defendants' attorney took the following exceptions, in writing, which were overruled, by the said Court; and having complied with the Statute, applied to this Court, for the present writ of Certiorari, which was granted him.

1. That said decision is contrary to Law: because the evidence disclosed the fact, that the cotton had been placed in the possession of the said Francis H. Welman, by the plaintiffs; and therefore, that he was the last, in the quiet and peaceably and legally acquired possession thereof.

2. That said decision is contrary to Law, because the said Francis H. Welman had a lien on the same, for storage.

3. Because the said decision is contrary to Law and evidence.

This case brings up for consideration, and construction, the provisions of the Act of the 25th December 1821, "An Act, the more effectually to quiet and protect the possession of personal property, and to prevent taking possession of the same by fraud or violence."—Prince D. 449-50.

The first section of this Act declares, "That upon complaint, made on oath, by the person injured, his agent or attorney, to any Judge of the Superior, or Justice of the Inferior Courts, or any Justice of the Peace, that any negro, or negroes, or other personal chattels, have been taken, enticed, or carried away, by fraud, violence, seduction, or other means, from the possession of such deponent; or that such negroes, or other personal chattels, having been recently in the quiet and legally and peaceably acquired possession of such deponent, have absconded, or disappeared, without his or her consent, and, as he or she believes, have been harbored, received, or taken possession of, by any person or persons, under some pretended claim, or claims, and without lawful warrant or authority; and that the said deponent, or the person for whom he is agent or attorney, bona fide, claims a title to, or interest in, said negroes or other chattels, or the possession thereof; that it shall be the duty of such Judge, or Justice, to issue a warrant, as well for the apprehension of the party so seizing, taking, enticing, receiving, 67 harboring, obtaining, \*or having possession of, such negroes, or other chattels, as for the seizure of such negroes, or other chattels, themselves—and upon

the return of such warrant, the Judge or Justice shall hear evidence, as to the question of possession, in a summary way, and cause the said negroes, or other chattels, to be delivered over to the party, from whose possession the same were violently or fraudulently taken, or enticed away, or from whom the same absconded, or in whose peaceable possession they last were; Provided such party shall, before such Judge or Justice, enter into a recognizance, with good and sufficient security, in double the amount of the value of such negroes, or other personal property, and the hire claimed, if any, to cause the said negroes to be produced and forthcoming, to answer any judgment, execution, or decree, that may be had, issued, or made, upon such suit, or action, at Law, or in Equity, as the opposite party may commence, or prosecute, within the next four years, touching the same; and such recognizance shall be returned, by such Judge or Justice, to the next Superior Court of the County, where the same is taken, to be transmitted to the Court where such suit or action may be commenced, and the securities upon such recognizance shall be bound and liable, for the eventual condemnation money, and execution shall issue, against them, in such manner, as against securities on appeals."

This Statute, being one manifestly made in contravention of common Law principles and proceedings, must be construed strictly: and especially so, as the proceeding, under it, to a certain extent, partakes of a criminal nature. The party injured, therefore, must not only bring himself strictly within some one of the cases, mentioned in the statute, but he must also support his complaint, at the hearing, by competent and sufficient testimony, or the Judge, or Justice, before whom the complaint is made, has no jurisdiction, under the Statute, over the subject matter in dispute. There are but two classes of cases, embraced within the act; the first is, where a person, bona fide claiming a title to, or interest in, a negro, or negroes, or other personal chattel, or the possession thereof, declares, under his oath, that such negro or negroes, or other personal chattel, have been taken, enticed, or carried away, by fraud, violence, seduction, or some other means, (of like character,) from his possession. The

68 \*second is, where a person, bona fide, claiming title to, or interest in, a negro or negroes, or other personal chattel, or the possession thereof, declares, under his oath, that such negroes, or other personal chattels, having been recently in his quiet and legally and peaceably acquired possession, have absconded, or disappeared, without his or her consent, and, as he or she believes, have been harbored, received, or taken possession of, by the person, against whom the warrant is prayed, under some pretended claim or claims, and without lawful warrant or authority. By a reference to the affidavit, which has been made in the present case, and the warrant issued thereon, it appears, that it is under



this last class of cases, as contained in the Statute, that this complaint has been made. The facts, so far as they are stated, on the face of the affidavit of Mr. Reilly, the prosecutor, may be considered as sufficiently strong, under the Statute, for the purpose of authorizing the Magistrate in the Court below, to have issued his warrant, and entertained jurisdiction of the case, in the first instance. But the Magistrate, on the return of the warrant, is required, by the Statute, to hear evidence, in a summary way, as to the question of possession, solely. Beyond that single question, he has no jurisdiction, under the Statute; and any other evidence, not pertinent to that issue, exclusively, he has no right to receive. On the hearing, the complainant is bound to support the facts, contained in his affidavit, by competent and sufficient testimony; and if he fails so to do, it is the duty of the Magistrate to dismiss the proceeding, for want of jurisdiction, and leave him, for redress, to the ordinary proceedings at Law. Now, the facts, as set forth on the face of the affidavit of the complainant, Philip Reilly, are, that certain personal chattels, to wit, five round bales of Upland Cotton, (identified by certain marks,) had been recently in the quiet and peaceably acquired possession of the firm of Harris & Reilly—that they have disappeared, without their consent, and, as deponent believes, have been taken possession of, and detained, by one Francis H. Welman, under some pretended claim, and without lawful warrant or authority: Where, I would ask, is the testimony, which was received by the Magistrate, in the Court below, on the hearing of this writ, which sustains any one of the facts, as sworn to by the complainant? If such testimony was taken, it is not to be found, in that, which has been returned to this Court, in obedience to the present writ. On the contrary, I find the facts, as contained in that testimony, not only in 69 positive contradiction \*to the facts, as set forth on the face of the complainants' affidavit, but, so far as the question, of the last peaceable and legally acquired possession, is involved in the present proceeding, conclusively showing, that not the complainants, but the defendant, Francis H. Welman, was in such possession, with their consent, and at their instance; or, in other words, that the cotton in dispute had been sent to the said Welman, by the complainants, for storage, with their approbation and consent; and consequently, could not have disappeared from their possession, without their consent. In the teeth of these facts, the Magistrate, in the Court below, not only sustains jurisdiction of this complaint, under the Statute, but proceeds to give judgment, that the defendant shall forthwith deliver up said cotton, to the complainants, and be discharged, upon the payment of costs; when he is expressly required, by the Statute, after hearing the evidence, as to the question of possession,

in a summary way, to cause the said chattels to be delivered over to the party, in whose peaceable possession it shall appear they last were. The facts, therefore, as they were in evidence, before the Magistrate, in the Court below, and as they have been returned to this Court, according to the testimony of the complainants' own witnesses, make out a case, which is clearly neither within the letter, nor spirit, of the Act of 25th December, 1821. For, if personal property come into the possession of another, lawfully and by and with the consent of the true owner; although a subsequent detention of the same, under some pretended claim, may not possibly be justified, upon legal principles, in a Court of Law; still, such detention does not render such party answerable, under the provisions as contained in the Act of 25th December, 1821. It is a case, not contemplated by the Statute, and, in my opinion, embraced, neither within its spirit, or language. The cases, and the only cases, embraced within the Statute, are where the original taking of the chattel, from the possession of the true owner, has been by fraud, violence, seduction, or some other means (of like character); or where the chattel, having been in the quiet and legally and peaceably acquired possession of the complainant, has absconded, or disappeared, without his consent, and has been taken possession of, or received, by the person, against whom the warrant is asked, under some pretended claim, or claims, and without lawful warrant or authority. If these facts are not clearly and satisfactorily made to appear, by the complainant, at the hearing, 70 by competent and credible \*testimony; the Magistrate can have no jurisdiction, over the subject matter of complaint, under the Statute, above referred to. In such case, he should dismiss his proceeding, for want of jurisdiction, and leave the parties to contest their rights, according to the usual and ordinary proceedings, in Courts of Law. Being clearly of opinion, therefore, for the reasons now given, that the Magistrate, in the Court below, under the facts, as they were testified to, before him, in the present case, had no jurisdiction over the subject matter in dispute, by virtue of the provisions, as contained in the Act of 25th December, 1821; I must dismiss these proceedings, in the Court below, with costs.

It is therefore ordered, that all the proceedings in the Court below, in the case of Harris & Reilly v. Francis H. Welman, under the Act of 25th December, 1821, be, and the same are, hereby dismissed, with costs. And it is further ordered, that the judgment of this Court, in the premises, be certified to Robert Raiford, Esq. the Justice, before whom said writ of possession was tried, by the Clerk of this Court, forthwith.

Charlton & Ward, for Plaintiff in Error.  
Millen & Kollock, for Defendant in Error.

# DECISIONS IN THE MIDDLE CIRCUIT.

JOHN SHLY, JUDGE.

## 73 \*RICHMOND SUPERIOR COURT.

**George W. Summers v. Philip H. Mantz and John A. Cameron, Administrators, &c.**

January Term, 1843.

### Debt on Judgment—Allegata and Probata—Variance.\*—

In an action of Debt on judgment, where the declaration alleges the recovery of a sum certain, for costs in the former suit, and the original judgment is left in blank, as to costs; the variance is fatal; and the record cannot be admitted as evidence.

This case is brought to this Court, from the Court of Common Pleas of the City of Augusta, by Certiorari, upon the exception, taken by the defendants, to the decision of the Judge of that Court, in admitting the judgment sued on, as evidence. The defendants objecting, on the ground of variance, between the pleadings and the evidence offered.

The facts, which appear in this case, from exceptions taken in the Court below, and certified to be correct by the Judge of that Court, are, that the action of debt is founded on a judgment of that Court, in favor of the plaintiff against defendants, for the sum of three hundred dollars, with interest, and the further sum of

for his cost, in his suit in this behalf expended. And in the above action, in setting out the judgment, the plaintiff states, "For that your petitioner, by the consideration and judgment of said Honorable Court, at the October term thereof, in the year of our Lord one thousand eight

\*Alleging Sum Certain—Variance.—Where the judgment alleged in the accusation was for a certain amount and costs, and the judgment shown by the evidence made no mention of costs, the execution for costs having issued additionally, and being, in effect, a part of the judgment, it was held not to be a fatal variance. *Conley v. State*, 85 Ga. 348, 364, 11 S. E. Rep. 659.

The foreclosure of a mortgage is not invalidated because of a variance between the amount stated in the mortgage and that stated in the affidavit for foreclosure. If the amount named in the latter be too large, the defendant or an opposing creditor can have it reduced. *Vance v. Roberts*, 86 Ga. 457, 462, 12 S. E. Rep. 653.

Where the affidavit upon which a distress warrant was based, alleged that the defendant was indebted to the plaintiff in a named amount, and the evidence was that the defendant had contracted to pay a certain number of bales of cotton, which were shown to be worth the sum alleged, it was held not such a variance as required a nonsuit. *Renew v. Redding*, 56 Ga. 311.

hundred and forty-one, recovered against the said Philip H. and the said John A., administrators as aforesaid, the sum of three hundred dollars, as his principal debt, and interest on said principal, from the thirteenth day of October, eighteen hundred and thirty-nine until paid, with three dollars, the cost of noting and protest, and thirteen dollars and twenty-three

74 cents, cost of \*suit, which in and by this Honorable Court, were then and there adjudged to your petitioner, for his damage which he had sustained, as well by reason of the non-performance of the said James Leverich, in his life time, of certain promises and undertakings then lately made by the said James in his life time, to your petitioner, as for his costs and charges, by him about his suit in that behalf expended. Whereof the said Philip H. and the said John A. administrators as aforesaid, were convicted, as by the records and proceedings in this Honorable Court more fully appears." And when the plaintiff offered the proceedings and judgment, as they appeared in said Court, the defendant's counsel objected to their going to the Jury as evidence, as by the judgment, so far as the costs and protest, was in blank, and of course, not recovered, as alleged by the declaration, and therefore ought to be rejected, upon the ground of variance between the allegation and proof offered. The Judge of that Court overruled the objection, as not forming a material variance, and the plaintiff obtained a verdict: and the question, now presented to this Court, is, whether the Judge erred in overruling the defendant's objections.

In examining this branch of pleading, the Court holds the rule to be, that a material variance is fatal, on a motion for a nonsuit, at the trial, especially if it relate to the description of a record, deed, or other written instrument, in setting forth which the utmost accuracy is required.—*Dunlap's P. 251; 10 John. R. 418*. The reason, for requiring a greater strictness in describing a written instrument, is, that when there is a variance, it does not appear that the contract, given in evidence, is that, on which the plaintiff declares—1 *Chitty's P. 304*; and a variance, however small, in setting out the names, &c. in a bill, or note, is fatal.—1 *Chitty P. 307; 1 Philips Ev. 1st Am. Ed. 163: (note.)* From the Law, as declared in the before stated case, does this case come within the rule of a material variance? The plaintiff declares, that he recovered so much, "for principal, with interest, and also three dollars, the cost of noting and protest, and thirteen dollars



and twenty-three cents, cost of suit, as by the records and proceedings in this Honorable Court, more fully appears;" and when the record and proceeding are produced, it appears that he recovered blank, for his cost, or, in fact, that he did not recover the three dollars protest fee, nor the thirteen dollars and twenty-three cents, cost of suit.

75 \*It is the opinion of this Court, that the variance is a material one, and that the Judge of the Court of Common Pleas erred, in not rejecting the judgment, on account of variance, between the allegation and proof offered. The verdict in this case is therefore set aside, and a new trial ordered in said Court.

Starnes & Phinzy, for Plaintiff.

W. W. Holt, for Defendants.

76 \*Seals & Upham v. John Cashin, Leon P. Dugas, The Mechanics' Bank, The Augusta Insurance & Banking Company, and The President, Directors & Co. of the Bank of Augusta.

January Term, 1843.

1. **Mortgage—A Mere Incumbrance.**\*—Under the laws of Georgia, a mortgage is a mere incumbrance, to pay a debt.

2. **Same—Whether an Assignment†—Act of 1818.**—It is neither an assignment in trust, nor a conveyance, or transfer, under the Act of 1818.

3. **Same—Not Affected by Act of 1818.**—The Act of 1818, therefore, does not affect mortgages, at all.

\***Mortgage—A Mere Security.**—Under the law of Georgia a mortgage is only a security for the payment of the debt of the mortgagor; the title still remains in the mortgagor. *Davis v. Anderson*, 1 Ga. 176; *Winter v. Garrard*, 7 Ga. 183, 184; *Ragland v. Justices*, 10 Ga. 73; *Scott v. Warren*, 21 Ga. 408; *Elfe v. Cole*, 26 Ga. 197; *Freeman v. Bass*, 34 Ga. 355. So, as to a mortgage given in another state and sought to be enforced upon lands in Georgia. *Tucker v. Toomer*, 36 Ga. 138.

†**Same—Whether Assignment—Act of 1818.**—The statement of the principal case that mortgages are not within the Act of 1818 prohibiting assignments to some creditors in preference to others, is limited in later cases by the qualification that it must have been given to secure a just debt, and without the reservation of any secret trust or benefit to the mortgagor. *Davis v. Anderson*, 1 Ga. 176; *Lee v. Brown*, 7 Ga. 276; *Lavender v. Thomas*, 18 Ga. 668, 675.

But in *Solomon v. Sparks*, 27 Ga. 385, 389, 390, it was held, the opinion of the court being delivered by BENNING, J., who previously and on numerous occasions had dissented from the Georgia doctrine that a mortgage was a mere security, that conceding that a mortgage could be, or was, a conveyance, the estate conveyed thereby was a conditional estate at law, and not an estate "in trust," and therefore it could not be within the purview of the Act of 1818.

**Same—Same—Act of 1881.**—Under the Act of 1881 (Acts 1880-1, p. 174) requiring deeds or other instruments of assignment executed by insolvent debtors

This bill states, that the complainants have obtained their judgment, against one of the defendants, John Cashin, and have issued a fi. fa. thereon, and that the Sheriff has made a return of Nulla Bona thereon—that one of the defendants, John Cashin, was largely indebted to the Banks, defendants, to the amount of insolvency; and the other defendant, L. P. Dugas, was the accommodation indorser of said John Cashin on sundry notes in said Banks—that whilst the complainants were carrying their case to judgment, and shortly before their judgment was obtained, the said John Cashin, to secure his said indorser from future loss, and shortly before their judgment was obtained, made and executed a mortgage of certain real and personal property, to said Dugas, and the same was placed on record, a few days before the said judgment was obtained. And the complainants further state, that said mortgage was made, to secure the payment of a pre-existing debt, and Cashin was at that time insolvent, and, by said mortgage, gave a fraudulent preference, to a portion of his creditors. And the bill prays, that this mortgage may be declared fraudulent and void, and the said mortgaged property may be decreed to be sold, and the complainants' demands be satisfied out of such sale.

To this bill, the defendants filed a general demurrer, for want of Equity.

On the part of complainants, it is contended that this mortgage is 77 \*fraudulent and void, as against other creditors, and comes within the provisions of the Act of the Legislature, passed in 1818. That said Act provides,

for the benefit of creditors to be accompanied by a sworn schedule or inventory of all assets owned by the insolvent debtor, it is held that while ordinary mortgages are not assignments (*Hollingsworth v. Johns & Co.*, 92 Ga. 428, 17 S. E. Rep. 621), yet a mortgage given to secure an existing debt, and which confers power upon the mortgagee to sell the goods therein conveyed, at wholesale or retail, but not below a specified price, the mortgagee agreeing to apply all the proceeds from that and other sources, above the amount of his debt, to the payment of the debt of a certain creditor, may, together with the contemporaneous writings, constitute an assignment within the terms of the act, and be void for want of the sworn schedule required thereby. *Kiser v. Dannenberg Co.*, 88 Ga. 541, 15 S. E. Rep. 17. And see *Kea v. Epstein*, 87 Ga. 115, 13 S. E. Rep. 312; *Fidelity, etc., Co. v. Tea Co.*, 95 Ga. 172, 22 S. E. Rep. 50.

Where an insolvent partnership executed and delivered to several of its creditors mortgages upon all its assets, said mortgages bearing the same date, all executed and recorded at the same time, and each referring to the others and providing that all should be of the same rank and dignity, it was held not to have thereby made an assignment; the court saying that such mortgages, if fair and honest in fact, were not fraudulent in law nor otherwise invalid, although other creditors were left wholly unsecured. *Hollingsworth v. Johns & Co.*, 92 Ga. 428, 17 S. E. Rep. 621.

"That any person, or persons, unable to pay his, her, or their debts, who shall, at any time hereafter, make any assignment, or transfer, of real or personal property, stock in trade, debts, dues, or demands, in trust, to any person or persons, in satisfaction or payment of any debt or demand, or in part thereof, for the use and benefit of his, her, or their creditor or creditors, or for the use and benefit of any other person or persons, by which any creditor of said debtor shall or may be excluded, from an equal share or portion of the estate, so assigned or transferred; such assignment, transfer, deed, or conveyance, shall be null and void, and considered, in Law and Equity, as fraudulent against creditors." And the proviso in this Act declares that "any person may sell all or any of his property, bona fide, provided there be no trust reserved for the seller, or any person appointed by him."

For the complainants, it is further contended, that the giving a mortgage, to secure one creditor, is within the mischief, intended to be remedied by the Act before stated—that a mortgage is an assignment in trust, to pay one or more creditors, and by which a creditor or creditors is excluded, from an equal share or portion of the estate so assigned or transferred; and that this mortgage is therefore fraudulent and void under said Act. And in support of this definition of the Law, the counsel for complainants refer to a written decision, made by Judge Montgomery, in this Court, in the case of *The Bank of the State of Georgia v. The Bank of Augusta*. In that case, the Judge says, "with regard to the pre-existing debts, were the fact admitted, I would hold a mortgage to be a transfer in trust—a mortgagee being a trustee in Equity—the only Court which notices trusts. Our Statutes point out the mode of foreclosing mortgages, but does not alter the relation in which the mortgagor and mortgagee stand, towards each other."

On the part of the defendants, it is contended, that the defendant, John Cashin, had a right to prefer one creditor to another, at common law; and might have secured his creditor, by mortgage or sale, as he might think proper. That a mortgage is neither an assignment, or transfer; nor is a mortgagee, under the Laws of Georgia, a trustee \*for the mortgagor; and that a mortgage is not within the provisions of the Act of 1818.

In the decision of this question, the Court must look into the old law, for the mischief, and the remedy. And further, this being a Statute in derogation of rights, secured by the common law, must be construed strictly. What, then, were the rights of the debtor, at common law? Why, that he might prefer one creditor to another; and this he may do, by transfer, or assignment, of any, or all his property to his creditors, for the payment of such creditors, as he might choose to name; and in that transfer, create these creditors trustees, and create a trust fund to pay such as he should

designate, as was the case, prior to the Act of 1818; and such conveyances, or transfers, are now on record, in the County of Richmond, made by mercantile firms, to secure certain classes of their creditors. And these cases come strictly within the words of the Act of 1818; and which, no doubt, caused the passage of the Act:—They were, strictly, assignments, or transfers, in trust, to pay certain creditors, in exclusion of other creditors; and, thus far, the common law right in such transfers, or assignments, have been taken away by the Act of 1818. The next subject to be examined, is, what weight ought the expression of an opinion, made by Judge Montgomery, upon a case where the facts were not in evidence before him, and therefore not called on to declare an opinion as to the Law—is such an opinion to be considered as a decision of this question? And which question is one of great importance to the people, as in its consequences it would nearly render the Law of mortgage void. But, as the Judge intimated what opinion he would have given, had the facts been in proof before him, I feel it my duty, from the respect which I feel for the memory of that Judge, to assign my reasons for coming to a different conclusion, from the same facts.

First: Is a mortgage an assignment, or transfer, so as to operate as a satisfaction, or payment, of a debt, or any part thereof? A transfer, in legal contemplation, means, the absolute conveyance of such interest, as the party has in the thing transferred, so that the party, to whom transferred, will have the perfect control, so as to make sale of the same.

In the second place, what is an assignment? This is a conveyance \*of all the right and title, which a party who makes the transfer, in the thing transferred, owned or possessed.

In the third place, what is a mortgage? "Mortgage may be defined to be (2 Atk. 435) a debt, by specialty, secured by pledge of lands, of which the legal ownership is vested in the creditor, but of which, in Equity, the debtor, and those claiming under him, remain the actual owners, until debarred, by judicial sentence, or their own laches." This is the definition of a mortgage, as it is at common law; and as soon as the mortgagor failed to pay the debt, secured by the mortgage, on the day it became due, he forfeited his right to redeem, and the mortgagee had a right to enter, and hold the estate, as the absolute owner: But, in process of time, Courts of Equity, seeing the injustice and oppression, exercised by mortgagees, began to exercise their authority; and finally assumed jurisdiction over mortgages, and considered, and so decreed, that the mortgagee should be held a trustee for the mortgagor; and that, after forfeiture at Law, yet, in Equity, it would still be considered the property of the mortgagor, and let him in to redeem, provided he made the application in that Court, within a reasonable time; and they



held the mortgagee to be a trustee for the mortgagor, and compelled him to account for the rents and profits received by him, in discharging the debt and interest; and therefore, Judge Montgomery was right, when speaking of mortgagees being trustees, and holding the mortgage estate in trust, to pay their own debt.

But this Court is not now deciding on mortgages at common law: It is to decide what is the force and effect of a mortgage, under the Laws of Georgia, so far as the legal estate, remaining in the mortgagor, whether the condition be forfeited, or not. The first Act was passed in 1768, in relation to recording mortgages and other deeds. It declares, that nothing in the Act shall be construed to bar any widow of any mortgagor of lands and tenements, from her dower, and right in and to the said lands and tenements; unless she should relinquish the same. The statutory provision, which alters the entire relation, which existed at common Law, and which prescribes the mode in which mortgagees are to obtain their money, is as follows: By the Act of 1799, (Prince D. 423,) when the term of payment, stated in the mortgage, has passed, the mortgagee must apply to the \*Superior Court, in case of land, and obtain a Rule Nisi, for the mortgagor to pay the money into Court, by a time stated in the rule; and if he fail to do so, the Court is then to give judgment, for the amount due on the mortgage, and order the mortgaged property sold, as in cases of execution, and the proceeds to be paid to the mortgagee, or his attorney. But when there shall be a surplus, it shall be paid over to the mortgagor, or his agent.

From the foregoing statutory provisions, can it be contended, that a mortgagee stands in the situation of a trustee to the mortgagor? Or must a Court of Equity now be applied to, in order to protect the mortgagor's rights of redemption? Or can it now be said, that a mortgagee has the right to take possession of the mortgaged property, and hold the same, until the mortgagor shall file his bill in Equity, to be allowed to redeem the same? I apprehend no such right would now be considered as existing, in the mortgagee. If so, I apprehend that a mortgage, in this State, will be defined to be, an incumbrance, created upon either real or personal property, to secure the payment of a debt, either due by specialty, or simple contract; and this incumbrance may, and must be enforced, at Law, as prescribed by our Statute. And this mode of enforcing this incumbrance is very similar to other common law proceedings, in obtaining judgment, in other cases of contract. And the same proceedings are to be had, in both instances, to wit: that the property must be sold by the Sheriff, and after paying off the plaintiff's demand, if there be a surplus, this is to be paid to the mortgagor, or his agent. Or, in case of judgment and *fi. fa.* the surplus is to be returned to the defendant. From the foregoing history of mortgages, both

at common law and under the provisions of our Statutes, it is evident, that Judge Montgomery, in his intimation of an opinion, had reference, solely, to mortgages in England, where a mortgagee is considered a trustee for the mortgagor: for the plain reason, that, at Law, the mortgagor cannot have the power to redeem, and must go into a Court of Equity, where it is considered as a trust estate. But as our Statutes have entirely altered the rights of mortgagor and mortgagee, and the proceedings must be had at Law, and that Law giving the mortgagor all the rights, which he could claim, in Equity, in England; the mortgagee has not the power, now, to seize the lands, and collect the rents and profits, and thereby make himself a trustee. The Sheriff is now \*the only person, who can take possession of the lands, and not then, until after a foreclosure, and *fi. fa.* to sell. And, at that sale, the mortgagee has no greater rights, than any other person has at Sheriff's sales.

I am satisfied that a mortgage, under the Laws of Georgia, is not a conveyance in trust, but is an incumbrance created to pay a debt.

Secondly: That a mortgage is not an assignment in trust, to pay debts, or any part thereof.

Thirdly: Nor is a mortgage a transfer of property, in satisfaction of a debt. It only creates a lien on the property, from its date, securing the payment of the debt, and does not operate as a payment, until foreclosure and sale.

This Court, for the reasons before assigned, does decide, that mortgages are not within the provisions of the Act of 1818; and the grounds, taken by the complainants were, that this mortgage, made by Cashin, one of the defendants, is within the provisions of said Act, and therefore void, as against his other creditors: and this Court having decided that this mortgage is not within the provisions of said Act, it is therefore ordered that the demurrer in this case be, and is hereby, sustained, and the bill dismissed.

82 \*Jacob R. Davis, Guardian of Erasmus, Claiming His Freedom, v. The Executors of Samuel Hale.

January Term, 1843.

**New Trial—Conflicting Evidence\*—Concurrent Verdicts.**—A verdict's being against evidence is not a ground for a new trial, where testimony, on both sides, has been submitted to the Jury, on which they might find either way. Nor, where there have been two concurrent verdicts, and no rule of law violated.

In this case, there have been two concurrent verdicts, in favor of the plaintiff,

\*New Trial—Conflicting Evidence.—See Knight v. Mantz, Adm'r, Ga. Dec. pt. 1, p. 22, and *foot-note*; Bagshaw v. Dorsett, Ga. Dec. pt. 2, p. 42, and *foot-note*.

establishing his freedom; and a motion for a new trial is now made, upon the following ground:—"That the verdict is against evidence, inasmuch as no sufficient proof was offered, of the freedom of the plaintiff's ward." The proofs, offered in the case, were of a contrary character. According to one set of witnesses, the boy, Erasmus, was said to be the son of a white woman; and from other evidence of pedigree, it was said, that he was the son of a white man, who left him free at twenty-one years of age. And in addition to these two contradictory tales, it was further proven, that the boy had been left in the care of some person, in South Carolina, not in the character of a slave, but more in the character of a free person of color. But how the boy got out of the possession of that person, and came to this State, does not appear. And the next we hear of him is in this State, in possession of Benjamin Sims, exercising acts of ownership over him, as a slave, and who sold him as such, to the person who now claims him, as his slave, by purchase from Sims. But whilst the boy was held by Sims, it was proved, by one witness, that Sims said, he had no right to hold the boy, after he arrived at the age of twenty-one years, or words to this effect. And this is the substance of the evidence, adduced on the trial.

The rule for granting new trials, upon the ground of a want of evidence, is that there is no evidence, upon which the verdict of the Jury can be supported. But, if there be any evidence to support the verdict, although it may be contradictory,

83 and even if the Court \*should be of opinion, that had the case been tried before the Court itself, it would have given a different verdict upon the facts; yet the Jury, in such cases, being the sole judges of the quantum, as well as the force and effect, of the evidence adduced before them, no new trial will be granted.—See *Graham on N. Trials*, 284, 381; 3 *Morgan*, 240; 1 *Wilson*, 22; 3 *Binney*, 317. Nor will a new trial be granted, where there is evidence on both sides, and no rule of Law violated, nor manifest injustice done, although there may appear to have been a preponderance of evidence, against the verdict.—2 *Strange*, 1142. Nor will a new trial be granted, when there have been two concurring verdicts, and no rule of Law violated.—3 *Taunt.* 232; 2 *John. R.* 457; 7 *Wendel.* 270; 3 *J. J. Marshal*, 421; 5 *Mass. R.* 353.

In this case, there being evidence on both sides of the question, submitted to the Jury, and upon which they might have found, either for plaintiff or defendant; and, secondly, there being two concurring verdicts, establishing the freedom of the plaintiff's ward; and, thirdly, there being no rule of Law violated, in the trial of the case, and no manifest injustice done by the verdict, it is the decision of this Court, that a new trial be, and is hereby, refused.

84 \**Frances Moore v. Germain T. Dortic and John J. Clayton, Ex'rs of Eugene D. Cook, Dec'd.*

January Term, 1843.

**Debts of Decedent—Order of Payment.**—In paying the debts of a decedent, mortgages have a general lien on the estate, on the same footing with judgments, in the order of priority of date.

This bill states, that Eugene D. Cook, the testator, in his life time, made and executed a note, and mortgage to secure the note, to complainant; that after the note became due, the testator made two payments, leaving a large balance due, on said mortgage and note; that testator's estate is largely insolvent, and that debts of superior degree will only be paid; that the executors are about to pay debts, of inferior degree to the mortgage debt; and that the executors will not be enabled to respond, out of their individual property, the amount which they may pay, out of the legal order; and the bill prays an Injunction, which was granted.

The defendants filed a general demurrer, for the want of Equity; and, in the argument, insist that a mortgage debt is not one of superior degree, but must be considered as of no higher degree, than the note, which it is intended to secure; that our statute of 1792 places bonds before notes of hand, and that notes of hand are not named in said Act, which directs executors and administrators, in what order they are to pay the debts due by decedents; and that if notes of hand are to have a place in the statute, they must be placed just before open accounts; and that, therefore, complainant is not entitled to the preference claimed, under the mortgage, made to secure the payment of the note. That the Legislature could not have intended, because a creditor happened to take a mortgage, on a part of the debtor's property, that, so soon as the debtor departed this life, the mortgage was to operate as general lien on the whole estate. And in support of these grounds, the defendants referred to an Act of the State of South Carolina on the same subject,

85 \*and which shews, by comparing them, that our Act is a copy of the South Carolina Act, and that the Courts of that state have given to their Act the construction, contended for by defendants; and that the words, "other obligations," in our Act of 1792, do not include notes of hand, but must mean other sealed instruments; and the defendants' counsel referred the Court to the following authorities:—*Grensly on Ex.* 241; *Powell on Mort.* 775, (note); 1 *Ves. Sr.* 313; *Williams on Ex.* 671; 2 *McCord R.* 188.

And on the part of the Complainant, it is contended, that the order, in which debts shall be paid, upon the death of a party, is a question of discretion in the Legislature, and therefore entirely arbitrary. That the Statute of 1792, declaring the order of pay-



ing debts, is, so far as the complainant's claim is concerned, clear and explicit, and that by every rule, laid down by the Courts for the construction of Statutes, the words, when plain and explicit, cannot be altered by mere construction, so as to hold, that the Legislature did not mean what they have said, but have meant something, which they did not say. And to prove that this rule of paying of debts is arbitrary, and has been altered from the common law rule, and that Courts of Chancery lay down rules by which they will be governed in their Court, the Court is referred to the following cases:—2 Chitty's Bl. 340, 365; 2 Ch. R. 54, 142; and the Act of 1764, Prince D. 223, Sec. 8. Wherever a creditor is an administrator, he must pay debts according to their dignity, and cannot retain out of their order.

The Court, in examining the authorities referred to, admits that the case, cited from McCord's Reports, is one in point, and would control this question, if this Court adopts the rule, as applied in that case. But as this court feels itself bound, in the construction of all Law, to pursue the rule laid down by the most eminent Judges, from Sir William Blackstone, down to the present day, it cannot concur with the rule laid down by the Judges in that case. What are these rules? 1st. Words are to be taken in their most common and known signification—if they be doubtful, then the context. Next, the subject matter. And, lastly, the reason and spirit of the Law, and which is called an equitable one. These are the rules, as stated by Mr. Blackstone. Now let us see whether these rules have been followed by other, and what Judges. \*If words go beyond

the intention, it rests with the Legislature to make an alteration." "Our decision," said Lord Tenterden in a recent judgment, "may, perhaps, in this particular case, operate to defeat the object of the Statute; but it is better to abide by this consequence, than to put upon it a construction, not warranted by the Act, in order to give effect to what we may suppose to be the intention of the Legislature."—(R. v. Braham, 8 Barn. & Cres. 104.) In another case, the same distinguished Judge said, "The words may probably go beyond the intention; but if they do, it rests with the Legislature to make the alteration. The duty of the Court, is only to construe and give effect to the provision.—(Notley v. Buck, 8 Barn. & Cres. 164.) "It is safer," said Mr. Justice Ashurst, in a judgment on the Game Laws, "to adopt what the Legislature have actually said, than to suppose what they meant to say."—(1 T. R. 52.) "I have often lamented," said Lord Tenterden, near the commencement of his judicial career, "that in so many instances, the Courts have departed from the plain and literal construction of the Statutes, relating to the settlement of the poor. As far as the authorities go, I have always held, and shall always hold, myself bound; but when they are silent, I hold myself

bound to construe these acts of Parliament, according to the plain and popular meaning of their words."—(R. v. Turvey, 2 B. & A. 522.) And see Lord Ellenborough's observations, in R. v. Bray, (3 M. & S. 20.) And the same disposition has been shown, and equally salutary doctrines inculcated, with regard to extending Statutes by Equity.—See Brandling & Barrington, 6 B. & C. 475. From the foregoing authorities, it is clearly established, that Courts are bound by the words of a Statute, where they are not ambiguous. What are the words of the Statute of 1792, which I am called on to give effect to? They are as follows:—"Debts due by a testator, or intestate, shall be paid by executors and administrators, in the order following, viz. funeral and other expenses of the last sickness; charges of probate and will, or letters of administration; next, debts due to the public; next, judgments, mortgages, and executions, (the eldest first); next, rent; then, bonds, or other obligations; and, lastly, debts due on open accounts: but no preference whatever shall be given, to creditors in equal degree, where there is a deficiency in assets, except in cases of judgments, mortgages that shall be recorded, from the time of recording, and executions lodged in the Sheriff's office, \*the eldest of which shall be first paid, or in those cases where a creditor may have a lien on any part of the estate."

The case now under consideration, and the demurrer filed, calls on the Court to say, whether judgments, mortgages, and executions, the eldest first, shall be paid, after paying off funeral and other expenses of the last sickness, and charges for administration and debts due the public; or whether the Court will construe these words in the Act to mean notes of hand, which the mortgage was made to secure: and as notes of hand are not named in the Statute, to interpolate them into the Statute, just before open accounts, as open accounts are last to be paid. From the rules before laid down, by the cases cited, for the construction of Statutes, this Court does not hold or possess the right, to say to the Legislature, you have said so, or so, but you did not mean what you have said. I construe your words, to mean quite a different thing. You have said, mortgages shall be paid, with judgments and executions, the eldest first; but I say you meant the note of hand was to be the rule by which you are to be paid. Were I to hold such rules, for construing the plain words of the Legislature, I think they ought, as speedily as possible, to deprive me of the power of being the interpreter of their words and meaning, or to execute their will.

It is therefore the decision of this Court, that, after the payment, by executors and administrators, of funeral and other expenses of the last sickness, charges of probate and will, or letters of administration, and debts due the public, then judgments, mortgages, and executions, the eldest first. But, where there is deficiency of assets, cred-

itors in equal degree, as different mortgagees and judgment creditors, the lien must be determined from the time of its being recorded. Thus it will be seen, that whilst the Legislature have given to mortgagees a general lien on the estate of their deceased mortgagor, which, before his death, was but a specific lien, they have, on the other hand, deprived the mortgagees of their specific lien, by postponing them to the funeral and other expenses of the last sickness, charges of probate &c. and next debts due the public: so that if the whole of a decedent's property were under mortgage, and the decedent's funeral expenses and last sickness, charge for probate &c. and debts due the public, were to take the whole estate; the mortgagee  
88 \*would lose his lien and his debt.

The mortgagee is therefore entitled to recover her debt, in the order prescribed by the Act of 1792.

From the points raised in this case, under this demurrer, the Court is called on to decide, whether notes of hand, and other written promises or agreements, are provided for; and if provided for, where are they to stand, in payment of the assets. And here, the Court finds much more difficulty, in the construction of every part of the Act. If notes of hand be a *casus omnisus*, then it can, in no case, be supplied by Courts of Law: Judges are bound to take the Acts of Parliament, as the Legislature have made them.—(1 T. R. 52.) If notes and other instruments in writing are provided for, it is under that part of the Statute which says, "then, bonds or other obligations, and lastly, debts due on open account." Now, according to the rule as laid down for the construction of Statutes, words are to be taken in their plain and popular meaning. Now is the Court to consider, that the Legislature did not intend to provide for the payment of notes and other written promises, whilst they have provided for the payment of open accounts? It is the opinion of this Court, that the Legislature did not intend to omit such evidences of debts; but used the words, "bonds and other obligations," in their common or popular sense, and therefore included notes of hand, and other promises in writing, under the words, "other obligations," and placed them on the same footing with bonds. And this is the construction, which this portion of the Law has uniformly received, in the Middle District. This Court, therefore, decides, that bonds, notes, and other written acknowledgments of the decedent, should be placed on the same footing, in payment of the decedent's debts.

The demurrer, for want of Equity, in complainant's bill, is hereby, overruled, and the defendants ordered to answer fully, to complainant's bill.

William W. Holt, Robert Clarke, George Schley, Counsel for Complainant.

Henry H. Cumming, Counsel for Defendants.

# 89 \*Hitt & Dill v. Charles Lippitt.

June Term, 1843.

1. **Misjoinder of Actions.**—A count in tort cannot be joined with one in assumpsit.
2. **Same—When Allegation of Fraud and Scienter May Be Treated as Surplusage.**—But, where assumpsit is the proper remedy, a scienter is not necessary, to enable a party to recover, for false representations. Hence, the allegations of fraud and a scienter, in such a case, are mere surplusage; and will not make the count sound in tort, so as to constitute a mis-joinder with a previous count for money paid.
3. **Bill of Exchange—Guaranty of Acceptance—Inures to Benefit of Accommodation Indorser, When.**—A promise, by a third person, to the drawer of a bill of exchange, that the drawee shall accept it, will enure to the benefit of an endorser for the drawer's accommodation, if communicated to him, by the promisor's authority; and will sustain an action, by the endorser, for a breach of guaranty, if the bill is not accepted.
4. **Same—Same—Same—Payment by Endorser—Interest.**—In an action on such a guaranty, the endorser, having paid the bill, is entitled to recover interest.

This is an action of assumpsit, to recover on a breach of verbal warranty, by the defendant, that one William H. Smith, of Savannah, should accept a bill of exchange, drawn by Snead & Danforth, of Augusta, and endorsed by Hitt & Dill.

The facts of this case, and upon which the plaintiffs have recovered are as follows:—Snead & Danforth were merchants in Augusta, and dealing in the purchase and sale of cotton, and constituted Lippitt & Smith, under the name of William H. Smith, their factors, in Savannah; and having made several shipments of cotton, consigned to Lippitt & Smith, they drew a bill of exchange on William H. Smith, (being the style of the firm,) for three thousand three hundred dollars, which was endorsed by Hitt & Dill, and accepted by William H. Smith. But before this bill arrived at maturity, Lippitt & Smith disagreed, and dissolved their mercantile connection. And a few days before the bill was to be paid

in Savannah, by Lippitt & Smith,  
90 \*Lippitt came to Augusta, and had an interview with Snead, one of the partners, in relation to making a new draft, to get the money to meet the three thousand three hundred dollars, as cotton had declined in price, and it was thought best not then to force a sale. And in this negotiation about renewing the draft, Snead informed Lippitt, that he could not ask his friends, Hitt & Dill, to endorse his draft, unless they could be assured that the bill would be accepted, by William H. Smith, on whom it was to be drawn: whereupon Lippitt assured and promised Snead & Danforth, that the bill, to be drawn by them, and to be endorsed by Hitt & Dill, should be accepted by William H. Smith, of Savannah, and authorized Snead so to state to Hitt & Dill, or language to that effect: upon which, Snead communicated



this assurance to Hitt & Dill, and obtained their endorsement on the bill, in renewal of the \$3,300. And in addition to this evidence, the plaintiffs proved a written memorandum, in the hand writing of Lippitt, as follows: "Snead & Danforth, your draft on William H. Smith, due 19-22 April, for \$3,300, must be renewed in full. The one on L. & S. due 23-26 April, will be paid in full." And which memorandum was left by Lippitt, at the store of Hitt & Dill. When the last bill was drawn, the Bank required a reduction of \$300; and the new draft, or bill, was discounted for \$3,000, and the amount applied to the payment of the \$3,300 bill. And when the bill was sent to Savannah, and presented to William H. Smith, he refused to accept it, according to Lippitt's promise, or undertaking, before stated; and Hitt & Dill were compelled to pay the bill. And the two bills were also in evidence before the Jury.

The defendant introduced no evidence, and took the conclusion. And before the Jury, the defendant contended that what passed, between Snead and Lippitt, did not amount to a warranty, which could bind Lippitt. 2ndly. That if it did, it was a warranty to Snead & Danforth, and not to Hitt & Dill. And on the part of the plaintiffs, it was contended, before the Jury, that what Lippitt had promised, to Snead & Danforth, did amount to a warranty, that Smith should accept the bill, and that the warranty was really made to Hitt & Dill, and that Snead & Danforth were merely the conduit pipe, through which the warranty passed, from Lippitt, to Hitt & Dill; and that this warranty was the sole motive, which moved Hitt & Dill to make

their endorsement, on the second bill, 91 as Lippitt & \*Smith were primarily liable, as acceptors on the first bill, and were good for the amount; and that the written memorandum, left by Lippitt, at the store of Hitt & Dill, was strong presumptive evidence, that there was a perfect understanding, between Hitt & Dill and Lippitt, as to the intended negotiation of the second bill. The Court charged the Jury, that if, from the evidence, they believed that what passed, between Snead & Danforth and Lippitt, was only intended to apply to Snead & Danforth, and not to extend to Hitt & Dill, then they were bound to find for the defendants. But if they believed that what had passed, between Snead and Lippitt, was intended by Lippitt, to convey the guaranty of Smith's acceptance, to them, Hitt & Dill, and that that guaranty was the moving cause, or consideration, of their endorsement, and that Snead was the conduit pipe, through which it was to pass to Hitt & Dill; that the promise of Lippitt did amount, in Law, to a warranty, that Smith should accept the bill; and he having refused to accept it, amounted to a breach of warranty, on the part of Lippitt; and in that event, they should find for the plaintiffs. And the Jury found a verdict for the plaintiffs, for the amount of the bill last drawn, with the interest.

A motion is now made to arrest the judgment, upon the ground, that the declaration contains two counts—one in assumpsit, and the second in tort; and the verdict being general, no judgment can be rendered, as tort and contract cannot be joined.

The first count in this declaration is an indebitatus count, for money paid, laid out, and expended, for the defendant, Lippitt, according to a bill of particulars, attached; and which bill of particulars briefly states the payment of the bill, and the promise of Lippitt, that Smith should accept the bill, and which was refused by Smith. The second count is contended, by defendant, to be in tort, and not in contract; and can only be properly understood, by giving a copy of this count, which is as follows:—

"And also, for that whereas, on the seventeenth day of April, and in the year aforesaid, at the County aforesaid, the said Charles and one William H. Smith being the acceptors, (as partners under the firm of William H. Smith,) of a certain bill of exchange for the sum of three thousand three hundred dollars, drawn on them by Snead & Danforth, in favor of and endorsed by your petitioners, and which was to 92 become due on the \*twenty-second day of April, in the year aforesaid, and which the said Charles and William H. would be bound to pay; the said Charles, fraudulently intending to deceive and defraud your petitioners, and well knowing that the said William H. (whose connexion in business with the said Charles, as partners as aforesaid, had been dissolved) would not accept any other draft, in renewal of the one before mentioned, in order to induce your petitioners to endorse a draft for three thousand dollars, in renewal of the one first mentioned, then and there represented to and promised your petitioner, that the said William H. would accept the same; and your petitioners, then and there confiding in the said representation and promise of the said Charles, then and there endorsed a draft for three thousand dollars, drawn by Snead & Danforth, on the said William H. bearing date the day and year in this count first mentioned, and payable sixty days after date, which draft was negotiated by the drawers, and the proceeds applied to the payment of the draft for three thousand three hundred dollars. And your petitioners say, that the said Charles deceived and defrauded them, in this: that the said William H. did not, and would not, accept the said draft for three thousand dollars, although especially requested so to do, and the same was returned protested for non-acceptance, and your petitioners obliged to pay the amount thereof, to wit, on the nineteenth day of April, in the year and County aforesaid, of which the said Charles then and there had notice. By means whereof your petitioners lost all recourse against the said Charles and William H. or either of them, on either of the said drafts, and are greatly injured and damaged; all which is to the damage of your petitioners six thousand dollars."

And the defendants' counsel refer the Court to the following cases, in support of their position, that this is a count in tort, and not in contract:—2 Saunders P. 516; 2 East, 446; 19 Eng. Com. L. Rep. 45, 267; 2 Chitty R. 343; 18 English Com. L. Rep. 361; 13 Ib. 170; 6 East, 333; 3 East, 62; 1 John. R. 503. And on the part of the plaintiffs, it is admitted, that tort and contract cannot be joined; but they insist that the second count in this declaration is not in tort, but is in assumpsit; and that the facts of this case require the remedy to be in contract; and refer the Court to the following cases. And the

plaintiffs further insist that the cases cited by \*defendant in 3 and 6 East, have been overruled, by the case in 5 Bos. & Pull. 365. They also cite 12 East, 452; Evans P. 87; 2 Nott & McCord R. 543; 2 East, 446; 19 English Com. L. R. 267; 11 John. R. 479; 4 Yeates R. 109; 2 Caine's R. 216; 6 John. R. 138.

From the foregoing authorities, the Court deduces the following rules, as plainly marked out, between tort and contract, or when a case requires a remedy sounding in form *ex delicto*, or *ex contractu*. Cases, where the remedy should be *ex delicto*, most generally arise, where the party selling has a knowledge of some latent defect, which the purchaser cannot discover, by ordinary diligence and examination, and the seller conceals the same, from the purchaser. In such cases, the Law considers it such a fraud, as amounts to a tort; and the gist of this action is the scienter, and its concealment; and in such cases, the scienter must be averred and proven.

But, in actions sounding in form *ex contractu*, the causes of action must arise upon a quite different state of facts. In this class of cases, the cause of action must arise from some statement, or representation, of the party to be charged, in relation to the thing bargained for, and which is untrue, and which causes injury to the opposite party. And in this class of cases, the scienter need not be averred, or proven, or if averred, need not be proven.—(19 Eng. Com. L. R. 267.) And in those cases, where the matter arises from contract, and the opposite party has been injured by any representations, made by the person selling, or undertaking to perform any act, and he fails to perform such promise, or maintain his representations; then an action must be brought, sounding in form *ex contractu*. And in this form of action, it is not material, whether the party making the representation, knew it to be false, at the time, or not. In applying these rules to the facts of this case, as developed by the testimony, the Court is brought to the conclusion, that this case is one which sounds in contract; and therefore the action of assumpsit is the proper form of action.

But it is contended by defendant, that the second count in this declaration sounds in tort, and not in contract, and is therefore improperly joined, with the first count.

The Court has examined this second count, and is brought to different conclusion, from that of defendant's counsel. 94 \*and the Court decides, that this count is in assumpsit and is strictly within the rules of pleading, as laid down by our Judiciary Act of 1799, which declares, that the plaintiff shall plainly, clearly, and distinctly, set forth his cause of action. And in this count, the plaintiff's case is fully set out, except that the plaintiff has averred that Lippitt well knew, at the time that he made the warranty, that Smith would not accept the bill, to be drawn and accepted by him. This averment is but surplusage, as it was not necessary to the plaintiff's recovery; and if made, need not have been proven. In every other respect, it is a count upon the warranty, which has been broken. The Court therefore decides, that there is no mis-joinder of counts, and overrules the motion in arrest of judgment.

The next question, presented by the defendant, is a motion for a new trial. And the first ground is, "that the verdict is contrary to evidence, inasmuch as the guaranty, alleged to have been made by the defendant, to the plaintiffs, is not proved." This ground is involved in the question of fact, which falls within the province of the Jury. The facts were submitted to them. And the Court charged the Jury, that if they believed, from the evidence, that Lippitt's statement to Snead was intended to apply to Hitt & Dill, and was intended by Lippitt to be communicated through Snead, to them, and was the moving cause of their endorsement; then it was, in effect, a warranty to Hitt & Dill, that Smith should accept the draft, to be drawn by Snead & Danforth, on Smith; and Smith having refused to accept, according to Lippitt's promise, it did amount to a breach of warranty, on the part of Lippitt. And that plaintiffs, in such case, had a right to recover; and from the evidence, the Court sees no cause to differ from the Jury, in their finding. This ground is therefore overruled.

The second ground, taken for a new trial, is, that the verdict is contrary to Law, inasmuch as the action is brought upon an alleged contract, not liquidated, and the Jury have increased their verdict, by including therein interest, on the principal sum claimed. Upon this ground, the Court and the defendant's counsel differ, upon the facts, under which the Law must be applied. The amount, for which the bill was to be drawn, was expressly agreed on by Lippitt, and Snead & Danforth, and subsequently stated by Lippitt, in his 95 \*written memorandum, left by him, at the store of Hitt & Dill; except that Lippitt wished the bill to be drawn for \$3,300, and the Bank would not discount it, for more than \$3,000. And the bill is set out, in this declaration, as a part of the cause of action, and which was agreed to and liquidated by Lippitt, both verbally and by his written memorandum; and



which sum, so agreed on, he guaranteed Smith should accept for. The Court therefore decides, that this ground cannot be sustained, and that the plaintiffs are entitled to recover interest, on the bill, which was not accepted by Smith, this amount having been liquidated, between all the parties.—2 Nott & McCord's S. C. R. 543.

The third and last ground taken is, "that the damages are excessive, for that if entitled to recover at all, the plaintiffs could only claim of the defendant one half of the original amount of \$3,000, the other half having been accepted for, by his former partner." This last ground is also one fact, and which was submitted to the Jury; and the Court charged them, that if, from the evidence, they believed that a draft for \$1,500, which was subsequently accepted by Smith, was in part performance of Lippitt's promise, then they could only find one half the amount of the \$3,000 draft. And

as there was evidence, that this draft was not accepted, in part performance of Lippitt's undertaking, and the Jury having found against such claim, set up by the defendant, this Court sees no ground, upon which it can say, that, in this, the Jury have erred. But on the contrary, the Court, believing that the Jury found according to the evidence before them, this last ground is also overruled, and a new trial refused.

Additional authorities quoted by defendant—1 Chitty's P. 231; 1 Barn. & Cres. 268; Gould's P. 215-16; 219, 437, 494. For plaintiff, 1 Douglass R. 17; 2 East, 446; Carlington & P. 45; 1 Chitty's P. 113, 154, 385.

Counsel for Plaintiffs—Messrs. A. J. & T. W. Miller, Mr. Crawford.

Counsel for Defendant—Mr. Gould, Messrs. Jenkins & Mann.

# DECISION IN THE NORTHERN CIRCUIT.

GARNETT ANDREWS, JUDGE.

## 99 \*HANCOCK SUPERIOR COURT.

Isaac S. Whitten, Pl'ff in Error, v. Thomas Little, Def't, Thomas Coleman, and Lewis D. Culm, Esq'rs, Justices.

January 13, 1843.

### 1. Assignment of Chose in Action—Protection at Law.

—A court of law will protect the assignment of a chose in action, under the same rules with a court of equity.

### 2. Same—Subsequent Garnishment in Favor of Creditor of Assignor—Interest of Assignee.\*—

The assignment of a chose in action will transfer the interest, to the assignee, notwithstanding a subsequent garnishment, in favor of a creditor of the assignor: and notice, to the debtor, of the assignment, is not necessary, to protect the assignee.

The answer of the Justice, to the writ of Certiorari, in the above case, discloses, that Thomas Little, the defendant, commenced his suit, in the 102d district, against Isaac Workman; that Isaac S. Whitten, the plaintiff in error, was summoned as garnishee, to depose his indebtedness to Workman; that Whitten deposed, "that, sometime since, he gave said Workman a promissory note, for twenty-five dollars, due said Workman, alone, or without either 'order,' or 'bearer,' included in the obligation of said note, on the first of November (then) next; that, before he was garnisheed, by the plaintiff (Little) he understood said note was traded, to James M. Hunt, and so believes; that this was his only indebtedness to said Workman," &c. And that judgment was thereupon rendered, against said Whitten, in favor of Little, for the amount of said note. Whitten being nothing more than a stake holder, and apprehending that he might hereafter be sued

by Hunt, wishes the judgment of the Court, declaring to whom he is liable.

It was contended by counsel for the plaintiff in error, that though the note was not negotiable at Law; yet it was a chose in action, \*which might be assigned, so as to protect the assignee, from the demands of Workman's creditors; that, if there were any equity, as between the maker and payer, such assignment could not defeat them; but as between third persons, Courts of Equity had always protected the rights of assignees; and that Courts of Law had so far adopted the rules of equity, on this subject, as to protect the rights of the assignee, to the same extent; though he had still to use the name of the assignor, whose interest is merely nominal, for the collection of the debt; and that Whitten, being a mere trustee, was bound to pay the money, due on his note, to whom, in equity, it was due. In support of these views, he read 3 Mass. R. 558; 4 Mass. R. 508; 1 Wash. C. C. R. 424; 2 Bayl. R. 441.

The defendant in error insisted, that, if the Court should be of opinion, that the note was assignable, to protect the assignee from the operation of the garnishment, the maker of the note, (Whitten,) should, before service, have had notice of such assignment: and that such notice had not been sufficiently given—the garnishee having only "understood," that said note was traded, to James M. Hunt.

The Court is of opinion, that it is now too late to discuss the question, whether the common law, as well as the equity, Courts, will protect the rights of an assignee of a chose in action. But in protecting his rights, it will be under the same rules, as have been adopted by the Courts of Equity, from imitation of whose practice, they have assumed the power, of noticing and protecting the rights of assignees of choses in action. According to the rules of equity, the assignee takes the chose in action, subject to all the subsisting equities, between the debtor and the assignor. If the debtor pays the debt to the assignee, after the assignment, and without notice thereof, it will be a good discharge of the debt.—*Meghan v. Mills*, 9 J. R. 64.

So, if the assignee, in any case, by failing to give notice to the debtor, put it in the power of the assignor to commit a fraud upon others, either by a subsequent assignment, or by a reception of the debt, from the debtor, he must suffer by such neglect. It would be inequitable, that the debtor, or other innocent assignees, should lose, \*by the neglect or fraud of the assignee.—2 *Simons*, 257; 5

### \*Assignment of Chose in Action—Priorities between Assignee and Garnishing Creditor.—

The assignment of a chose in action passes the property of the assignor therein to the assignee, and he takes precedence over the claim of a creditor of the assignor who subsequently seeks to reach the same by garnishment proceedings. *Baer v. English*, 84 Ga. 403, 11 S. E. Rep. 453; *First Nat. Bank v. Hartman Steel Co.*, 87 Ga. 435, 13 S. E. Rep. 586; *Haas v. Old Nat. Bank of Evansville*, 91 Ga. 307, 18 S. E. Rep. 188; *Jones v. Glover*, 93 Ga. 484, 21 S. E. Rep. 50.

And this is true even though the garnishing creditor has obtained judgment against the assignor previous to the assignment; the lien of a general judgment not being effective against choses in action until it has been fixed by a garnishment or some other collateral proceeding. *Fidelity, etc., Co. v. Exchange Bank of Macon*, 100 Ga. 619, 28 S. E. Rep. 393.



Simons, 195; 3 Russell, 1; 9 John. R. 64.

So, on the other hand, if the debtor should, after notice of the assignment, or even, of such facts as should put him on his guard, pay the debt to the assignor; it shall be considered fraudulent, as against the assignee, and he will have to pay the debt again, to him.—12 John. R. 343.

Laying out of the question whether the understanding of Whitten was not enough to put him on his guard, against paying the note to Workman, and whether, if such payment had been made, after what he had understood, about the assignment of the note, to Hunt; we will proceed to examine, whether any notice, before the garnishment was levied, was necessary, to defeat its lien, as against the assignment. Indeed, Whitten has, very properly, been put on his guard; so much so, that he refused to pay the money to Workman, unless authorized by the judgment of the Court.

The Court is of opinion, that the assignment, if made before the levying of the garnishment, is good, though notice may not have been given, until afterwards. The assignment was, certainly, effective and operative, as between Workman and Hunt, on the day that it was made; and should not, in equity, be defeated, unless some innocent person has been made to suffer, for the want of such notice. The plaintiff (Little) has not, in any manner, been injured, because Whitten was not notified of such assignment, before he (Little) served his summons of garnishment. Whether

such notice was given before, or after, the levy, could have made no difference, with him. If Whitten had paid the note to Workman, before notice of the assignment to Hunt; it would be a fraud on him, if he should be compelled to pay it again, to Hunt. Or, if some other innocent person had been about taking an assignment of the same debt, from Workman, and had applied to Whitten, to know, if it was due to him, (Workman;) then, according to the cases reported in Simons and Russell, above cited, if he, Whitten, not having had notice of the assignment, had answered in the affirmative, and such innocent person had, in consequence, taken a second assignment; it would be equitable that Hunt should be postponed, to such innocent assignee,

102 \*because, by his neglect, the second assignee had been induced to take the last assignment. The plaintiff, Little, can have no right to stand in a better situation, or have other rights, than those of his debtor, Workman, who had none, to the note of Whitten, after the assignment.

That the assignment is good, if made before the levy of the garnishment, though no notice may have been given, prior thereto, was fully sustained, in the cases of Wakefield v. Martin and Trustees, 3 Mass. R. 558; Dix, et al. v. Cobb and Trustees, 4 Mass. 508.

The Certiorari is sustained, and a new trial ordered.

Sanford, for Plaintiff in Certiorari.  
Sayre, for Defendant.

# DECISIONS IN THE WESTERN CIRCUIT.

JUNIUS HILLYER, JUDGE.

## 105 \*WALTON SUPERIOR COURT.

**Waters Brisco v. L. R. Brewer, B. B. Ransom, G. W. H. Murrel, and Urban Patillo.**

February, 1843.

1. **Plea to Jurisdiction—A Personal Plea.**—A plea to the jurisdiction is a personal right, and available only by defendant himself.
2. **Judgment of Justice—Want of Jurisdiction—Creditors Setting Aside in Equity.**—Judgments, in a Justice's Court, cannot be set aside, on the ground of want of jurisdiction, upon the application of other creditors, by bill in Equity.

The charges, in the above bill, are, that Briscoe held a note, made by Patillo, one of the defendants, for about two hundred dollars, on which he had sued in the Inferior Court, and obtained judgment. That the other defendants, likewise, held notes, individually, on Patillo, for about the same amount, and that, pending the suit, brought by Briscoe, they prevailed on Patillo to give them small notes, under thirty dollars, in lieu of their original notes, and that, on these small notes, suits were brought, in the Justice's Court, and judgments rendered, before the judgment in the Inferior Court, in favor of complainant. The bill further charges, that by these judgments, an amount of money (I do not now recollect how much) had been raised by the Sheriff, and was in his hands, for distribution, among the *fi. fas.* and prays that the *fi. fas.* in favor of defendants, be perpetually enjoined, and that the money, in the sheriff's hands, be paid over to complainant, in satisfaction of his *fi. fa.*

The demurrer is upon the ground, that there is no equity in the bill, and that, by

**\*Plea to Jurisdiction—A Personal Plea.**—A plea to the jurisdiction is personal to the parties over whom it is alleged that the court has no jurisdiction. Their co-defendants cannot plead it, or demur, or move to dismiss. *Rice v. Tarver*, 4 Ga. 571, 592. But sec. 5079 (3460) of the Code now declares: "Parties, by consent, express or implied, cannot give jurisdiction to the court as to the person or subject-matter of the suit. It may, however, be waived, so far as the rights of the parties are concerned, but not so as to prejudice third persons." Under this section, the creditors of a defendant can take advantage of the want of jurisdiction, and have the judgment declared void so far as it affects them. *Suydam v. Palmer*, 63 Ga. 546; *Beach v. Atkinson*, 87 Ga. 293, 13 S. E. Rep. 591. See also, *Ga. Railroad, etc., Co. v. Harris*, 5 Ga. 527; *Central Bank v. Gibson*, 11 Ga. 453; *Raney v. McRae*, 14 Ga. 589.

the Statute of the State, defendants had a right to do what the bill charges they had done.

Haygood, for Complainant.

James Jackson, for Defendants.

106 **\*By the Court.**—In determining the question, raised by the demurrer, it is not necessary to consider the constitutionality of that part of the Statute of 1811, which gives jurisdiction to the Justice's Court, in cases where the demand originally exceeded their jurisdiction, and which had been liquidated and divided, into sums within their jurisdiction. The constitutionality of that part of the Statute has been denied by complainants' counsel, with much earnestness, in the argument; but the demurrer must be sustained, on other grounds.

The want of jurisdiction, in the Justice's Court, and the constitutionality of the Statute, referred to, might have been enquired of, and determined, at the trial in the Justice's Court, and all further adjudication of that matter must be considered as concluded, by the judgment.

The plea to the jurisdiction is a personal right; and I know of no legal principle, by which the creditors of the defendant can set aside a judgment, on the ground that he failed to plead to the jurisdiction of the Court, which rendered the judgment. We might as well be called on, to set aside a judgment, on the application of creditors, on the ground that the defendant failed to plead usury, or infancy, or the Statute limitations, &c.

The demurrer must therefore be sustained, and the bill dismissed.

## 107 \*HALL SUPERIOR COURT.

**The State v. William T. Brazil.**

March Term, 1843.

**New Trial—Jury Consulting Witness after Being Charged.**—A new trial will be granted, if the Jury, after being charged with a cause, converse with a witness, who has testified before them.

**\*New Trial—Jury Consulting Outsider Improperly Admitted While Considering of Their Verdict.**—Where it appears that one who was not a member of the jury, and whose name was not on the list, did, without the knowledge or consent of the losing party or his counsel, accompany the jury to their room, remain there with them, and participate in the formation and rendition of the verdict, the losing party is entitled to a new trial. *Starling v. Thorne*, 87 Ga. 513, 13 S. E. Rep. 552.



Verdict of guilty of an assault.

On motion of counsel for the defendant, it is ordered by the Court, that the Solicitor General shew cause, on or before the first day of the next term of this Court, why the verdict of the Jury should not be set aside, and the judgment of the Court arrested in this case, and a new trial ordered, upon the following ground, to wit:

Because the Jury had and held conversations with David Martin, while in their

room, and that without leave of the Court; and that this rule operate as a supersedeas, in said case.

Wm. Daniel, Defendant's Attorney.

The Court is of opinion, that a new trial ought to be granted, on the ground stated in the rule. Juries must not be permitted to examine the witnesses, after they have been charged with a cause, by the Court. It is ordered, therefore, that a new trial be granted, in the above case.

## DECISIONS IN THE COWETA CIRCUIT.

WILLIAM EZZARD, JUDGE.

### 111 \*DE KALB SUPERIOR COURT.

Malinda Harris v. Angus Ferguson, Murat McGee, and A. Mimms, Justices.

March Term, 1843.

**Oath of Illegality—Conflicting Evidence—Inferior Court Competent to Decide.**—Where there is conflicting evidence, on an oath of illegality, in an inferior court: that court is competent to decide upon the weight of the evidence.

This Certiorari was filed, for the purpose of correcting certain errors, alleged to have been committed, in the Justice's Court, upon the trial of the illegality, upon an execution, issued from said Court. It appears, from the return of the Magistrates, that the evidence before them, as to the payment of the execution, which was the ground of illegality alleged, was conflicting; and it was competent for the Court, to determine as to the weight and credibility of the testimony. This being the case, I cannot determine that the Court erred, in dismissing said illegality. It is therefore ordered, that the Certiorari be dismissed, and the proceedings below affirmed.

### 112 \*Jesse L. Baker v. William Ezzard and Reuben Cone.

1. **Sale of Land—Fraudulent Representations—Actionable.**—Fraudulent representations, in the sale of lands, as to their quality, are actionable.

2. **New Trial—Misdirection in Matters of Law.**—A new

\***Practice in Justice's Court—Right of Magistrate to Decide upon Evidence.**—In a justice's court the magistrate has the right to decide upon the facts, on an affidavit of illegality, but his submitting the issue to a jury is no ground of error. *Burke v. McEachem*, Ga. Dec. pt. 2, p. 129; *Walker v. Tatum*, Ga. Dec. pt. 2, p. 161.

\***New Trial—Erroneous Instructions.**—See *Wylly v. King*, Ga. Dec. pt. 2, p. 7. and *foot-note*; *Maynor v. Lewis*, Ga. Dec. pt. 2, p. 205.

trial will be granted, for misdirection of the Judge, in matters of law, material to the issue.

This case was referred to me, for decision, by an order, passed at the last term of De Kalb Superior Court.

The original action was brought, upon a promissory note, made by defendants, and payable to one James A. Cooper, or bearer, and by said Cooper transferred to the present plaintiff.

The defense set up, to the payment of the note, on the trial, was, that the note was given to Cooper, in part payment for a lot of land, purchased by defendants, of Cooper, and that at the time of the purchase, defendants had not seen said lot of land, and that, in making the purchase, they relied entirely upon the representations of Cooper, as to the location and quality of the land, and so stated to him, at the time of the purchase. That said Cooper represented said lot of land to be a rich, level, valley lot, and of great value, which representation, it was contended on the part of the defendants, was wholly false and fraudulent; and that said lot was mostly mountainous, and broken, and of little or no value, and that this was well known to said Cooper, at the time of sale.

It was further insisted, that plaintiff was interested in said lot of land, and that the note in controversy was transferred to him, in consideration \*of his interest in said lot, and that the circumstances, attending the sale, were well known to him, at the time he received the note.

Upon the trial, the counsel for the defendants moved the Court, to instruct the Jury, that a false and fraudulent representation, by the vendor, as to the quality of the land sold, is the subject matter of action; and if they believed that such false and fraudulent representations were made, by the vendor, and that the defendants were damaged by them, to the amount of

the note sued on; they would find a verdict for the defendants.

This instruction the Court refused to give; but gave the contrary, viz. That a vendor of real estate is not responsible, in damages, for false and fraudulent affirmations, as to the quality of the land sold.

The Jury found a verdict for the plaintiff, for the amount of the note.

Defendants' counsel then moved for a new trial, on the following grounds:

1st. Because the Court erred in the opinion, expressed to the Jury, that the vendor of lands is not responsible in damages, to the vendee, for a false and fraudulent representation, as to the quality of the land sold.

2nd. Because the Court erred in not charging the Jury, that such vendor is responsible to such vendee, for such false and fraudulent representations.

3rd. Because the verdict of the Jury is contrary to Law and evidence.

I shall consider the first two grounds, together; because they involve the same principle.

The doctrine, asserted in the charge to the Jury, and objected to as erroneous, in the motion for new trial, is this,—

114 That, in the sale of \*lands, no fraud can be committed, by false affirmations, as to the quality of the lands, which shall subject the party making them to damages.

This is a question of great importance in this State, where a vast quantity of land is sold, without having been seen, by one or other of the contracting parties; and where much reliance is frequently placed, upon the representations of the party, acquainted with the quality of the land. It is certainly a sound moral principle, that a person, who, by his own false and fraudulent representations, induces another to part from his property, for less than its value, or to give more for property, than it is worth, is bound to make it good. This is common sense, and common honesty; and although the range of legal obligation may not be co-extensive with that of moral, yet I can see no reason, why they should not be equally binding, in this case. Here, the vendor alleged, that he was acquainted with the land—that it was rich, valley land, and very valuable. The vendees say, "we are unacquainted with the land, and purchase upon your representation, and give six hundred dollars, for a lot of land, proved not to be worth more than one hundred."

The vendor has, then, got five hundred dollars for the lot of land, more than it is worth. How has he got it? By his own false and fraudulent representation. He has given to the vendor nothing, for this five hundred dollars. Is it right that he should retain it? Is it just? Is it Law? Would it not be holding out a bribe, for villainy and fraud? Would it not be saying to every man, that you can cheat, and defraud, as much as you please, in the purchase and sale of lands, and shall be protected by Law?

But let us see, whether the Law is so. The reason, given by those, who contend that a person who is not liable, for false and fraudulent representations, as to the quality of lands, is, that it is in the power of the party, to go and see it, and therefore it is his own folly, if he relies upon the representations of the other party.

This appears to me to be a very poor and weak reason, for sanctioning fraud and legalizing dishonesty. It might be very inconvenient, for the party to go and see the lands,—it might lie at a great distance from him. Many other, and good reasons might exist.

115 \*Now is it not more for the welfare, interest, and security of society, that the Law should hold a man responsible, for his fraudulent representations, than to permit him to make them, and profit by them too, merely because the other party to the contract chose to put confidence in him, rather than submit to the expense and trouble of, perhaps, making a long journey to see his land? By deciding, that a person shall be liable for his false and fraudulent representations, no person can be injured. By establishing a contrary doctrine, many have been, and will be, defrauded.

But authority is not wanting, upon this question; and although, perhaps, no decision of the English Courts can be produced, where an action has been sustained, for a false and fraudulent representation, as to the quality of lands; yet the principle is fully recognized.

In England, the value, and of course the quality, of lands, is mostly ascertained by reference to the amount, for which they rent; and little is said, in sales, about quality, other than as it is determined by the rent. In this country, no such standard of value prevails.

In the case of *Risney v. Sealey*, 2 Salkeld, 211, the vendor represented to the purchaser, that the land rented for thirty pounds, when, in truth and in fact, it only rented for twenty; and the Court decided, that for this false affirmation, an action lay.

In 2 Lord Raymond, 1118-19, the same question occurred; and after very full consideration, was decided in the same way.

In the case of the *Duke of Norfolk v. Worthy*, 1 Campbell, 337, the vendor represented the estate to be within one mile of a Borough, when, in truth and in fact, it did not lie within three or four miles; and it was decided, that for this false representation, the contract should be rescinded.

The same doctrine is laid down and recognized, in 14 Vesey, 144; 1 Salkeld, 28; 3 Merivale, 704; and in *Sugden on Vendors*, 210.

Now there was the same objection, existing in these cases, to a recovery, as exists in the case under consideration. In 116 the one, it \*was in the power of the vendee, to ascertain what the property rented for, by enquiring of the tenant. In the other, it was also in his power to have looked at the estate, and to have as-



certained whether it was within one mile, or four miles, of the Borough. It was a matter, open and visible to the senses; yet he chose to rely on the representations of the vendor, and was defrauded; and the English Courts decided, that he should recover for the fraud.

In the case under consideration, the vendees might have gone, and looked at the land. They did not; but relied upon the representations of the vendor, and were defrauded. And shall they not recover for the fraud?

Nor are American authorities wanting, upon this question. In 1 Story's Eq. 205, the learned author, in treating upon this subject, says, that, "if a person, owning an estate, should sell it to another, representing that it contained a valuable mine, and the representations were false; the contract for sale, or the sale, if completed, might be avoided, for fraud; but if he represents that it contained twenty acres of woodland, or meadow, when it contained only nineteen acres and three-fourths, the small difference of a quarter of an acre could have no influence on the mind of the purchaser, and would not avoid the contract." Plainly indicating, that if there had been no woodland, or meadow, the contract might be avoided, for the fraudulent representation. Now, in both of these cases, it was in the power of the purchaser, to have gone and seen for himself, whether there was a valuable mine, or how much woodland, or meadow, there was.

The latter case is almost identical, with the case under consideration. Here, the land was represented to be rich, valley land, and very valuable: whereas it is mostly mountain, and of little or no value. Shall the contract be void, in the one case, and not in the other?

In Kentucky, it has been decided, that a fraudulent representation, as to the quality of lands, is actionable.—1 Little, 46.

The same doctrine has been established in Connecticut.—5 Day, 439. Though, previous to that time, a different doctrine prevailed.—2 Day, 128.

117 \*The Supreme Court of Alabama have also made a similar decision.—9 Porter, 165.

In the case of Wardell v. Fostick & Davis, 13 John. R. 325, the vendor sold a tract of land, without warranty of title, falsely representing that it lay in the township of Moab, State of Pennsylvania, when in truth and in fact, there was no such township, nor no such land. This was well known to the vendor. The vendee brought an action, for the false and fraudulent representations, and the Supreme Court of New York sustained the action. Now the same objection was urged, there, that is urged here, viz. that it was the duty of the vendee, to have gone and looked for the land, before he purchased; that whether it existed or not, was a matter, open and visible to the senses; and that if he chose to rely upon the representations of the vendor, it was his own

folly. That case is therefore identical, in principle, with the present.

The Law is the same in South Carolina.—1 Bay's R. 276; 1 Nott & McCord, 278.

This latter case was an action, brought upon two bonds, given in consideration of the purchase of a tract of land: and one of the grounds of defence, relied on, was false representations, by the vendor, as to the quality of the land. In delivering their opinion, the Court say, "A deficiency in quantity, or defect in quality, where there has been a false representation, are legitimate grounds for a reduction of the price, or rescission of the contract, as the case may be."

On full consideration of this branch of the case, I am therefore of opinion, that the interest of society, and of sound morality, as well as the preservation of good faith, in the making of contracts, require, that a person should be held responsible, for false and fraudulent representations, as to the quality of lands.

This principle is sustained, by the doctrines of the English Courts; and has been expressly recognized and established, as Law, by the highest judicial tribunals of many of our sister States.

There was, therefore, error in the charge of the presiding Judge.

118 \*In looking into the testimony in this case, I am by no means satisfied, that the evidence, as to fraudulent representations, was sufficient to justify the Jury, in finding for the defendants. But, as the charge of the Judge withdrew from their consideration all the evidence upon that point, I think that the ends of justice will be best promoted, by submitting the case to the consideration of another Jury. This I believe, too, to be in accordance with Law. For if the Judge, at the trial of a cause, misdirect the Jury on matters of Law, material to the issue, the verdict will be set aside, and a new trial granted.—6 Modern R. 242; 2 Salkeld, 649; 10 Barn. & Cres. 145; 5 Ib. 501; 3 Bingham, 319; 10 Johnson, 447; 5 Day, 479; 4 Conn. R. 356; 5 Mass. 438, 365; 9 Cowen, 674; 3 Wend. 418; 1 Ib. 511.

It is therefore ordered, considered, and adjudged, that the Rule Nisi be made absolute, and a new trial granted.

119 \*COBB SUPERIOR COURT.

Enoch Morris v. Hezekiah R. Foote, et al.

1. Chancery Practice—Answer as Evidence against Co-defendant.—The answer of one defendant, in a Bill in Equity, is evidence against a co-defendant, who is his privy in estate.

2. New Trial—Improper Admission of Evidence.\*—The

\*New Trial—Admitting Illegal Evidence—Facts Otherwise Established.—The admission of improper evidence is no ground for a new trial where the facts shown by it are established by other evidence. Cochran v. Davis, 20 Ga. 581, 582; Pines v. State, 21

improper admission of evidence is no ground for a new trial, when the facts, shown by it, are proved by other testimony.

**3. Executions—Delaying for Consideration—Discharging Surety on Appeal.**—Conceditur. Delaying, for a consideration, the levy of an execution against the principal, by which delay he becomes less able to pay it, will discharge the security on appeal.

This was a bill, filed by complainant, who was the security on appeal, in a suit, brought upon a promissory note, made by James B. Waller and William Morris, payable to John Anderson, which suit was brought in the name of John Anderson, for the use of John Meritt, against the said Waller and William Morris. The bill alleges that, after final judgment was rendered, on the appeal, in said case, the execution, issued upon the same, was transferred, by the said Meritt, to the said Foote, and that, after said transfer, said Foote made a contract with said Waller, the principal in said execution, and received from him a consideration, for forbearance on the said *fi. fa.* without consent of the said Enoch Morris, the security on the appeal. The bill further charges, that the said *fi. fa.* had been paid off, to the said Foote, with the money and property of the said Waller, and kept open, fraudulently, by the said Foote, and that he is now endeavoring to collect the money, due on said *fi. fa.* out of the said complainant, Morris. Wherefore he prays, that the said Hezekiah Foote may be perpetually enjoined, from the collection of said *fi. fa.* out of the said complainant. There have been two trials in this case, before two Special Juries, both of whom found for the complainant. After the last trial, at the last term of this Court, the defendant's counsel moved for a new trial, upon the following grounds:

Ga. 227, 237; *Desverges v. Desverges*, 31 Ga. 753, 755; *Carrol v. Gillion*, 33 Ga. 539, 546-7; *Steinheimer v. Coleman*, 39 Ga. 119, 124; *Knorr v. Raymond*, 73 Ga. 749, 763; *Smith v. State*, 88 Ga. 627, 628, 15 S. E. Rep. 675; *Payne v. Miller*, 89 Ga. 73, 14 S. E. Rep. 926; *Battle v. State*, 92 Ga. 465, 17 S. E. Rep. 861.

So a new trial will not be granted on such ground when the other evidence in the case is sufficient to sustain the verdict. *Stephens v. Crawford*, 1 Kelly 574, 580; *Arrington v. Cherry*, 10 Ga. 429; *Jordan v. Pollock*, 14 Ga. 145, 154; *Brady v. Little*, 21 Ga. 132, 134; *Pines v. State*, 21 Ga. 227, 237.

Or, where the verdict could not have been affected, or must have been the same, notwithstanding the admission. *Ellis v. Doe ex dem.*, 10 Ga. 253, 262; *Collier v. Cross*, 20 Ga. 1, 3.

**Same—Rejection of Legal Evidence—Where Facts Otherwise Shown.**—So the rejection of legal evidence is no ground for new trial when the facts which would have been proven thereby are shown by other evidence in the case. *Leary v. Leary*, 18 Ga. 696, 701; *Reich v. State*, 63 Ga. 616, 619.

Or where the evidence rejected could not have changed the result if admitted. *Fitts v. Johnson*, 22 Ga. 307, 311; *Johnson v. Johnson*, 30 Ga. 857, 859; *Wilcox v. Turner*, 46 Ga. 218, 220; *Littlefield v. Drawdy*, 84 Ga. 644, 651, 11 S. E. Rep. 504.

1st. Because the Court erred, in directing the Jury, that the answer  
120 \*of John Anderson was evidence against the said Foote, as one derived title from the other, and they were, therefore, privies.

2nd. Because the Court erred in charging the Jury, that, if the said Foote granted to Waller a delay in collecting the *fi. fa.* on a verbal contract, for a consideration, and that by such delay, Waller became less able to pay the debt; the judgment security was thereby discharged.

3rd. Because the finding is contrary to Law and evidence.

Upon the argument of the rule, the two latter grounds have been abandoned, by defendant's counsel. It therefore only becomes necessary to enquire, whether the first ground be well founded. It is a general rule, that the answer of one defendant is not evidence, against his co-defendant; but to this rule, as to all others, there are exceptions; and one of the exceptions is, when one defendant succeeds to another, and they become privies in estate, (*Wheeler's Amer. D.* 342-3; *Osborn v. The U. S. Bank*, 9 Wheaton, 738); and another is, when one defendant claims through another, or when they are all proved to be partners, in the same transaction.—*Field, et al. v. Holland, et al.*, 6 Cranch, 8; *Clarke's Ex'rs v. Van Reimsdeck*, 9 Cranch, 153. Then, as Foote derived his title to this execution from Meritt, who was the usee of Anderson, the plaintiff, they were privies in estate, and therefore, would seem to fall within the exception to the general rule, on this subject. But it is contended, that the answer of Anderson ought not to have been considered as evidence, against Foote, for the reason, that he had parted with all interest in the note, and was, in fact, interested to have the judgment set aside. There is no doubt, that Anderson's answer would have been competent evidence, against Foote, so far as any payment, or indulgence, may have been given, while he was the legal owner of the note, or judgment; and it is somewhat difficult to conceive, why his answer should not be evidence as to facts of the same nature, which might have occurred afterwards, provided the facts came within his knowledge. And I think a strong reason, in favor of this position, is this; that, being a party to the record, he could not be examined as a witness; and if the complainant could not procure his evidence, by means of his answers to a bill; he would be deprived of  
121 \*his testimony. But, admit the fact, that the Court did err, in directing the Jury, that this answer was evidence against the defendant, Foote; it remains to be seen, whether a new trial ought to be granted, for this reason. The rule, with regard to the admission of illegal testimony, is this: that a verdict will not be set aside, on this ground, provided there be sufficient evidence, without it, to authorise the find-



ing of the Jury.\*—Graham on New Trials, 246-7. I find upon an examination of the answer of Anderson, he states, in one place, that Foote gave Waller indulgence, but does not state that it was upon a contract, or for any consideration. This statement could not, therefore, have had any weight, upon the minds of the Jury; for a bare indulgence of this sort would not have operated as a discharge of the security. Upon the ground of payment, he states nothing, positively, as coming within his own knowledge, but says he has been informed, and believes, that the execution had been paid off. These are the only parts of his answer, which bear upon these points; and I cannot conceive, that they could have any effect upon the minds of the Jury, especially when we take into consideration the facts, which were proved by the other witnesses, which, in the opinion of the Court, were sufficient to support the verdict. This Rule Nisi was granted, mainly upon the second ground, to wit, the discharge of the security, by the indulgence. I was not satisfied, but what the Court might have erred, in its charge upon this point; as there seemed to be respectable authority, in opposition to the charge of the Court. But the more I have investigated the subject, since, the better I have become satisfied, that I was not in error; and what is quite gratifying to me, the fact is now conceded, by the able counsel for the defendant. It has been contended, in the argument, that the defendant was surprised, by the charge of the Court, upon this ground of indulgence, at the last trial, and that a new trial ought to be granted, on that ground. This is not one of the grounds, upon which the application is made; and if it were, it seems to me, that it would be establishing a dangerous precedent, to grant a new trial, merely upon the ground, that the Court had changed its opinion, between the first and the last trial, when it is conceded, that the opinion, delivered at the last trial, was correct. I have bestowed upon this case a good deal of reflection,

122 \*during the pendency of this rule, for the purpose of determining, whether the Court had committed any error, on the trial, which would entitle the parties to a re-hearing; and the result of that investigation is, that there is no sufficient ground, for granting a new trial.

The motion is therefore overruled.

123 \*William U. Anderson, Thomas Glascock, and Eli H. Baxter, for the Use of Eli H. Baxter, v. Ephraim Knight.

Abatement of Actions—Death of Joint Plaintiff.—If

\*See Mayer v. Wiltberger, Ante, 20.

†Abatement of Suit—Death of Joint Complainant.—A creditors' bill filed by several parties for distinct and separate demands does not abate upon the death of one of the complainants pending the suit. Berry v. Mathewes, 7 Ga. 457. 460.

one of several joint plaintiffs die, pendent lite; the suit will proceed in the name of the survivors, whether they appear to be partners, or not.

This action was predicated on two promissory notes, made by the defendant, and payable to William U. Anderson, Thomas Glascock, and Eli H. Baxter, or order. Pending said suit, and before final trial, Glascock, one of the payees, died, and his death was suggested on the record. The cause was permitted to proceed, in the name of the survivors, and a verdict was found for the plaintiffs. Defendant's counsel then made a motion in arrest of judgment, upon the following ground:—"Because the note, which was the foundation of the action, was made payable to all the plaintiffs, by name, and they are not averred to be partners, and Glascock being dead, and unrepresented, the Court erred in permitting the case to proceed."

It was conceded, at the trial, that if the payees of the notes, who are the nominal plaintiffs, had been co-partners; or if the fact had been averred in the declaration that they were co-partners, in this particular transaction; the action could have proceeded, properly, in the names of the survivors. But it was contended, that as there was no averment of this fact, the fair presumption was, that they were not co-partners; and not being co-partners, when Glascock died, he having an interest in said note; the suit abated, as to his interest, and could not proceed, until his representatives were made parties. Let us, then, examine this question. In Chit. Pl. 9, I find this authority: "When the contract was made with several persons, whether it were under seal, or in writing but not under seal, or by parol, if their legal interest were joint; they must all, if living, join in an action, in form ex contractu, for the breach of it, though the 124 contract \*with them was, in terms, joint and several." Then it was necessary for all these parties to be made plaintiffs to the action, as they were all living, at the time the suit was commenced. But if either of them had died, before the commencement of the action, the right of action would then have vested in the survivors, and not in the survivors and representatives of the deceased. In 1 Chity's Pl. 25, I find this authority: "When one or more of several obligees, covenantees, partners, or others, having a joint legal interest in the contract, dies; the action must be brought in the name of the survivor, and the executor or administrator of the deceased must not be joined." Then it is clear, from this authority, that, if Glascock had died, before the action was commenced, the right of action would have survived, to the other payees, Anderson and Baxter. This being the case, we will next enquire, what effect was produced on said suit, by the death of Glascock, pending the action. In Chit. Pl. 482, this doctrine is laid down: "When a sole plaintiff dies, pending the suit, such death may be pleaded

in abatement: but in the case of several plaintiffs, or defendants, the death of one does not abate the suit, if the cause of action survive to, or against the survivors."

In 2 Shellon's Practice, 191, I find this authority: "Now, in all cases of joint actions, if one of the plaintiffs, or defendants, die, pending the action; the suit shall not abate, but the suggestion may be entered on the roll, of such death, and the proceedings may be continued, without any sci. fa. in the name or names of the survivors." And this practice is in accordance with the provisions of Stat. 8 and 9 Wm. 3rd, Chap. 11, Sec. 7th, Schley's D. 290.

I am, therefore, of opinion, that the Court did not err, in permitting said cause to proceed, in the names of the survivors, without making the administrator of the deceased plaintiff, a party. The motion, to arrest the judgment, is, therefore, overruled, and the verdict and judgment, rendered in said case, affirmed.

## 125 \*Jesse C. Farrar v. George Baber.

1. **Form of Action—Debt.**—An action of Debt will not lie, to recover for the loan of a collateral article.
2. **Same—Indebitatus Assumpsit.**—Nor will indebitatus assumpsit.
3. **Judgment by Default—Reopening—Defects Available in Declaration.**—After opening a judgment by default, the defendant may avail himself of any radical defect, in plaintiff's declaration.

This certiorari was granted, at the instance of the plaintiff, for the purpose of correcting certain errors, alleged to have been committed, by the Inferior Court, in a suit, commenced by plaintiff, against defendant, upon the hearing of which a non-suit had been awarded. The petition alleges, that plaintiff instituted his action of debt, against defendant, in said Inferior Court, on an instrument in writing, in substance as follows: "Borrowed of Jesse C. Farrar, one hundred and fifty dollars, in July Scrip eighteen hundred and forty one, dated October the second, eighteen hundred and forty one,"—which was in the usual form of the action of debt, and that there was an averment, in the declaration, that the scrip was worth seventy-five cents to the dollar; that said action was returnable to the June term, 1842, of said Court, and that, at said term, defendant failed to appear, and judgment by default was entered; and that, at December term, he paid the cost, and opened the default, and filed his plea, and then excepted to plaintiff's declaration, upon the following grounds:

1st. That the action was improperly brought in debt; that it should have been assumpsit.

2d. That the declaration contained no legal cause of action, there being no promise, on the part of defendant, to pay the sum borrowed, and that the demand was not for money.

3d. That said declaration contained

126 no averment, that the loan \*was made by the plaintiff, at the instance and request of defendant, and that said declaration contained no super se assumpsit.

The Court sustained the exceptions taken to the declaration, and awarded a non-suit. Certain exceptions were taken to their decision, which they refused to sign. A writ of certiorari was then applied for, and obtained, directed to the Clerk of said Inferior Court; and in compliance with said writ, he has sent up the declaration; and as the errors complained of depend, entirely, upon the sufficiency, or insufficiency, of the declaration, it is only necessary to examine it, for the purpose of determining said Certiorari. Two questions arise, in this investigation—1st: Whether the declaration be defective. 2d: If so, whether they were such defects, as could have been taken advantage of at that stage of the case.

First, then, as of the proper action, whether it should have been debt, or assumpsit. It is contended on the one hand, that an action of debt could not be maintained, on this instrument, because it contains no promise to pay any thing; and if a promise could be implied, from the fact of borrowing, it would only be a promise to repay, or return, the thing borrowed, to wit, scrip,—and that an action of debt would not lie, for recovery of scrip, it being an action for the recovery of a debt eo nomine, and in numero.—1 Chitty's P. 123. On the other hand, it is contended, that debt may be maintained, inasmuch as debt will lie, whenever indebitatus assumpsit will.—Authority relied on, 1 Tidd's P. 3. There is no doubt of this fact. But the more important question, to be settled, is, whether an action of indebitatus assumpsit would lie, upon this instrument. The doctrine, contained in 1 Tidd's P. 2, is, that indebitatus assumpsit is the proper remedy, for the recovery of money, for a precedent debt, as for the sale of goods, &c. and the action of debt will also lie, in all similar cases. But will it lie, in a case like the present, when the instrument, declared on, shews nothing more than that defendant had borrowed of plaintiff a quantity of scrip, which the law would imply he was bound to return, and that his failure to do so would constitute such a breach of said implied contract, as would entitle plaintiff to his action against him, but not an action of indebitatus assumpsit, for a precedent debt, but what is termed a special action of assumpsit, for the non performance of an act, which he was legally bound to perform? And I find it

127 stated in \*2 Chitty's P. 277, note, that stock in the public funds cannot be recovered, in an action of indebitatus assumpsit, as money lent, but the lender must declare, specially, upon the promise to replace it.—Authorities cited, 5 Burr. 25, 89; 2 Bla. R. 684; 1 East, 1. And in the same note, it is stated, that, on failure to replace stock, the measure of damages is



the price, at the day when it ought to have been replaced, or at the trial, at the option of the plaintiff. Then, according to these authorities, neither debt, nor indebitatus assumpsit, will lie, on this instrument. But there is another objection to the declaration, which, I consider, is entitled to great weight: that is, that it does not contain any sufficient breach. The promise, which the law raises, by implication, from the act of borrowing, is that defendant would return the thing borrowed, to-wit, the scrip; and the breach, assigned in the declaration, is, that defendant had failed to pay the money. The breach of the contract, being essential to the cause of action, must in all cases be stated in the declaration.—1 Chitty's Pl. 365. I am therefore of opinion, that the declaration is defective, on this ground.

This brings us to the consideration of the second proposition, to-wit, whether defendant could avail himself of said exceptions, at that stage of the case. Our rule of Court says, that upon opening a judgment by default, the defendant shall plead instantler, to the merits of the action. Now, what are we to understand by this rule? That defendant is obliged to go to trial, on the merits, notwithstanding the declaration may be radically defective? or, simply, that he cannot plead in abatement? Judge Gould, in his Pleading, says, "a default cures no defect, in the declaration, which would not have been aided, on general demurrer, for no fact can be presumed to have been proved, when no trial has been had, and no proof exhibited; and therefore a motion in arrest of judgment, for the insufficiency of the declaration, after a default, operates precisely as a general demurrer, to the declaration, would have operated." A general demurrer goes to matter of substance only, and not to matter of form; and it is stated in Gould's Pl. 467, that "if the matter pleaded be, in itself, insufficient, without reference to the manner of pleading it, the defect is substantial." Now, let us apply this rule, to this case. Here is an action of debt, brought for a sum of money,

which, it is alleged, defendant owed the plaintiff, \*when it should have been a special action of assumpsit, for the recovery of damages, for a breach of the contract, in not returning the scrip borrowed. Again, the plaintiff's right of action mainly arose, from the breach of said implied contract, in not returning the scrip, and no such breach is alleged, in the declaration. It is stated in Gould's Pleading, 34, that "after a general imparlance, the defendant can plead, only to the merits, or, in legal phrase, to the action, and is, of course, precluded from pleading to the jurisdiction of the Court, the disability of the plaintiff to sue, or the form of the writ." This rule is equally applicable to a case, where the default is opened; and this is the true distinction, that defendant cannot plead in abatement, but must plead to the merits. But, it can not be con-

tended, that, because he can not plead in abatement, the plaintiff has the right to recover, in a declaration, which is wholly defective, not in form only, but in substance. Suppose a party were to bring an action of trover, and allege no conversion, could not the defendant avail himself of this defect, in the declaration, by way of demurrer, upon opening a default? I think so, most clearly. I am, therefore, of opinion, that the declaration, in this case, is so defective, that if a recovery had been had upon it, the judgment might have been arrested; and that defendant, therefore, had the right, to avail himself of said defects, by way of demurrer, upon opening the default, and that the Inferior Court did not err, in awarding a non-suit, in said case.

It is therefore ordered, that the Certiorari be dismissed, and the proceedings in the Court below affirmed.

## 129 \*FAYETTE SUPERIOR COURT.

John Burke v. Archibald McEachern, Defendant, and D. D. Durham, and John Simmons, Justices.

1. Justice's Court—Right of Magistrate to Decide upon Evidence.\*—In a justice's court, the magistrate has a right to decide upon the facts, or on affidavit of illegality, But.

2. Same—Same—Submitting Issue to Jury.—His submitting the issue to a Jury is no ground of error.

This Certiorari was brought, for the purpose of correcting certain errors, alleged to have been committed, upon the trial of a case of illegality. The ground of illegality was payment; and the errors assigned are, that the Court erred, in submitting the issue, as to the fact of payment, to a Jury; and that the finding of the Jury was contrary to evidence. The Justices state, in their return, that, after hearing the evidence, as to payment, they were satisfied, and that they then submitted the case to a Jury, and that the Jury found, by their verdict, that the execution was paid off. It appears, then, that the case was tried, both by the Court and Jury; and, although it was competent for the Court, to have decided the question, themselves, without a Jury; yet I do not conceive, that the mere fact, of their submitting the case to a Jury was a ground of error, when the verdict of the Jury was only confirmatory of their own opinion. As to the other ground, I think the evidence of payment, as detailed by the return, shews that it was sufficient to establish the fact, and sustain the illegal-

\*Oath of Illegality—Right of Magistrate to Decide upon Conflicting Evidence.—Where there is conflicting evidence, on an oath of illegality, in an inferior court, the court is competent to decide upon the weight of the evidence. Harris v. Ferguson, Ga. Dec. pt. 2, p. 111; Walker v. Tatum, Ga. Dec. pt. 2, p. 161.

ity. It is, therefore, ordered, that the Certiorari be dismissed, and the proceedings of the Court below affirmed.

130 \*John Sellers v. Wm. W. Bishop, for the Use of John Reeves.

**Affidavit of Illegality—Going behind Judgment.\*—**An affidavit of illegality reaches nothing, prior to the judgment.

In this case, several grounds of error were alleged, in the petition: 1st. That Bishop never had any interest, in the account sued; 2nd. that the Court gave judgment, without any proof, to establish the account; 3rd. that one of the Court appeared as counsel, in said case; 4th. that the verdict of the Jury, on the trial of an affidavit of illegal-

**\*Affidavit of Illegality—When Judgment May Be Attacked by Same.**—The general doctrine is that an affidavit of illegality cannot go behind the judgment or decree: the judgment or decree being *res judicata* as to every defense which might have been pleaded at the trial of the cause. Mayor, etc., of Macon v. Trustees, 7 Ga. 204; Rodgers v. Evans, 8 Ga. 143; Mangham v. Reed, 11 Ga. 137; Swinney v. Watkins, 22 Ga. 570; Green v. Shields, 37 Ga. 35; Robinson v. Dumas, 42 Ga. 614; Inman v. Jones, 44 Ga. 44; Field v. Price, 50 Ga. 135; Chancy v. Carrigan, 53 Ga. 84; Scogin v. Beall, 54 Ga. 499; Sloan v. Cooper, 54 Ga. 486; Lynch v. Gannon, 57 Ga. 608; Finney v. Mayer, 61 Ga. 500; Dahlonega Gold Min. Co. v. Purdy, 68 Ga. 296; Harbig v. Freund & Co., 69 Ga. 180; Inman v. Foster, 74 Ga. 829; Bowen v. Groover, 77 Ga. 126; Griffin v. Frick, 97 Ga. 219, 23 S. E. Rep. 833; Ogle-tree v. Andrews, 99 Ga. 133, 24 S. E. Rep. 842.

The exception is when the judgment is not voidable merely, but wholly void; as where the court was wholly and under all circumstances without jurisdiction, or where the defendant was not served and did not appear, and so did not have his day in court. Parker v. Jennings, 26 Ga. 140; Inman v. Jones, 44 Ga. 44; Jackson v. Hitchcock, 48 Ga. 491; McLaren v. Beall, 50 Ga. 632; Hambrick v. Crawford, 55 Ga. 335; Brown v. Wilson, 59 Ga. 604; Hood v. Parker, 63 Ga. 510; Harbig v. Freund, 69 Ga. 180; Brantley v. Greer, 71 Ga. 11; Craig v. Fraser, 73 Ga. 246; Hamlin v. Coleman, 74 Ga. 831; Williams v. Sulter, 76 Ga. 355; Morris v. Morris, 76 Ga. 733; Planters' Loan & Sav. Bank v. Berry, 91 Ga. 264, 18 S. E. Rep. 137; Moye v. Walker, 96 Ga. 769, 22 S. E. Rep. 276; Manning v. Weyman, 99 Ga. 57, 26 S. E. Rep. 58.

See also, express provision of Georgia Code, § 4742, (3671): "If the defendant has not been served, and does not appear, he may take advantage of the defect by affidavit of illegality; but if he has had his day in court, he cannot go behind the judgment by an affidavit of illegality."

That it does not lie to a judgment which is voidable merely, see the following cases: Parker v. Jennings, 26 Ga. 140; Keaton v. Cox, 26 Ga. 162; Hart v. Lazaron, 46 Ga. 396; Emory v. Smith, 51 Ga. 323; Hood v. Parker, 63 Ga. 510; Greene v. Oliphant, 64 Ga. 565; Brantley v. Greer, 71 Ga. 11; Georgia R. R. & B. Co. v. Pendleton, 87 Ga. 751, 13 S. E. Rep. 822; Hartsfield v. Morris, 89 Ga. 254, 15 S. E. Rep. 363; Merry v. Wilds, 100 Ga. 425, 428, 28 S. E. Rep. 444.

ity, filed in said case, was erroneous, because it was proven, by Sellers, who was the defendant in the Court below, that he had paid off said account, to said Bishop, subsequent to the date thereof. The return of the Magistrate shews, that the suit was brought upon an account, for blacksmith's work, done by the said Bishop, which was legally established. That there was no plea filed, and no defence made. That judgment was entered, and execution issued, and levy made; and that the defendant then swore to the illegality. And it appears, from the facts stated in the petition, that the illegality was taken, upon grounds, which existed, anterior to the judgment, and that the illegality was not sustained. The return is not full, as to all the matters stated in the petition. But, no exception having been taken to the same, the Court must decide upon the facts, as they appear. There being, then, no defence made at the trial, and judgment having been rendered against the defendant, he ought, if he was dissatisfied with said judgment, to have entered an appeal, or, if there was error committed by the Court, he ought to have applied then, for a Certiorari, to have corrected that error. But, it seems he preferred relying upon an affidavit of illegality, the principal ground of which was, that the debt had been paid, not since the judgment, but at some period, subsequent to the date of said account. A party can not swear to the illegality of the execution, upon a ground, which existed before the judgment; but ought to set up such matter, as a defence, on the trial. There is, then, nothing, from which it appears, in this case, that there was any error committed, either by the Court, or Jury. It is, therefore, ordered, that the Certiorari be dismissed, and that the proceedings below stand affirmed.

131 \*Benjamin Garner v. Hezekiah Hopgood, and William Veenon.

**Evidence—Objections—Failure to Urge—Waiver.\*—**Objections to the admission of a note in evidence cannot be made, after the paper has been read, and the defendant has offered evidence to defeat it.

This Certiorari was filed, for the purpose of correcting certain errors, alleged to have been committed, in a Justice's Court, in a case, founded on a promissory note, to which defendants had plead duress, usury, &c. The petition states, that on the trial of said case, before the Jury, plaintiff in-

**\*Evidence—Objection—Waiver by Failure to Urge In Time.**—If a party permits evidence to go to the jury without objection, and the jury finds on the evidence, the party is not entitled to a new trial on the ground that the allegation and the proof do not correspond. Generally, when a party permits proceedings to be had, in the progress of his case without making any objection, the court will hold him to have waived the objection, and will not relieve him



introduced the note in evidence, and closed his testimony. That defendant then examined two or three witnesses, as to the consideration of the note, in support of his plea. After which, he made a motion for a non-suit, upon the ground, that the note had not been tendered to him, by the plaintiffs' counsel, as evidence, and that the Court sustained the motion, and awarded a non-suit. These facts are fully sustained, by the Magistrate's return. If the defendant had any objection, to the note's being read in evidence, he should have made the objection, when plaintiff's counsel offered to read the note, and his having failed to do so was a waiver of his right. It was certainly too late, to raise this objection, and move for a non-suit, after he had examined his witnesses, in the defence. It is, therefore, ordered, that the Certiorari be sustained, and a new trial ordered.

132 \*Walter S. Campbell v. Isma W. Wooldredge.

**Juries—Verdicts—Must Be Unanimous.**—A jury cannot find a verdict on the agreement of a majority; but must be unanimous.

This Certiorari was filed, for the purpose of correcting certain errors, allege to have been committed, on the trial of a suit, against the said Campbell, upon a note, to which the plea of infancy was filed. It is stated, that the Jury found a verdict for plaintiff. But the principal ground of error assigned is, that the Jury did not agree to the verdict, the verdict having been found, by a majority, the others dissenting. This ground is sustained, by the return of the Magistrate. It is necessary, that each member of the Jury should agree to a verdict; and a verdict, found by a majority, is illegal. It is, therefore, ordered, that the Certiorari be sustained, and a new trial granted.

133 \*Jesse Mann v. James A. Crombie, Harrison Walker and James Westbrooks, Justices.

**Action on Account—Proof—Proving Same in Previous Non-Suit Insufficient.**—Proving an account, in a

against the consequences of the proceeding, to which he had not objected at the proper time. See the following cases, including the principal case, cited to sustain this proposition in *Haiman v. Moses*, 39 Ga. 712; *Stewart v. Grimes*, *Dud.* 209; *Garner v. Hopgood*, Ga. Dec. pt. 2, p. 131; *Stroup v. Sullivan*, 2 Kelly 281; *Harrison v. Young*, 9 Ga. 359; *Carhart v. Wynn*, 22 Ga. 24; *Arline v. Miller*, 22 Ga. 330; *Bryan v. Gurr*, 27 Ga. 378; *Wilhelms v. Noble*, 36 Ga. 599; *Shewmake v. Jones' Ex'rs*, 37 Ga. 102.

†**Verdicts—Must Be Unanimous.**—The unanimous agreement of the jury is necessary to make their verdict legal. *Smith v. Mitchell*, 6 Ga. 465. But a new trial will not be granted, even in a criminal case, because one of the jurors, when polled, stated that he had agreed to the verdict reluctantly. *Parker v. State*, 81 Ga. 332, 6 S. E. Rep. 600.

Justice's court, previous to a non-suit, will not dispense with proof of the same account, in a subsequent action founded upon it, in the same court.

This was a suit, brought upon an open account, in favor of the said Crombie, against the said Mann, for blacksmith's work, in which a judgment was given for the plaintiff. The principal ground of error, complained of, is that the verdict of the Jury was contrary to evidence, in as much as defendant proved, that he had made a contract with plaintiff, to let him have his blacksmith tools, that year (the time within which the work was done) to do his work; and that the Jury found a verdict for the plaintiff, notwithstanding this fact was proved. The return of one of the Justices sustains this statement, in the petition. The other Justice says, there was one witness for defendant, but does not state what he proved. But says there was no evidence touching the case. He states another fact, in his return; to wit, that the same account had been sued on, at a previous term of the Court, and that it was then proven, and that a non-suit was then awarded: and that, when the suit was recommenced, the Court considered it unnecessary to prove the account again. This was certainly error, in the Court. I think, therefore, according to the facts, stated in both returns, there was error committed, both by the Court and Jury.

It is, therefore, ordered, that the Certiorari be sustained, and a new trial granted.

134 \*Benjamin Starr v. William Johnson.

**Evidence—Interested Witness—Party to Negotiable Paper—Where Not a Party to Suit.**—A party to a negotiable instrument, who is not a party to a suit upon it, is not, as a matter of course, so interested in the event, as to be an incompetent witness.

The object of this Certiorari is to correct certain errors, alleged to have been committed, on the trial of a case, in a Justice's Court, in a case pending between the above parties, predicated on a promissory note, which reads as follows:—"On or before the 25th day of December next, I promise to pay Samuel Gray, or bearer, thirty-five dollars and 25 cents, for value received of him, this 4th February, 1837. Now the conditions of the above note is as follows: i. e. if the subscriber to said note does try to collect the amount of the above note, from Travis Johnson, and fails to collect it, then the subscriber is bound to pay half the amount, i. e. seventeen dollars and 12½ cents. In witness whereof, I have hereunto set my hand, this day and date above written"—and subscribed by William Johnson. It appears, from the return of the Justices, that on the trial, the plaintiff moved to read in evidence in the interrogatories of Samuel Gray, the payee of said note, for the purpose of proving that he held a note, for thirty-five dollars and twenty-five cents, on Travis Johnson and William Johnson, and

that the said note, sued on, was given as a compromise of said note; which testimony was objected to, by defendant's counsel, and rejected by the Court, upon the ground, that the payee of a note could not be a witness, on account of his interest. It further appears, that plaintiff proved, by the testimony of another witness, that he wrote the note, and heard the contract, between Gray, the payee, and defendant, and that it was understood, that, if defendant could collect the \$35.25, out of Travis Johnson, defendant was to pay Gray the whole amount; but, if he could not collect it of Travis Johnson, then Gray was to lose one half of the \$35.25; and, upon this evidence, the Jury found for the defendant. Two grounds

of error are alleged: first, that the  
 135 \*Court erred, in rejecting the testimony of the payee; secondly, that the Jury found, contrary to evidence. As to the first ground, the mere fact of a person's being a party to a negotiable instrument, who is no party to the suit, is not sufficient evidence of his interest, to render him incompetent, as a witness. As to the second ground, it appears that the defendant, according to the terms of the note, was bound to pay the seventeen dollars and 12½ cents, at all events; and this was all the plaintiff claimed, in said suit. Defendant offered no evidence, to shew why he should not pay it. The verdict was, therefore, certainly contrary to all the evidence. I think, therefore, that both grounds of error are sustained by the return. It is, therefore, ordered, that the Certiorari be sustained, and a new trial ordered.

136 \*William Bonds, Appellant, v. Abraham Gray, Respondent.

1. **Wills—Attacking Probate—Affirmative of Issue.**—On an appeal from the court of ordinary, upon a motion to set aside a will, that has once been proved; the party, attacking the will, holds the affirmative, and must open and conclude.

2. **Same—Same—Dismissal of Proceedings.**—The propounder of the will, in the above case, cannot dismiss the proceedings.

3. **Same—Probate—Caveat—Appeal—Affirmative of Issue.**—In an appeal, on a caveat to the probate of a will, the propounder of the will holds the affirmative. *Semb.*

4. **Same—Proof of Making—Declarations of Testator—Res Gestæ.**—The subscribing witness to a will may prove, as part of the *res gestæ*, the declaration of the testator, at the time of attestation, that the instrument was his will, in order to show that such a will was made.

5. **Same—Same—Same—As Evidence of Revocation of Former Will.**—Such proof may go to the Jury, as evidence of the revocation of a former will, which could not be found, after testator's death, but of which a copy has been established, in lieu of the original.

6. **Same—Revocation—Presumption When Will Not Found.**—It being shewn that a certain will was executed; evidence, that it remained in the testa-

tor's possession, and could not be found, after his death, raises a presumption, that it was revoked.

7. **New Trial—Conflicting Evidence.**\*—When there is conflicting evidence before the jury, no rule of law violated, and no manifest injustice done: a new trial will not be granted, because the proof preponderated against the verdict.†

This was an appeal from the Court of Ordinary, upon a petition, and Rule Nisi, granted in said Court, calling upon the respondent, who was the executor of Sarah Gray, to shew cause, why a paper, which had been proven and admitted to record, as the last will and testament of Sarah Gray, deceased, should not be set aside, and declared void, upon the following grounds:

1st. Because the original will, of which it is a copy, was revoked, before the death of the testatrix.

137 \*2nd. Because, at the time of the death of the testatrix, she left no will, having revoked, annulled, and destroyed, the aforesaid original will.

3rd. Because said Sarah Gray died intestate.

4th. Because the aforesaid copy is a forgery, she having left no will at her death.

5th. Because, if ever the said Sarah Gray did make a will, she revoked and destroyed it, before her death, there being no will of her's then in existence.

On the trial of this Rule, in the Court below, the will was established; and from that decision, an appeal was entered, to this Court. When the case came up for trial, at the March term, 1841, a question arose, as to which party had the right to commence and conclude the evidence, and argument: and the Court, then, in accordance with what it understood to be the practice, determined that the propounder of the will was the actor, and as such, must go on, and prove the will, and was, therefore, entitled to the conclusion. The respondent, not being prepared with evidence to support the will, moved to dismiss his case. This motion being resisted, the Court determined that he had no right to dismiss it. A verdict was then found for the appellant, setting the will aside. A motion was then made, for a new trial, upon the ground that the Court erred, in deciding that the propounder of the will had not the right to dismiss his case. The Court refused the motion, upon this ground, but granted it upon another, to wit, that the Court erred, in deciding that the propounder of the will was the actor, and as such compelled to make out his case, by proving the will again. Some dissatisfaction having been expressed, with the decision of the Court,

\***New Trial—Conflicting Evidence.**—If there is sufficient evidence to support the verdict, and no principle of law has been violated, the court will not grant a new trial, although the evidence preponderate against the verdict. See *Knight v. Mantz*, Adm'r. Ga. Dec. pt. 1, p. 22, and *foot-note*; *Bagshaw v. Dorsett*, Ga. Dec. pt. 2, p. 42, and *foot-note*.

†See *Bagshaw v. Dorsett*, Ante, 42; *Davis v. Hale*, Ante, 82.



upon this point, and although the Court was well satisfied of its correctness, yet it was unable, at the time, to refer to any authority, in point, in support of it. It has since, however, found an adjudicated case, which fully sustains it. It is the case of Joseph Southerlin, et al. appellants, v. James Kinney, et al. reported in Rice's S. C. R. 35. That case, like this, was an appeal from the Court of Ordinary, upon the probate of the will, where the executor had been cited before the 138 Ordinary, \*to prove the will, in solemn form. The Ordinary heard the case, and decided in favor of the will. The parties, protesting against the will, appealed to the Court of Common Pleas. There it was contended, that the executors should go on, and prove the will, in the first place; but the Court determined that the appellants were the actors, and entitled to open and conclude, both in evidence and argument. The case was tried, and no evidence was given, to impugn the will, and the Jury found for the appellees. The appellants then moved for a new trial, and the principal ground of error alleged was, that the Court erred, in deciding that the appellants were bound to go on, as the actors in the issue, without the executors proving the will, in the first place. The Court of Appeals refused the motion, and determined, that the Court of Common Pleas had decided this point, correctly; and, in pronouncing the decision of the Court, the Judge remarks—"The appellee has the decision of the Court below, in his favor; his rights are fixed. Until that decision is removed, his position is purely passive." It will be remarked, that the case under consideration, and the one in Carolina, are precisely similar. In both, the will had been proven, in common form, and probate granted, and admitted to record; and the executor was cited before the Ordinary, to prove the will in solemn form. A decision was made, in favor of the will, and the party, protesting against it, appealed, and was held to be the actor. But, upon reflection, I am inclined to think that, where the contest arises, upon the first application to prove a will, and an appeal is entered, before the will is admitted to record, the facts are different; and the other party might properly be considered the actor.

Upon the second trial, in the Superior Court, of the case under consideration, the Jury found the following verdict:—"We, the Jury, find the will propounded not to be the last will and testament of Sarah Gray, deceased." The respondent's counsel then moved for a new trial, upon the following grounds:

1st. Because the Court erred, in permitting the declaration of the testatrix, Sarah Gray, to be given in evidence, to shew she had made another will, subsequent to that propounded by respondent, as evidence of a revocation of the first will.

2nd. That the verdict of the Jury was contrary to both Law and evidence.

139 \*In order to understand the nature and admissibility of this testimony, and the force of the objection, it must be considered, in reference to the other testimony, and the facts of the case. The paper, propounded as the will, purported to be a copy of the will of Sarah Gray, deceased, bearing date on the 14th day of June, in the year 1834, which had been established, by an order of the Superior Court, in lieu of the lost original. It was proven, first, on the part of appellant, by Robert Westmoreland, in substance, that he heard Abraham Gray, the respondent, say, shortly after the death of testatrix, that he had searched, and could find no will, nor could he find any notes, or other valuable papers, known to be in possession of testatrix, previous to her death, and that he had got other persons to examine, and could find none. On the part of respondent, John G. and Calvin S. Westmoreland, two of the subscribing witnesses, were sworn, who proved the execution of the original will, and that testatrix, at the time of executing the same, was of sound and disposing mind. The minutes of the Court were then read, to prove the establishment of the copy, in lieu of the original; and the will before the Court was identified, by Robert Heflin, former Clerk, to be the paper, established by said order. It was proven, on the part of appellant, that Gray, the respondent, moved his mother from South Carolina; that she lived with him, and that he said, if the other heirs would pay him, for the trouble he had been at, in moving his mother, from South Carolina, he would divide with them. One of the Westmorelands stated, that the old lady lived with Gray, and that he managed her affairs, that she was about seventy years of age. Edwin Drury, who was also a subscribing witness to the will, and whose testimony had been taken by interrogatories, testified that he wrote, and witnessed, a will made by Mrs. Sarah Gray, in which she gave all her property to Abraham Gray, with the exception of five dollars, to each of the other heirs; and that the same will was witnessed, by John G. and Calvin S. Westmoreland; that he did not recollect the precise date of said will; and that he never heard Mrs. Sarah Gray say any more, than sometime after the above named will was made, he was called on to witness an instrument of writing, which she acknowledged to be her will; but witness did not read, or hear said instrument read, as she objected to having it read; and that Elisha Kendall was a witness to the above named instrument, as well as witness. The last part of this testimony is that, which

140 is objected to, and \*forms the first ground of this motion. It is stated in the rule, that the Court erred, in permitting the declarations of the testatrix to be given in evidence, to shew she had made another will, subsequent to that propounded, as evidence of a revocation of the first will. I think, then, the rule assumes that to be true, which is not war-

ranted, by the testimony. It was not proven, by the declarations of testatrix, that she had made another will; but the fact was proven by Drury, one of the subscribing witnesses, and who was called in for that purpose, that she did make an instrument of writings, which she acknowledged to be her will. Now, the fact, that she did execute an instrument, is proven by competent testimony; and not by her declarations, as the rule assumes. But it is said that there is no evidence that it was a will, except her declaration. This is true; and the question then arises, as to the admissibility of such declaration. Mr. Starkie says, in his Evidence, 1 vol. 39, "that all the surrounding facts of a transaction, or, as they are usually termed, the *res gestæ*, may be submitted to a Jury, provided they can be established, by competent means, and afford any fair presumption, or inference, as to the question in dispute." And Mr. Greenleaf says, in his Treatise on Evidence, page 121, "that when a person does any act, his declarations, made at the time of the transaction, expressive of its character, motive, or object, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted as proof, like any other material facts. They are parts of the *res gestæ*." If, as the ground, taken for a new trial, assumes, the Court had permitted the bare declarations of the testatrix, made at a subsequent time, to have been given in evidence, to prove the fact, that she had made a subsequent will; there is no doubt it would have been erroneous; but the fact of making the instrument was proven, by the witness, of his own knowledge, and not by the declarations of the testatrix; and then her declarations, as to the nature of the instrument, made at the time of doing the act, are made by the Law a part of the act, and therefore legal evidence. But it is further stated, in the rule, that the declarations of the testatrix, that she had made a subsequent will, were permitted, as evidence of a revocation of the first will. There is a wide difference between the legality of the testimony, and the sufficiency of the testimony to prove a given fact. The making of a subsequent will, expressly revoking a former will, amounts to a revocation. Also, the making of a subsequent will, making a

141 disposition \*of the property, devised in the first will, different, or incompatible with the disposition, made of it by the first will, will revoke a prior will. The evidence here was, that she had made a subsequent will; but it did not appear, from the evidence, what the contents of that will were. It could not, therefore, be said to be sufficient evidence, to prove a revocation. But the making of a subsequent will was a distinct fact, which it was competent for the party to prove; and the admission of that evidence, which was competent, cannot be erroneous, merely because every other fact was not proved, necessary to establish a certain state of facts. I am, therefore, of opinion, that the declarations

of the testatrix, at the time she executed this instrument of writing, stating that it was her will, constituted a part of the transaction, and were therefore legal evidence. But it is contended, for respondent, that the admission of this testimony would be in violation of the 22d Section of the Statute of Frauds, which declares that no will, in writing, shall be repealed, or altered, by any words, or will by word of mouth only, except the same be, in the life time of the testator, committed to writing &c. I do not conceive that authority at all applicable, to the facts of this case. There is no attempt, here, to repeal, or alter, this will, by word of mouth; but the sayings of the testatrix are not in relation to this will, but in relation to a distinct transaction, when that transaction is being consummated, as to its quality, and are therefore received, as constituting a part of the *res gestæ*.

The second ground is that the verdict was contrary to both Law and evidence. It is a rule of Law, that when there is evidence, on both sides of a case, and no rule of Law is violated, nor manifest injustice done, the Court will not grant a new trial, although there may appear to have been a preponderance of evidence, against the verdict.—Graham on New Trials, 380. But they will grant a new trial, upon the ground that the verdict is contrary to evidence, when it is manifestly and clearly so.—Constitutional R. C. S. 1 Vol. 93.

Let us, then, examine the facts of this case, for the purpose of determining, whether this verdict be contrary to evidence, or whether there be evidence, sufficient to support it. It will be recollected, that this was a copy will, established in place of the original, which was said to be lost. And it is contended, that, having been established \*by an order of Court, in the manner which the Law prescribes, it has all the force and effect of the original. This is conceded. But its being a copy can give it no additional validity. And the fact, that a copy has been established, does not prevent the appellant, from proving any thing, in relation to the original, which would go to shew, either that it had been improperly obtained, or that it had been cancelled or revoked. There can be no doubt, from the evidence, that the testatrix did, in 1834, make a will; and that the one, under consideration, is a correct copy of the same. But the establishing a copy of what the original will was cannot make it a valid will, if the original had been cancelled, revoked, or annulled, by any other means, known to the Law, before the copy was established. Let us, then, refer to some of the evidence, in relation to this will. There was no proof, that it was in existence, at the time of the death of the testatrix; but, on the contrary, it was proven, that Gray, the respondent, said that he examined, shortly after the death of the testatrix, and could find no will. Now what is the legal presumption, arising from the fact? It is laid



down in Starkie's Evidence, 3 vol. 1715, that "if a will, proved to have been executed, and which, after execution, remained in the custody of the testator, can not be found, after his death, a presumption (according to the practice of Ecclesiastical Courts) arises, that he has cancelled the will, and the burthen of proving the contrary is thrown on the party, alleging the contrary." This doctrine is fully sustained, by the decision of the Court of Errors, in the State of New York, in the case of Butts v. Jackson reported in the 6th vol. Wendel R. 173, where the question is very elaborately and ably discussed, overruling the decision of the Supreme Court, as reported in 9 Cowen's R. 208. But the reply to this is, that the will has been established, and here it is, and of as much force as the original would be, if it were present. That is true, perhaps, to a certain extent. But suppose the original was here; would the mere fact of its being present prove that it had not been revoked by a subsequent will, or other instrument? If not, does the fact, that a copy has been established, prevent the party from proving, that the original could not be found, after the death of testatrix? I think not. And the fact was proved, on the trial, and the legal conclusion follows. I think, therefore, when we take into consideration this part of the testimony, together with the fact, that another will was made, subsequent to this; that a person was called on to witness it, 143 who had written the first; \*and that she refused to let him read it; and that neither will could be found after her death; the presumption is strong, that she had cancelled both wills, and intended to die intestate. I am not, therefore, prepared to say that there is no evidence, to support the verdict, nor do I consider it manifestly contrary to the evidence; nor can I say, that it is contrary to law.

The motion for a new trial is, therefore, refused.

H. & O. Warner & Herie, for the motion; and Latham & J. Q. A. Alford, contra.

#### 144 \*MERIWETHER SUPERIOR COURT.

Isaac C. Bell v. William Hobbs.

1. Declaration in Attachment—Recitals—A declaration in attachment need not recite the issuing and levy of the original process, which already form a part of the record.
2. Action of Assumpsit—Alleging Promise—Sufficiency.—A formal statement of a promise is not necessary, in an action of assumpsit, where all the facts are set forth, from which the law implies a promise.

On the trial of the above stated case, a verdict was found for the plaintiff, for the sum of \$435.16, with interest and cost of suit; and defendant's counsel made a mo-

tion, to arrest the judgment in said case, upon the following grounds:

1st. Because it does not appear, on the face of plaintiff's declaration, that the attachment, on which it purports to have been founded, has been returned, executed, or that the same has been levied, on any property whatever of the defendant's, or that the same has not been replevied, as required by Statute, so as to give the Court jurisdiction.

2d. Because there is no allegation, in the said plaintiff's declaration, of any promise, on the part of the defendant, to pay the said plaintiff any sum of money whatever, either expressly or implied; nor is there any allegation of any indebtedness, or legal liability whatever, on the part of said defendant, to said plaintiff, which, in law, will authorise him, the said plaintiff, to have a judgment rendered, by said Court, in his favor.

The only question, which arises, under the first ground of this motion, is, whether it is necessary for a declaration, in a case which has been commenced by attachment, to contain an allegation, that said attachment, the foundation of the suit, had been executed, by being levied on the property of the defendant, and that said property had not been replevied. What then is the office of the declaration? It is a statement of the plaintiff's cause of action; and according to our Statute, the cause of action must be plainly, fully and distinctly

145 \*set forth in the declaration. What, then, is the cause of action, in this case? It is the note, described in the declaration, as having been made by the defendant, William Hobbs, and the plaintiff, as his security; and the allegation, that he was security only, and the fact that Hobbs, the principal, and the plaintiff, his security, had both been sued on said note, and that, during the pendency of the same, the said Hobbs had placed himself in such a condition, as would authorise the issuing of an attachment. These are all the facts, which were necessary to exist, to authorise the attachment to issue; and it seems to me sufficient, to be stated in the declaration; as the original attachment constitutes a necessary and independent part of the case, and its execution, return, levy &c. are just as clearly and fully brought to the consideration of the Court, by an exhibition thereof, as if they were again set forth in the declaration. I therefore consider, that an omission, to state in the declaration the levy, return, and non-replevy of the property, is not such a defect, as would justify the Court, in arresting the judgment.

As to the second ground, it is a general rule, that, in an action of indebitatus assumpsit, the plaintiff must, in his declaration, allege a promise; but it is held, however, that, in declaring in assumpsit on a bill of exchange, against the drawer, or on a promissory note, against the maker, a statement of the facts, which render the defendant liable to pay, is sufficient, without expressly alleging a promise, on his

part.—Gould's Pleading, 58—in note, which cites 1 Salk. 128; 1 Stra. 224; Lord Ray. 538; 2 New Rep. 63. Then, as all the facts and circumstances, from which the liability of defendant arises, are set forth, in the declaration; an omission to aver an express promise (according to the above authorities) will not vitiate the declaration, and would not, therefore, be a sufficient cause, to arrest the judgment. I am the more inclined to this opinion, when I take into consideration the fact, that many defects, which would be held to be bad, in a declaration, if taken advantage of, by way of demurrer, are cured by a verdict. I am, therefore, of opinion, that the judgment cannot be arrested, on either of the grounds, taken in said rule.

It is, therefore, ordered, that said rule be discharged, and that the verdict and judgment in said case be affirmed.

146 \*Daniel Hollisclaw, Adm'r &c. v. Mordecai Johnson, Guardian, &c.

**Bill in Equity—Good in Part—Demurrer to Whole Bill.\***

—A demurrer to a bill will not be sustained, when the complainant is entitled to any part of the relief prayed for.

This bill is demurred to, upon several grounds; but one is insisted on, in the argument, and will be alone considered. The bill alleges, that on the 4th day of January, 1826, Nancy Cosby, of the county of Warren, in said State, made her deed of gift, by which she conveyed to her three grandchildren, Columbus, Nancy, and Robert Johnson, a negro girl, by the name of Harriet, to them and their heirs forever; provided, that if any, or either, of the above named children should die, before they become of age, or married; the said negro girl and her increase to revert to, and become the party of, the others, to be for their mutual benefit; and at their arriving at the years of mature age, to be distributed among them, according to equity and justice. The bill further alleges, that the complainant, Hollisclaw, married the said Nancy, and that she afterwards died, and that he had taken out letters of administration on her estate; that Columbus, another one of said children, in the year 1836, died, without having married, or attained the age of twenty-one years; and that the defendant, Mordecai Johnson, who is the guardian of Robert, the other child, had had the possession of the said negro, and her increase, now alleged to be three children, since the first day of January, 1838—the said negroes having been fraudulently

carried off, from the county of Wilkes—and has appropriated the hire, use, and proceeds of said negroes, to his own use; and the bill prays that a partition may be made, of the said negroes and their increase, and hire, and that he may have a decree, for one half of the same; and also prays that said defendant may be required to give security, not to remove said negroes, &c. The ground, insisted on in the demurrer, is this

147 —“That complainant seeks a partition of personal property, \*to which he claims title, by a deed of gift; and that it appears, from the bill, that said property, conveyed by said deed, was not, by the express terms thereof, to be distributed to the donees, until they arrived at mature age; and that it does not appear, that they have arrived at mature age, but on the contrary, that one of them, to wit, the ward of defendant, is yet a minor.” This is a general demurrer, which goes to the whole bill; and if it shall appear, that complainant is entitled to any part of the relief prayed, the demurrer will not be sustained. The deed conferred upon the three children an estate in joint tenancy, and they were jointly entitled to the possession of the property, from the time of its creation, until the death of Columbus; and at his death, they were jointly entitled to his portion, as survivors. So it will be perceived, that complainant has as much right to the possession, as the defendant; and as such, is certainly entitled to one half of the hire of said negroes, for the time that he has been deprived of the possession and use of the same. Whether he is entitled to have a partition of said negroes, before the said Robert arrives at full age, is a question of some doubt, depending upon the proper construction of the deed. But I do not consider it important, to decide this question, at this time, as it will be time enough to determine that question, on the hearing of the bill. It is therefore ordered, that the demurrer be overruled, and that said bill stand for an answer.

148 \*Hardaway & Hawkins v. William D. Tinsley.

**Witnesses—Competency—Defendant in Justice's Court.\***—A defendant in a Justice's Court is not a competent witness for himself.

This was an action, founded on an endorsement of a promissory note, made by defendant, Tinsley, to plaintiffs. The error, alleged in the petition, is that defendant plead to said action that he had given notice to the plaintiffs, requiring them to sue on said note, and that they had neglected to do so, for more than three months, as required by the Statute; and that the Court permitted defendant to prove the fact

\*Demurrer to Whole Bill.—A general demurrer will not be sustained if there be any equity in the bill. Morel v. Houstoun, R. M. Charl. 284; McLaren v. Steapp, 1 Kelly, 376, 378; Hazlehurst v. Savannah, etc., R. Co., 43 Ga. 13, 52; Lowe v. Burke, 79 Ga. 164, 166; S. E. Rep. 449; Reese v. Reese, 89 Ga. 646, 652, 15 S. E. Rep. 846. And see Patterson v. Turner, 62 Ga. 674.

\*Witnesses—Competency—Defendant in Justice's Court.—See Dowdle v. Stenson, Ga. Dec. pt. 2, p. 150; Smith v. Halk, Ga. Dec. pt. 2, p. 164.



of giving the notice, by his own oath. This fact is admitted, and shewn to be true, by the return of the Justices. There is no doubt, but that the Court erred, in admitting this evidence; this being a fact, which it is not competent for a defendant to prove, by his own oath; as the law only allows parties to prove their accounts, by their own oaths, in a Justice's Court, and does not make any provision, allowing a defendant to prove a matter of defence of this kind, by his own oath—It is therefore ordered, that the Certiorari be sustained, and a new trial granted, and the Justices are directed not to admit said evidence, on said trial.

149 \*Edward Gresham v. Thomas Landens, William McLenden and George B. Wright.

1. **Justice's Court—Dividing Claims to Confer Jurisdiction\*—Remedy.**—When several suits are brought, between the same parties, in a Justice's Court, the defendant can take advantage of their amounting to more than thirty dollars, only by a plea to the jurisdiction.†

2. **Duress—Legal Arrest.**—Legal arrest is not Duress.

This petition for Certiorari alleges, that these actions were commenced against defendants, for three promissory notes, amounting to seventy-five dollars. Two grounds of error are alleged: first, that the Court erred, in giving judgment in said cases, because, in the aggregate, they exceeded a Justice's jurisdiction. Secondly: because the notes were obtained, when the maker, or principal, was under duress.

It does not appear, that any exception was taken, to the jurisdiction in the Court below; and, as the question was not raised then, the Court committed no error, in entertaining jurisdiction—the cases being, *prima facie*, within their jurisdiction. As to the second ground, it appears, from the return, that they were given by defendants, whilst one of them, to-wit, Landers, was under an arrest, by virtue of an attachment, issued against him, for having failed to collect certain executions, put in his hands, as a constable; and that he gave said notes, for the purpose of obtaining his discharge. It appears, therefore, that he was in custody, under a legal process, issued by a Court of competent jurisdiction. The imprisonment was not, therefore, illegal, and could not constitute duress. It is therefore, ordered, that the Certiorari be dismissed, and the proceedings below affirmed.

150 \*James Dowdle v. James W. Stenson.

**Witnesses—Competency†—Right of Defendant to Deny**

\***Justice's Court—Dividing Claims to Confer Jurisdiction.**—See generally, Pinckard v. Ware, Ga. Dec. pt. 2, p. 172, and *foot-note*.

**Same—Same—Objection Not Raised Below.**—See Dodson v. Connally, Ga. Dec. pt. 1, p. 132, and *foot-note*.

†See Brisco v. Brewer, Ante, 105.

†**Witnesses—Competency—Defendant in Justice's**

**Plaintiff's Account—Statute.**—The act, authorising a defendant to deny the plaintiff's account, upon his own oath, is confined to cases where the plaintiff proves his account by affidavit, without appearing in court.

This was an action upon an open account, commenced by plaintiff, against defendant, by making an affidavit, in Harris County, the place of plaintiff's residence, and sending it into Meriwether County. At the first trial, the defendant filed his affidavit, in the terms of the Statute, denying the justness of said account, and the Court gave judgment against plaintiff, there being no other testimony. On the last trial, it appears the plaintiff appeared, and proved his account, in open Court, by his own oath, and subjected himself to a cross examination. But the error complained of is, that the Court permitted the affidavit of defendant, which he had made in the first instance, to be read in evidence, notwithstanding plaintiff had proven his account, in open Court. This fact is admitted, by the return. Now, I am of opinion, that this affidavit of defendant ought not to have been admitted, as the law only gives the defendant this privilege, of denying plaintiff's account, when he does not appear, in open Court, to prove his account. The Magistrate states, in his return, that he admitted this affidavit, to rebut the original affidavit of the plaintiff. But I consider, that both affidavits were improper testimony; and the introduction of illegal testimony, on one side, is no reason, in law, why it should be admitted on the other. Both ought to have been rejected. It is, therefore, ordered, that the Certiorari be sustained, and a new trial ordered.

151 \*Daniel Keith v. John C. Willingham, et al.

1. **Chancery Practice—Decree in Favor of Person Dying Pendente Lite.**—A decree in Chancery, obtained in favor of a person who died *pendente lite*, is void; and may be set aside by a subsequent original bill.

2. **Same—Decree in Favor of Fictitious Person—Persons Absent and Unheard of.**—So, of a decree in favor of persons who never existed, or have been beyond seas, unheard of, for more than seven years.

3. **Same—Same—Conclusive as to Other Parties.**—But, as to other parties, such decree is conclusive, and cannot be reversed by a new original bill.

This is a bill, filed by complainant, against the defendants, praying an Injunction, upon the following state of facts:—The bill charges, that in the year 1829, one Nancy Brown died intestate, possessed in her own right of a lot of land, to wit, lot No. 207, in the 11th district of formerly Troup, now Meriwether, county, and that she left, as her heirs and next of kin, Lucretia, who had intermarried with Henry Knight;

**Court.**—See Hardaway v. Tinsley, Ga. Dec. pt. 2, p. 148; Smith v. Halk, Ga. Dec. pt. 2, p. 164.

Sarah, who had intermarried with John C. Willingham; Nancy, who had intermarried with Colom Copland; Elizabeth Brown, Rebecca Brown, George Brown, and William Brown, children of William Brown, deceased; and Charity Brown, the widow of the said William, who was the son of the said Nancy Brown: and that complainant had been informed, that the said Nancy had another child, by the name of Elizabeth, who had intermarried with Stephen Vickers, who had long since removed from this State, and had not been heard of for many years; and that complainant, after the death of the said Nancy Brown, had become the purchaser, for a valuable consideration, of the entire interest of the said John C. Willingham, and Henry Knight, in and to said lot of land, to which they were claimants, as heirs and next of kin, in right of their wives, the interest of the said Willingham and Knight having been levied on and sold, at sheriff's sale. And that complainant took upon himself the administration of the estate of the said Nancy Brown, for the purpose of securing the interest in said  
 152 \*estate, which he had purchased, as aforesaid; and that he sold said lot of land, in his character of administrator, for the sum of eight hundred dollars. And that a bill was filed, at the instance of the said John C. Willingham, and as he, complainant, believes, without any authority from the other heirs of the said Nancy Brown, against the said complainant, as administrator as aforesaid, in the Superior Court of Meriwether County, requiring him to account for, and distribute, the assets of said estate. And that, upon the hearing of said case, the jury found a verdict against complainant, as administrator as aforesaid, for the whole amount of the proceeds of the sale of said lot of land, after deducting the expenses of the administration, and the share of one of the distributees, which he had paid; upon which finding, a decree was rendered, and a fieri facias issued thereon, which was proceeding to sell the property of complainant. It is further stated, that the children of William Brown were represented, in said bill, as minors, and appeared in said case, by the said John C. Willingham, as their next friend; and that he has removed from the State, and is wholly insolvent; and that complainant believes that his security on his bond is also insolvent. Complainant further states, that he had been informed, by said Willingham, that Nancy Brown had a child by the name of Elizabeth, who intermarried with Stephen Vickers, and that he so believed, and so admitted, in his answer to said bill: But that he has since made the most diligent enquiry, amongst those acquainted with the family, and cannot ascertain, except from the said Willingham, that there ever was such an individual, as Elizabeth Brown, daughter of the said Nancy Brown, or that any individual of the name of Vickers, at any time intermarried with one of the children of said Nancy Brown. And that complainant believes, and charges, that John C. Willingham fraudulently repre-

sented, that the said Vickers and wife were distributees of said estate, to enable him to control and enjoy an interest in said estate, to which he was not entitled. And it is further charged, that if there ever were such persons, as Vickers and wife, they have long since removed from this State, and have not been heard of, except through said Willingham, for more than twenty years: and that he believes they had departed this life, before said verdict and decree were rendered. It is further charged, that Henry Knight, one of complainants in said bill, departed this life, during the progress of said cause, and before any verdict, or decree, was  
 153 rendered; \*and that his legal representatives were not made parties. And also, that Nancy Copland died, during the pendency of said suit, and before the verdict and decree, and that her legal representatives were not made parties: and that said execution is proceeding illegally; and, so far as Copland and wife, Knight and his wife, and Vickers and wife, are concerned, is absolutely null and void, in as much as two of them had died, during the pendency of the suit, and that Vickers and wife, if there ever were such persons, have been absent, without being heard of, for more than seven years. The bill prays that said verdict and decree, rendered in said case, may be set aside, and complainant permitted to retain in his hands the distributive shares of Willingham, and Knight, and that the Sheriff be enjoined, from proceeding with said fi. fa.

A motion is now made to dissolve said injunction, upon the ground, "that there is no equity in said bill, which would authorise the granting, or continuing, said injunction." This, then, is in the nature of a demurrer, and, for the purposes of the argument, all the charges in the bill must be taken to be true. For the defendants in the bill, it is contended, that this bill cannot be maintained, under the present state of facts, for the reason that it seeks to set aside a decree of the Court of Equity, which, it is contended, cannot be altered, reversed, or set aside, in any way, except on a petition for a re-hearing; and when the decree has been enrolled (which it is contended is the case here) by a bill of review.—Authorities cited, 2 Maddox Ch. 453; 2 Johnson's Ch. R. 205; 2 Maddox Ch. 463. It is further contended, that this is not a bill of review; and if it were, the facts stated are not such, as would authorise the granting a bill of review: As a bill of review can only be maintained, for errors in matters of Law, apparent on the face of the bill, or for newly discovered matter, which has come to the knowledge of the party, subsequent to the decree.—Mitford's Pl. 127; 2 Maddox Ch. 538; 3 John. Ch. R. 126. On the other hand, it is admitted, by complainant, that this is not a bill of review, and that the facts are not such, as to sustain such a bill. But it is contended, that it is an original bill, the object of which is to set aside the decree, rendered in the former suit, upon the ground that said decree is absolutely void, it having been rendered in favor of parties, who were dead, at the time it was rendered. Authori-



ties relied on : the case of the Executors  
 154 of King v. John and Isaac \*Bailey,  
 Charlton's R. 190; 9 Porter's Ala.  
 R. 178; 1 Ala. R. (new series) 712, 725.  
 In Mitford's Pl. 93, I find this doctrine:  
 If a decree is obtained by fraud, it may  
 be impeached, by original bill, without  
 leave of the Court; and it seems, that it  
 is not confined to cases of actual fraud,  
 but extends also to cases of fraud, arising by  
 implication. And in the case of Giffard v.  
 Hort, 1 Schoales & Lefroy, 386, it is stated,  
 that a decree, obtained without making parties  
 of those whose rights are affected  
 thereby, is fraudulent and void, as to those  
 parties; and a purchaser under it, with  
 notice of the defect, is not protected thereby.

Let us, then, examine the several grounds,  
 upon which it is sought to set aside this  
 decree, with reference to these authorities.  
 First, then, as to Knight and his wife, the  
 charge is, that Knight died, pending the  
 suit: and also, that his interest in the land,  
 the subject matter of the litigation, had been  
 sold and purchased by complainant. As to  
 the first ground, it will be recollected, that  
 the suit was in the name of Knight and wife,  
 for a right which belonged to the wife: and  
 the authority, as laid down in Mitford's Pl.  
 59; Story's Eq. Pl. 293; and 6 John. Ch. R.  
 132, is, that in a case of this sort, the suit  
 does not abate, on the death of the husband.  
 As to the other ground, if in fact there had  
 been such a sale of Knight's interest, as to  
 divest the title of his wife, which is consid-  
 ered very doubtful; there is no reason  
 assigned, why the party did not avail himself  
 of this defence, on the former trial; and  
 having neglected to do so, it is now too late,  
 and he is precluded by the decree.

The only ground, urged against the decree,  
 so far as the interest of Willingham and wife  
 is concerned, is that his (Willingham's) inter-  
 est had been sold, at Sheriff's sale; and this  
 being a matter, which had happened before  
 the decree, the same rule applies.

The ground upon which the decree is  
 resisted, so far as the children of William  
 Brown are concerned, is, that they were  
 represented, in said suit, by the said Willing-  
 ham, who, it is alleged, has removed from the  
 State. and is insolvent; and it is believed,  
 his security is also insolvent. If these facts  
 had existed, and had been made apparent to  
 the Court, when the suit was commenced, or  
 during its pendency; it might have been  
 a sufficient reason, for having him

155 \*removed, and another more trust-  
 worthy appointed, in his place. But I  
 can not conceive, that this forms any valid  
 objection to the decree, as it is not pretended  
 they were not justly entitled to the sum,  
 decreed in their favor. And it does not lie  
 with the complainant, to object to paying  
 over the money, on this account, as his interest  
 can not be affected by it.

Next, as to Copland's interest in said  
 decree, the charge is, that Nancy, his wife,  
 who was the meritorious cause of the suit,  
 died, pending the suit, and that therefore,  
 the suit, so far as she was interested, abated;  
 and there being no plaintiffs, as to her inter-

est, no decree could be rendered in her favor.  
 To this it is replied, that Chancery will not  
 relieve against a judgment at law, unless the  
 defendant in the judgment was ignorant of  
 the fact in question, pending the suit, or  
 unless he was prevented from availing him-  
 self of the defence, by fraud, or accident, or  
 the act of the opposite party, unmixed with  
 negligence, or fault, on his part. This is a  
 general rule. But I apprehend it does not  
 apply, to a case, where there are no parties  
 to the suit. The presumption is, that the  
 party knows who are the proper plaintiffs,  
 and ought to know when one of them dies:  
 and if the suit is carried on, without proper  
 parties before the Court, and a decree is ren-  
 dered; it is at his own peril; and the defend-  
 ant could not be protected, in paying off a  
 judgment, under such circumstances: for  
 there being no party before the Court, no one  
 would be authorized to give a discharge. It  
 will not do to say, that a payment to the  
 attorney would protect him: for no one can  
 be the attorney of a dead person. I am there-  
 fore of opinion, that the bill is well founded,  
 so far as Nancy Copland's interest is con-  
 cerned.

We next come to consider the charge, as to  
 Vickers and wife; which is, that there are  
 no such persons in existence, or that, if there  
 ever were such persons, they had been absent  
 from this State, for more than seven years,  
 without being heard from; and that they  
 were dead, before said decree was rendered;  
 and that their names were fraudulently intro-  
 duced into said bill, by said Willingham,  
 and represented as distributees, for the purpose  
 of enabling said Willingham to enjoy a share  
 in said estate, to which he was not entitled.  
 Suppose, then, that there are no such persons:  
 what, then, would be the consequence?—

Why, that said estate would be subject  
 156 to be divided, into \*four shares, instead  
 of five, and the other distributees, to  
 wit, Willingham and wife, Knight and wife,  
 William Brown's children, and the represen-  
 tatives of Nancy Copland, would be entitled  
 to the portion, assigned to Vickers and wife,  
 in the decree; and they are all capable of  
 receiving and receipting for the same, except  
 Nancy Copland. Therefore, so far as these  
 other parties are concerned, I can see no  
 good reason, for reversing the decree. The  
 decree has specified the amount, to which  
 each of said complainants is entitled. The  
 amount, decreed to Copland and wife, is one  
 hundred and fifty-five dollars and thirty  
 cents, and the like sum to Vickers and wife.  
 This being the case, the Injunction can be  
 dissolved, as to the shares of some of the  
 parties, and retained as to the others, so as  
 to prejudice the rights of none.

It is therefore ordered, that the Injunction,  
 granted in said case, be dissolved, so far as  
 to authorise the execution, issued upon the  
 said decree, to proceed to collect the several  
 sums, due to Willingham and wife, Knight  
 and wife, and the children of William Brown,  
 and three-fourths of the amount due to or  
 decreed to Vickers and wife. And that said  
 Injunction be retained, so far as to prevent  
 the collection of the sum, decreed to Copland

and wife, and one-fourth of the sum due to Vickers and wife, until the further order of this Court. And, inasmuch as it appears, that the said John C. Willingham, the next friend of the children of William Brown, deceased, has removed from this State, and is represented to be insolvent, and his security also being represented to be insolvent, and is also alleged to have removed from the State, since the filing of said bill;—it is therefore ordered, that such portion of said decree, as is due to the said children, be withheld from the said John C. Willingham, and that the same, when collected, be paid into the office of the Clerk of the Superior Court of said County, subject to be paid out, to the lawful guardians of said children.

### 157 \*DE KALB SUPERIOR COURT.\*

**Jesse Childress, Bearer, v. Daniel Stone and Nathaniel Guyton.**

1. **New Trial—Verdict Contrary to Evidence.**†—A new trial is to be granted, where a verdict is manifestly against evidence.

2. **Partnership Note—Payment by One Partner or Third Person—Extinguishment.**—Payment of a partnership note, by one partner, or by a third person for him, is a payment of the note, so as to prevent that third person from recovering on it, against the firm.

This was an action, brought upon a promissory note, made by the firm of Stone & Guyton, and payable to Robert Wood, or bearer. The defence set up was payment. The Jury found a verdict for the plaintiff, for the amount of the note, with interest and cost. The defendant's counsel then moved for a new trial, upon the ground, that the Jury found contrary to evidence, and the weight of evidence. On the trial, the plaintiff read the note in evidence, and closed his testimony. Defendants then proved, by Jesse Childress, a son of plaintiff, that plaintiff paid the money to Wood, the payee of the note, and that he, witness, loaned plaintiff the money, to pay it. On further examination, he stated that plaintiff owed Guyton, one of defendants, five hundred dollars, and that plaintiff took up said

\*It was the intention of the publisher, to place the decisions of each county by themselves. The following cases, in De Kalb and Cobb, are out of this proposed order, only because one of them was received from the Executive, after the printing was begun, and the MSS. of the others, when arranged for the press, did not specify in what county they were decided. A subsequent application to the Judge ascertained that fact.—Note in Original Edition.

†**New Trial—Verdict Contrary to Evidence.**—A new trial will not be granted because the evidence preponderates against the verdict, if there is sufficient evidence to support the verdict, and no principle of law has been violated. See *Knight v. Mantz*, Adm'r. Ga. Dec. pt. 1, p. 22, and *foot-note*; *Bagshaw v. Dorsett*, Ga. Dec. pt. 2, p. 42, and *foot-note*.

note, from Wood; that it was agreed, between plaintiff and Guyton, that if the money was not collected, out of Stone, that plaintiff was not to pay Guyton what he owed him, by that sum, or, in other words, that there was to be a deduction from the debt, which plaintiff owed Guyton, equal to the amount of the note; and further, that it was agreed, that, if a judgment was recovered against Stone & Guyton, it was not to be enforced against Guyton, but that the object of the suit was to enable Guyton to collect the money out of Stone, the

158 other partner; \*and that if the money was collected out of Stone, it was to be paid over to Guyton. Defendant also read in evidence, a decree of the Court, making a final settlement, between Stone & Guyton, and allowing all the outstanding debts, due the firm, to Stone. This was all the testimony. The question then arises, was there sufficient evidence to support the verdict: for I understand this to be the rule—that when there is evidence, on both sides of a case, and the question is thereby rendered doubtful; the Court will not interfere, by granting a new trial. But if the verdict be manifestly against the evidence, the Court will grant a new trial. In this case, there was but one witness, and he the son of the plaintiff, and could not therefore be presumed to have any bias in favor of the defendant. He states, virtually, that the note was paid by his father, at the request of Guyton, one of defendants, and that plaintiff was allowed a credit, on a debt which he owed Guyton, to the amount of said note; that when judgment was obtained on the note, in favor of plaintiff, Guyton was not to be required to pay it, but the money was to be collected out of Stone, and paid over to Guyton. Then, I would ask, was not this, to all intents and purposes, a payment of said note, by Guyton, one of the defendants? If so, the plea of payment was fully sustained. But, it may be said, that, in as much as Stone and Guyton were jointly liable, for the payment of this debt, and Guyton had paid the whole, he ought to recover half the amount from Stone. That may be true; but not in this action. His proper remedy must be, by an action in his own name for contribution. I think the facts, proven by the defendants, fully establish the fact, that said note was paid off by Guyton, one of defendants. This testimony is uncontradicted, and unimpeached; and a payment by either defendant is a bar to the plaintiff's right of recovery. It is therefore ordered, that the verdict be set aside, and a new trial granted.

Calhoun & Dabney, for Plaintiff.  
Murphy, for Defendant.

### 159 \*COBB SUPERIOR COURT.

**William P. Malony v. Uriah Harkey.**

**Juries—Verdict—Omission of Foreman to Sign Full Name.**—The omission of the foreman of a Jury, to sign his name in full, to the verdict, when the par-



ties were present, and no objection made, is not ground of error.

The action, in the Court below, for the correction of the alleged errors in which this Certiorari was brought, was founded upon an open account, for bacon. One of the errors complained of is, that said bacon was bought by a man, by the name of Nero, and charged to him; and that Malony, who was the defendant, in the Court below, could not be made liable for the same, but that he was protected by the Statute of Frauds. Another ground of error alleged is, that the verdict was not signed by the Jury. As to the first ground, the evidence, as set forth in the return, shews that defendant told Nero, that he had bought the bacon of the plaintiff, Harkey, and directed him to go and get it; and that he would pay for it. It appears, therefore, to have been his own contract, and not the contract of Nero. As to the other ground, it appears, from the return, that the verdict was signed "Joshua Foreman." Whether this is the correct, or only, name of the Juror, who acted as foreman, does not appear; nor has the Court any means of ascertaining. But, suppose there had been an omission of the foreman of the jury, to sign his name, in full. If the case was tried by a competent jury, and a verdict returned, and received by the Court, in the presence of the parties, and no objection made, at the time; I do not think that so trifling an omission as this ought to vitiate the proceedings; especially, when we take into consideration the manner of doing business, in the Justice's Court—It is therefore ordered, that the Certiorari, in this case, be dismissed, and the proceedings below confirmed.

160 \*James A. Collins v. Hardy Pace, and P. H. Randall, and Thomas Hooper, Justices.

**Levy of Execution—Liability of Property Once Sold to Second Execution.**—Property, once sold under execution, is not liable again, to execution against the same defendant, without proof that the title had been revested in him.

This Certiorari was filed, for the purpose of correcting certain errors, alleged to have been committed, on the trial of a claim case, in which the present defendant, Pace, was plaintiff, and Collins, claimant. Upon which trial, the Jury found the property subject. The return shews, that the only evidence, introduced by the plaintiff, was the fact, that a portion of the property was found in the possession of the defendants in execution, and that claimant had said, that he had bought the property, at a previous sale (when it had been sold, at the instance of the same plaintiff, as the property of the same defendants) for the defendants, provided they should pay him the money, for which it sold; and that he had agreed to let them have it, if they paid him the money. But there was no evidence, that they had paid him back the

purchase money, or any part of it. On the contrary, it was proven, that the claimant had bought the property, at a public sale, and paid the money for it. It was not, therefore, liable to be sold again, as the property of defendants, until the title had been revested in them, by the payment of the purchase money.

It is therefore ordered, that the Certiorari be sustained and a new trial ordered.

161 \*Thomas Walker v. Elisha Tatum.

**1. Contract of Sale—Failure of Consideration—Remedy.**

—Where a note is given, in payment for a purchase of property, which note is represented as good, but actually valueless; the vendor may tender the note back, and recover the price agreed upon.

**2. New Trial—Conflicting Evidence\*—Decision of Inferior Court.**—A new trial will not be granted, in an inferior court, where there was conflicting evidence, of the weight of which that court was the competent tribunal to decide.

This Certiorari was brought, for the purpose of correcting certain errors, alleged to have been committed, in the Court below, in a case, wherein Tatum was the plaintiff, and Walker the defendant: which action was predicated upon an account of thirty dollars, as the balance of the price, due for a wagon, sold by plaintiff, to defendant. The proof shewed that, by the contract between the parties, the wagon was sold, for the price of thirty-five dollars, and that five dollars was paid in cash, and a note for thirty dollars, on one House, was to be given for the balance. The ground, upon which the plaintiff's action was predicated, was that the defendant, at the time of the trade, represented the note on House to be good, and that he was not good. Also, that defendant, instead of giving him a note for thirty dollars, on said House, gave him a note for twenty dollars only, which he had tendered back to defendant, and commenced his suit, upon the original consideration. The proof, on the part of the plaintiff, by one witness, was that plaintiff tendered to defendant a note on House, and told defendant, that was the note, which he let him have; and that, at the time of the trade, he told him the note was good, which facts were not denied, by defendant. Another witness testified, that the note tendered was for twenty dollars. Another witness proved that, long before the trade, House was notoriously insolvent. The defendant proved, by one witness, that plaintiff wanted defendant to endorse the note, and that he refused to do so; and said that if plaintiff took the note, he must take \*it at his own risk. Now, if a party sells goods to another, who pays him in bank bills, which are, at the time, of

\*New Trial—Conflicting Evidence.—See Knight v. Mantz, Adm'r. Ga. Dec. pt. 1, p. 22, and *foot-note*; Bagshaw v. Dorsett, Ga. Dec. pt. 2, p. 42, and *foot-note*.

+Same—Same—Decision of Inferior Tribunal.—See Harris v. Ferguson, Ga. Dec. pt. 2, p. 111, and *foot-note*; Burke v. McEachem, Ga. Dec. pt. 2, p. 129.

no value; he has the right, by tendering back the bills, to sue the purchaser, for the price of the goods. And I can see no good reason, why the same rule will not apply, when the payment is made, in a note, which is represented to be good, if it be not so. Then, if this doctrine be correct, the plaintiff had a right to recover, for the price of his wagon, in this form of action, provided the proof would authorise it. The finding of the Jury was for the plaintiff: and the error, complained of, is that the finding is contrary to evidence. Now, on the one side, there was evidence that plaintiff tendered back the note, to defendant, and stated to him, that he had represented the note to be good, and had traded it to him, as a thirty dollar note, and that it was for twenty dollars only, and that defendant did not deny it. Also, that the note was not good. And, on the other hand, it was proven, that plaintiff took the note at his own risk. The testimony was, therefore, conflicting; and it is peculiarly the province of the Jury, to determine, as to the credibility of the witnesses; and when there is any evidence to support the verdict, the Court will not set aside a verdict, merely because it is contrary to the weight of evidence, there being no matter of Law involved.\*

It is therefore ordered, that the Certiorari be dismissed, and the proceedings, in the Court below, confirmed.

**163 \*James C. Scott v. Lewis Cooper and Asa C. Harden.**

**Negotiable Paper—Bona Fide Holders—Failure of Consideration—Defence When.**—Failure of consideration, in a negotiable note, is no defence to an action, in favor of a bona fide holder, without notice, unless he took the note after it became due.

This Certiorari is brought, for the purpose of correcting certain errors, alleged to have been committed, in two cases, in a Justice's Court, predicated on two promissory notes, of twenty-five dollars each, payable to James Simmons, made by the said Cooper & Harden, and sued on by the said Scott, as bearer; on the trial of which cases, the Jury found verdicts for the defendants. Several grounds of error are alleged. One is, that the defendants relied upon the plea of failure of consideration, and that the Court permitted them to go into proof, to support said plea, without making any proof, that the notes were over due, when they were transferred to plaintiff, or that plaintiff had any knowledge of such failure of consideration, when he traded for said notes. The return fully admits the facts, that this objection was raised, to the introduction of said evidence, and that said objection was overruled by the Court, and the testimony admitted. The rule of law is, that a defence, of this sort, cannot be set up, against a note in the hands of a third person, to whom it has been transferred, without proof that it was over due,

when it passed out of the hands of the payee, unless it is shewn, that the plaintiff had notice of such failure of consideration, at the time he received said note.

I am, therefore, of opinion, that the Court erred, in admitting any evidence of failure of consideration, and deem it unnecessary to go into an examination of the other grounds.

It is, therefore, ordered, that the Certiorari, be sustained, and new trials, in said cases, be ordered.

**164 \*George M. Smith v. James T. Halk.**

**Witnesses—Competency—Defendant in Justice's Court.**\*—A defendant, in a justice's court, cannot prove a payment of the debt sued for, by his own oath.

The error, complained of in this case, is that an action was commenced, by the plaintiff, on a promissory note, and that the defendant filed a plea of payment, of twelve dollars and seventy-five cents, and that he introduced no evidence, to support his said plea, except his own oath, which was objected to, but which was admitted by the Court, and the Jury found a verdict for the defendant, for the sum of nine dollars and seventy-two cents. I am of opinion that the Court erred, in permitting the defendant to support and establish his plea of payment, by his own oath: the fact of payment being such a fact, as should be proven, by other evidence, and not by the oath of the party.†

It is, therefore, ordered, that the Certiorari be sustained, and a new trial ordered.

**165 \*Blakeman & Luke v. John Hays.**

**Awarding Costs—At Common Law.**‡—At common law, costs can be awarded only against the unsuccessful party.

In this case, there were mutual debts, between the parties, and the Jury, on the final trial, found a verdict, confirming the judgment of the Court, which was for the sum of three dollars and twenty-eight cents, in favor of the defendant; and they further found, that said defendant should pay the cost of the appeal. This is one of the grounds of error, assigned. It is a rule, in the trial of cases in Equity, that the jury may find the cost, against either party; but I know of no such rule, at common Law. There the cost must follow the finding. I am of opinion, therefore, that there was error, in the Jury's finding a verdict in favor of the defendant, and, at the same time, finding the cost against him.

It is, therefore, ordered, that the Certiorari be sustained, and a new trial ordered.

**\*Witnesses—Competency—Defendant in Justice's Court.**—See *Hardaway v. Tinsley*, Ga. Dec. pt. 2, p. 148; *Dowdle v. Stenson*, Ga. Dec. pt. 2, p. 150.

†See *Ante*, 148, 150.

‡**Costs at Common Law.**—At common law no final costs were recoverable. *Mangham v. Reed*, 11 Ga. 139, citing 2 Inst. 288; *Tidd's Pr.* 945; 2 Com. Dig. 542.

\*See *Ante*, 42, 82, 136.



166 \*Benjamin S. Pendleton & Co., Plaintiffs in Execution, v. Enoch R. Mills, H Ezekiah Harrison, Josephus Harrison, Samuel Harrison, Defendants in Execution, and Joshua Calahan, Claimant.

1. **Personal Property—Change of Possession—Loan or Gift—Presumption.**—Where a parent permits personal property to go into possession of a daughter, on her marriage, or shortly afterwards, and to remain there, for a length of time; it will be considered a gift, and the property vests in the husband.
2. **Same—Gift—Conditions.**—If any condition is attached to such gift; it must be expressed, at the time the possession is changed.
3. **New Trial—Conflicting Evidence.\***—A new trial will not be granted, on the ground of a verdict's being against evidence, merely because the evidence preponderates against the verdict, where there is proof on both sides, and no rule of law violated.

This was a claim case, for the purpose of trying the right of property, to a certain negro girl, by the name of Sarah, which had been levied on as the property of Samuel Harrison, one of the defendants, by virtue of the above stated fi. fa.

A claim had been interposed, by Joshua Calahan, as the next friend of two minor children, to-wit, Jephthah and Elizabeth Harrison, the children of the defendant. On the trial of said case, the Jury returned a verdict, finding the property subject. The counsel then moved for a new trial, upon the ground, that the Jury found contrary to Law and evidence.

On behalf of plaintiff, it was proven, that the negro girl was in the possession of defendant, at the time of the levy, and that he had had her in possession, and had exercised acts of ownership over her, for four or five years. On the part of the claimant, a deed of gift, made by Joshua Calahan, and his wife, Sarah Calahan, bearing date on the 22d February, 1841, conveying said negro to said children, was offered in evidence. The execution of said deed

167 was proven, by the \*subscribing witness, A. J. Williford, who is the son of Sarah Calahan, and brother in law to the defendant, who was examined by interrogatories. Upon his cross examination, when asked when said deed was executed, he says he does not recollect the precise time; and, on being asked whether it was made at the time it bears date, or afterwards, he answers that it was made after the time it bears date; and assigns as a reason, that the deed, first made to the children, was thought to be informal, and it was agreed, by the parties, at the time of making the first deed, that if it was not in proper form, another should be made, bearing the same date; and accordingly, the deed exhibited was made to bear date with the one first made. He is again asked to be

particular, and to state, as near as possible, at what time he subscribed said deed, as a witness; to this he replies, as before, that he does not recollect the precise time. He further testifies, that he has known the girl, ever since she was born—that he first saw her, in his mother's possession, and that that possession was not changed, until the year 1838, at which time she was sent to Harrison's (the defendant) to wait on his wife, who was sick, and that she has been in the possession of Harrison, ever since. The claimant also read the interrogatories of David Williford, another son of claimant's wife, for the purpose of accounting for the possession of defendant. He says, that the girl was loaned to defendant's wife, by claimant's wife, until the determination of a law suit, then pending in De Kalb County, against Joshua Calahan and his wife. Upon his cross examination, he is asked, if he was present, at the time the negro girl first went into the possession of Harrison, the defendant, and he answers, he was not. He further states, that defendant has had her in possession ever since 1837, or 1838. He is then asked, how he got his information, respecting the possession of said girl, and whether he knows any thing, of his own knowledge, respecting the said possession, or whether he had received his information from others, and from whom? and he evades the force of this question, by saying that he had already answered it.

This is the substance of the testimony on both sides. The facts, then, established by the evidence, seems to be these—that Mrs. Calahan was a widow—that this negro girl was born her's, during her widowhood—and that Joshua Calahan intermarried with her—that subsequently, the defendant married Mrs. Calahan's daughter, and

168 \*that some time after their marriage, this negro girl went into defendant's possession, and has remained there ever since. It was contended by counsel for plaintiff, that this possession of defendant, thus acquired, vested in him a good title; and that the property was therefore subject to the judgment. On the other hand, it was contended, that Calahan and wife had never parted with the title of said negro, to defendant, but that he held the negro, by virtue of a loan, until the time of the execution of the deed of gift, and afterwards as the natural guardian of his children. I understand the doctrine, as laid down in the books, to be this—That when a parent permits personal property to go into the possession of a daughter, on her marriage, or shortly afterwards, and to remain there, for a considerable length of time, it will in law be presumed to be a gift, and will vest a good title to the property, in the son-in-law. And if any condition is attached to the gift, it must be expressed, at the time the possession is changed—2 McCord's Ch. R. 131; 2 Nott & McCord, 93; 1 Bay's R. 232. The question then is whether, according to the testimony, and these authorities, this was, in the eye of the law, a loan, or a gift. One of the witnesses testifies, that when the girl went into

\*New Trial—Conflicting Evidence.—See Knight v. Mantz, Adm'r, Ga. Dec. pt. 1, p. 22, and *foot-note*; Bagshaw v. Dorsett, Ga. Dec. pt. 2, p. 42, and *foot-note*.

the possession of defendant, she went there, for the purpose of waiting on his wife, who was sick; but says nothing about any conversation at this time, going to shew that she was loaned. The other witness states, that she was loaned by Mrs. Calahan to her daughter, for a certain time, or until a certain contingency should happen; but on his cross-examination, he says he was not present at the time, and he refuses or fails to answer, how or from whom he derived his information. I think, then, that his testimony cannot be relied on, as establishing the fact satisfactorily. And according to the authorities referred to, if there was no condition or stipulation, at the time the possession was changed; it would be considered a gift, and would vest a good title in defendant, which could not be afterwards divested, by any act of the donor. I think, then, when we take into consideration all the facts of this case,—first, that the girl went into possession of defendant and wife, in the year 1837 or 1838, and was permitted to remain there, without any conveyance of any kind, until the year 1841, after the rendition of the judgment in favor of plaintiffs—and that the possession was not even then changed, but a deed of gift was made, by claimant and wife, conveying the negro to defendant's children; and that, for some cause or

169 other, \*that deed was cancelled, and the present deed executed,—and that said deed does not bear date, at the time it was made,—it cannot be said to be a case, free from doubt, or that the verdict is manifestly contrary to the evidence. If there be sufficient evidence to support the verdict, the Court will not grant a new trial, though the evidence may preponderate against the verdict; especially when no principle of Law has been violated.\* Then, after maturely examining all the facts of this case, I am not prepared to say, that said verdict is contrary to Law, or evidence. The motion for a new trial is therefore refused.

Calhoun & Dabney, for motion; and Irwin, contra.

## 170 \*HEARD SUPERIOR COURT.

John W. D. Boling, Nathan Lipscomb, and Thomas Lipscomb, Securities, v. Wilson Strickland, Justice, and James Wilder, Plaintiff.

### Justice's Execution—When May Be Levied on Land.—

Before a justice's execution can be levied on land; the officer must make a return thereon, that sufficient personal property of the defendant is not to be found, to satisfy the execution. And this is the rule, even where the defendant himself points out the land, for levy.

This Certiorari was filed, for the purpose of correcting certain errors, alleged to have been committed by the Court, on the trial of a question, arising upon the hearing of an

affidavit of illegality, filed to sundry fi. fas. issued from the said Court. The first ground, taken in the affidavit, was that the constable had levied the fi. fas. on land, without making any entry, that there was no personal property to be found. The law, upon this subject, is, that executions, issuing from a Justice's Court, shall not be levied on land or negroes, unless there is no personal property to be found, sufficient to satisfy the same: and the Courts have held, that the best evidence of this fact is the return of the officer. The return of the magistrate admits the fact to be as stated; but states that he overruled this ground of illegality, upon the ground that the defendant pointed out the property, himself. It is true, the law gives to a defendant the privilege of pointing out such of his property, in his possession, as he may think proper: but this must be understood, with this limitation—that it be property, of the kind and description, subject to the execution; and the land levied on was not so, unless the defendant had not a sufficiency of personal property, to satisfy said executions. And this fact should have appeared, by the entry of the officer. I am therefore of opinion, that the Justices erred, in overruling this ground of illegality. I do not think the other ground of illegality sufficient.

It is, therefore, ordered, that the Certiorari be sustained, so far as the illegality of the levy is concerned, and that the magistrate direct \*the constable (if there be a sufficiency of personal property to satisfy said executions) to dismiss the levy on the land, and proceed to raise the money, out of the personal property. And if there be not a sufficiency; that he perfect his return, upon the executions, and then proceed against the land.

172 \*Thomas C. Pinckard v. Lucy Ware, Executrix of John M. Ware, Deceased, and Frederick D. Palmer and Samuel Lane, Justices.

### Justice's Court—Dividing Claim to Confer Jurisdiction\*

\*Justices' Courts—Dividing Claims to Confer Jurisdiction—Statutes.—The Act of 1801, amending the Judiciary Acts, so far as they relate to justices' courts, gives its express sanction to such a division or "splitting up" of a large debt as will bring it within the jurisdiction of a justice's court. *Lavender v. Thomas*, 18 Ga. 676. See also, *Bank of St. Mary's v. Brooks*, 12 Ga. 533; *Bank of Savannah v. Planters' Bank*, 22 Ga. 466; *Alexander v. Young*, 23 Ga. 616.

So it is now provided by the Ga. Code, § 4669, (447): "Debts which in the aggregate amount to more than justice's-court jurisdiction, may be divided into liquidated demands, so as to bring them each within such jurisdiction."

"Liquidated," as used in this section, is equivalent to settled, acknowledged, or agreed; and applies to a case where an account for goods sold on the same day was, by agreement, divided into four parts,

\*See Ante, 42, 82, 136, 161.



—**Ouster of Jurisdiction—Necessary Proof.**—To oust a Justice's Court of Jurisdiction, on the ground that an entire demand has been divided into several smaller ones, it must be proved, before the justice's court, that the whole demand was originally entire.‡

This Certiorari is brought, for the purpose of correcting certain errors, alleged to have been committed, on the appeal trial of sixteen cases, commenced by Lucy Ware, as Executrix, &c. against the said Pinckard, upon sixteen promissory notes. The error complained of is, that a motion was made, by defendant's counsel, to dismiss said cases, upon the ground that plaintiff had commenced sixteen separate and distinct suits, against the defendant, upon sixteen promissory notes, payable to the testator, returnable to one and the same term of said Court,

each becoming due on a different day. In such case the plaintiff may bring separate actions in the justice's court after all have become due, and the defendant is not entitled to a consolidation when the same will oust the jurisdiction of such court. *Parris v. Hightower*, 76 Ga. 631.

**Same—Same—Lien of Materialman Not within Statute.**—An entire lien of a materialman, recorded as required by the statute, cannot be enforced by dividing it into notes of less than \$100 each, so as to confer justice's-court jurisdiction. The statute creating such lien contemplates a single lien and a single suit to enforce it; in short, it is a right created by statute and enforceable only in the manner prescribed by the statute. *Bell & Bro. v. Rich*, 73 Ga. 240.

**Same—Same—Consent of Debtor Necessary.**—In order that a claim may be so divided, the consent of the debtor is necessary. Without such consent the creditor can neither divide his claim nor enter a credit for the amount in excess of the justice's-court jurisdiction, and thereby bring his claim within that jurisdiction. *Cox v. Stanton*, 58 Ga. 406 (distinguishing *Wilhelms v. Noble Bros.*, 36 Ga. 599); *McDonald v. Tison*, 94 Ga. 549, 20 S. E. Rep. 428; *Parks v. Oskamp*, 97 Ga. 802, 25 S. E. Rep. 369.

But the holder of the bills of an incorporated bank to the amount of \$150, might, under the statute of 1842, Cobb's Dig. 652, divide them into such amounts as did not exceed the jurisdiction of the justice's court and sue thereon separately. *Bank of St. Mary's v. Brooks*, 12 Ga. 533.

And where the plaintiff claimed only \$100, it was held that the judgment should not be arrested because the note attached to the declaration, and put in evidence, was for more than \$100; the jurisdiction under the statute depending upon the amount "claimed." *Wilhelms v. Noble Bros.*, 36 Ga. 599.

**Same—Same—Same—Consent Must Be Given before Suit.**—And such consent must be given before the bringing of the action. After the suit has actually been brought for more than \$100, jurisdiction can-

—**Dividing Claim to Confer Jurisdiction—Ouster of Jurisdiction—Proof Necessary.**—Where several suits are brought in a justice's court and it is sought to oust the jurisdiction on the ground that they originally constituted one entire demand which was divided to confer jurisdiction, that fact must be proved. *Kendall v. The Justices of the 675th Dist.* Ga. Dec. pt. 2, p. 185.

‡See Ante, 105, 149.

exceeding, in the aggregate, the jurisdiction of said Court; and therefore, that said Court had no authority to take cognizance of said cases; which motion was overruled, by one of the justices, and sustained by the other; and it was therefore consented by the parties, that said cases should be brought up by Certiorari. The return fully sustains the charges, contained in the petition. The only question to be determined is, whether the magistrate erred, in refusing to dismiss said

not then be conferred by agreement that judgment shall be rendered for \$100, and interest; in other words, the jurisdiction must attach at the beginning of the suit. *Bell & Bro. v. Rich*, 73 Ga. 240.

**Same—Same—Same—Right of Debtor to Consolidation.**—The debtor has the right to have several such suits in a justice's court consolidated, if by so doing the court is not ousted of its jurisdiction. *Mfrs. Bank v. Goolsby*, 35 Ga. 82; *Hartman v. Mayor*, etc., 45 Ga. 96; *Parris v. Hightower*, 76 Ga. 634.

**Same—Same—Whether Unlawful as Preferring Claim Divided.**—The fact that the splitting up of a claim may put that debt ahead of other debts, does not render such action unlawful. *Bank of Savannah v. Planters' Bank*, 22 Ga. 466; *Alexander v. Young*, 23 Ga. 616. Nor is it any ground for relief in equity. *Lavender v. Thomas*, 18 Ga. 677; *Alexander v. Young*, 23 Ga. 616.

As to whether a debtor and creditor, under any circumstances, can, by agreeing to the division of the claim of the latter into small notes within justice's-court jurisdiction, and thereby expediting judgment thereon, give the claim of such creditor priority over the larger claim of a creditor who has attached the debtor's property, but not yet secured judgment, there seems to be much doubt. It was so held in *Andrews v. Kaufmans*, 60 Ga. 669. This decision was criticised and the point left open in *May v. Sibley*, 69 Ga. 133, and again in *Bell & Bro. v. Rich*, 73 Ga. 240.

If this is done through fraud and collusion, it is illegal, and may be attacked by the creditors prejudiced thereby. *Raeffe v. Moore*, 58 Ga. 94; *May v. Sibley*, 69 Ga. 133; *Beach v. Atkinson*, 87 Ga. 288, 13 S. E. Rep. 591.

In *Andrews v. Kaufmans*, 60 Ga. 669, it was held that the fact that the small notes were made by agreement for the purpose of defeating the attaching creditor, was not of itself sufficient to make a case of collusion and fraud.

See in this connection Ga. Code, § 4578 (3331), which provides: "The lien of an attachment is created by the levy, and not the judgment on the attachment; and in case of a conflict between attachments, the first levied shall be first satisfied; but in a contest between attachments and ordinary judgments or suits, it is the judgment and not the levy which fixes the lien: Provided, however, that the lien of an attachment shall have priority over the lien of an ordinary judgment that has been obtained upon a suit filed after the levy of the attachment."

**Same—Same—Other Cases.**—For other cases in which claims were divided in order to confer jurisdiction upon the justice's court, but which went off on points of procedure, evidence, etc., see *Dodson v. Connally*, Ga. Dec. pt. 1, p. 132; *Chambers v. Dickson*, Ga. Dec. pt. 1, p. 164; *Jack v. Watson*, Ga. Dec. pt. 1, p. 168; *Brisco v. Brewer*, Ga. Dec. pt. 2, p. 105; *Gresham v. Landens*, Ga. Dec. pt. 2, p. 149; *Kendall v. Justices of 675th Dist.*, Ga. Dec. pt. 2, p. 185.

cases, upon this state of facts. It is not alleged that any plea had been filed to the jurisdiction of the Court, nor does it appear that it was either plead, or attempted to be proved, that the consideration, for which said notes were given, was one entire debt, divided by the parties into sixteen parts, for the purpose of giving to the Justice's Court jurisdiction. Was there any error, then, in refusing to dismiss said cases, without such plea and proof? I think not: for the ground, upon which it has been decided, that the Justice's Court did not have jurisdiction

173 in such cases, is, \*that the debt was one and entire, and that its nature could not be changed, by splitting or dividing it into several parts. Then, before the Justice's Court can be ousted of its jurisdiction, for this cause, the fact must be made to appear, as this doctrine is not applicable to several notes, between the same parties, given for different considerations. I am therefore of opinion, that the Court did not err, in refusing to dismiss said cases.

It is therefore ordered, that the Certiorari be dismissed, and that said cases proceed to trial, in the Court below.

174 \*William A. Redd, Guardian of Martin J. Kendrick, *v.* Thomas Wood, Thomas C. Pinckard, Joseph Ector, John S. Wood, Augustus Wood, Mortimer Ector, Richard Ector, and Allen Livingston.

1. **Ne Exeat—Denied Where Petitioner without Legal Right to Sue.**—A writ of ne exeat will not be granted, in favor of a person, who has no legal right to sue.

2. **Administrator ad Colligendum—Right to Bring Action.**—An administrator ad colligendum can bring no action.

3. **Next of Kin—Right to Bring Action.**—The next of kin of a decedent cannot sue for his property, without administration.

4. **Chancery Practice—Matter of Fact—Not Subject of Demurrer.**—A demurrer to a bill in Equity cannot be sustained, on the allegation of a mere matter of fact. This is the subject of plea, and answer, not of demurrer.

5. **Estate of Deceased Infant—Devastavit by Absconding Guardian—Remedy of Next of Kin.**—Where the guardian of a deceased minor has wasted the estate, and he and his securities are about to remove themselves and their property from the jurisdiction of the court; the next of kin may have a quia timet, to secure themselves.

This bill was filed, by William A. Redd, as the guardian of Martin J. Kendrick, a minor, against Thomas Wood, who is alleged to be the guardian of Mary Eliza Kendrick, and the other defendants, four of whom, to wit, Joseph Ector, Thomas C. Pinckard, John S. Wood, and Augustus Wood, are his securities, in which it is alleged, amongst other things, that John W. Kendrick, of Troup county, departed this life, leaving his two children, Martin J. and Mary Eliza, his only heirs and legatees, and that they were possessed of a large estate, of the value of forty

thousand dollars. That the complainant, Redd, was appointed the guardian of Martin J. and the defendant, Thomas Wood, guardian of Mary Eliza; that the estate was divided, and the portion of Mary Eliza paid over to her said guardian. That in the year 1840, the said Mary Eliza died, leaving the said Martin, her brother, her only heir at law, and entitled to the whole of her estate; and that the said Thomas Wood

has wasted most of said estate, and 175 \*has become wholly insolvent, and has caused his negroes to be conveyed out of the State, for the purpose of evading the payment of said estate; and that Joseph Ector, for the purpose of defrauding the said Martin J. and evading his liability, on said guardian's bond, has conveyed the whole of his property, consisting of land and negroes, to his two sons, Richard Ector and Mortimer Ector, without any consideration; and also that John S. Wood, another of the securities, has made a voluntary conveyance of his property, to Allen Livingston; and that it is apprehended by complainant, that said parties will remove said property without the limits of said State; which charge is also made, with regard to Augustus Wood. It is also stated, that the complainant, the guardian of the said Martin J. had made application for letters of administration, on the estate of the said Mary Eliza, which application is still pending; and prays a ne exeat, and that said parties be restrained from conveying or removing said negroes, until further order, &c.

The defendants now move to dissolve the ne exeat, and quia timet, and to dismiss the bill upon the following grounds:

"1st. Because the same was improvidently granted by the Court.

2nd. Because the same was irregularly granted, in this; that said complainant shews no right, by his said bill, to maintain said suit, against said defendants; and that letters of administration have been granted to Joseph Ector and Richard Ector, two of the defendants, upon the estate of Mary Eliza Kendrick, the intestate, which letters were granted at the last July term of the Interior Court of Heard county, sitting for ordinary purposes; the said administrators giving bond and security, in terms of the Law."

I will first consider the question in reference to the writ of ne exeat. The writ of ne exeat is a prerogative writ, which is issued to prevent a person from leaving the realm.—2 Story's Eq. 686. A writ of ne exeat issues, for the purpose of obtaining security for a demand, from a person intending, whatever may be the cause, to leave the country, when the other party has not a legal remedy, and cannot hold him to bail.—2 Maddox Ch. 226. It is a rule that a writ of ne exeat issues, only upon a certain, equitable, money demand, at the instance of a plaintiff, who shews a title to 176 sue.—2 Maddox Ch. 227. \*And, further, it is said the affidavit must be as



positive, as to the equitable debt, as an affidavit of a legal debt must be, to hold to bail.—Ib. 229. It is also necessary, that the plaintiff should swear, positively, that defendant is going abroad, or to some declaration of his, that he is. Let us then apply the above rules, to the facts of the case under consideration. There is no separate affidavit, the bill being sworn to in the usual form; and when we look to the facts, as charged in the bill, there does not seem to be that certainty and positiveness, either with regard to the amount of indebtedness, or the fact that the defendants are going abroad, to authorise the granting of this writ, by which the citizen is restrained of his natural liberty; which is therefore never granted, without great consideration. But there is another part of this authority, which is conclusive upon this branch of the case. The writ of *ne exeat* is issued only at the instance of a plaintiff, who shows a title to sue. It is a well established doctrine, that the next of kin to a deceased person cannot maintain a suit in Equity, for the recovery of the property of the deceased, without administering, though he be entitled to the property.—Bradford v. Felder, 2 McCord's Ch. R. 168; Paige's Ch. R. 47. This plaintiff, having no title to sue, by reason of his not having taken out letters of administration, does not bring himself within the rule. I am therefore of opinion that, so far as the order issued in this case, authorises the issuing of a writ of *ne exeat*, restraining the liberty of the persons of the defendants, it is unsupported by authority, and should therefore be dissolved. With regard to the other branch of case, to-wit, that part of the order, which is more properly predicated upon that portion of the bill, denominated *quia timet*, I have found much more difficulty, in coming to a conclusion. Mr. Story says, in his Commentaries, 2d vol. 130, bills, *quia timet*, in equity, are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied, to prevent wrongs or anticipated mischiefs, and not merely to redress them, when done. The party seeks the aid of a Court of Equity, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires any compensation, or other relief. The manner, in which this aid is given by Courts of Equity, is dependent upon the circumstances. They interfere, sometimes, by the appointment of a receiver, to recover rents, or other income; sometimes, by an order to pay a pecuniary fund \*into Court; sometimes, by directing security to be given, or money paid over; and sometimes, by the mere issuing of an injunction, or other remedial process: thus adapting their relief to the precise nature of the particular case, and the remedial justice required by it. Now what is the anticipated mischief in this case, which the bill seeks to prevent? It is alleged, that Mary Eliza Kendrick has died intestate, and

without issue; that her guardian, one of defendants, was at the time of, or previous to, her death, possessed of a large estate, to which the ward of complainant is entitled; that said guardian has wasted and squandered said estate, and is now insolvent; that he has colluded with Joseph Ector, one of his securities, and procured him to run his property out of the State; and that the said Ector, for the purpose of evading his liability, as security on the guardian's bond, has made a fraudulent and voluntary conveyance of his negroes and other property, to his sons; and that it is now apprehended, that they will run said property out of the State. Similar statements are made, as to apprehensions that the other securities will do the same. It is also alleged, that complainant has made application for letters of administration, on the estate of the said Mary Eliza, which application is now pending; and that it is apprehended, that these anticipated mischiefs will happen, before said letters can be granted. And the bill prays that these defendants may be restrained from doing these acts, until the further order of the Court. A party cannot go into a Court of Equity for relief, when he has a full, complete and adequate remedy at law. Then, taking all the facts charged in the bill to be true, I would enquire, what course could have been pursued at law, to remedy or prevent those anticipated mischiefs? I know of none. But it was contended by defendant's counsel, in the argument, that the complainant might have obtained temporary letters of administration, by application to the Clerk of the Court of Ordinary, and that he could then have commenced a suit, on the guardian's bond, and held the parties to bail; and Toller's Law of Executors, 254 and 404, was relied on, as authority to sustain the position, that a temporary administrator could sue. By an examination of this authority, it will be found that certain temporary administrators, to-wit, *durante minoritate*, *durante absentia*, et *pendente lite*, may maintain actions, for the recovery of debts due the deceased. But this power does not extend to such temporary administrators, as are constituted under an appointment by the Clerk of the Court of Ordinary, under 178 our Statute; \*who are appointed, after an application is made for letters, until the next Court only; who are appointed, not as a matter of right, but only at the discretion of the Clerk, to collect and take care of the effects of the deceased. It will be found, by all the authorities on the subject, that the three kinds of temporary administrators, first mentioned, have various privileges attached to their appointment, which do not belong to an administrator *ad colligendum*. In Toller's Law of Executors, page 107, I find this authority: "The ordinary, in default of persons entitled to the administration, may grant letters, *ad colligendum bona defuncti*, and thereby take the goods of the deceased into his own hands—and thus assume the office of an executor or administrator, in respect to collecting them: but the grantee of such letters cannot sell the effects, without

making himself an executor de son tort." Chancellor Kent, in his Commentaries, vol. 2d, 335, when speaking on the subject of granting letters of administration, says: "If no one offers (that is, applies) the surrogate must then appoint a mere trustee ad colligendum, to collect and keep safe the effects of the intestate; and this last special appointment gives no power to sell any part of the goods, not even perishable articles, nor can the surrogate confer upon him that power." And Judge Blackstone, in his Commentaries, 2nd vol. 505, says, "The ordinary may grant his letters ad colligendum bona defuncti, which neither makes him executor or administrator; his only business being to keep the goods in his safe custody." All of these authorities go to shew, that an administrator ad colligendum is much more limited in his powers than an administrator durante minoritate, &c. and none of them say, that he has any power to sue. But there is an authority in 2 P. Wm. 584, which is directly in point, and goes fully to establish the position, that such person has not the right to sue. The question there was, whether an administrator pendente lite could sue for the recovery of the goods of the deceased. And in the report of the case this language is used, by the counsel, who contended that the administrator had the right—"But it would very much lessen and take off from the use and benefit of these administrations, if it should be adjudged that none, by virtue thereof, were capable of suing for and recovering the debts of the deceased: This construction would reduce the grant of letters of administration pendente lite, to no more than letters ad colligendum bona, &c."

179 \*admitted to be the settled doctrine, by which argument it was fully that such an administrator had no power to sue. But suppose he has the right to sue. It must be recollected that, according to our Statute, the granting of such temporary letters is a matter of discretion with the clerk; and it is therefore by no means certain, that they would have been granted to the complainant, in this case, if application had been made. What, then, was the remedy, proper to be pursued, by the complainant in this case, at the time of filing of this bill, for the purpose of protecting and securing the rights and interests of his ward? He could not have sued on the guardian's bond, even if he had applied for and obtained letters ad colligendum: For such an administrator cannot sue. He could not have brought an action in the name of his ward, as next of kin; for the next of kin cannot maintain a suit, for the recovery of personal property. He was not entitled to a writ of ne exeat, as we have already seen; because, to maintain such a suit, the party must have title to sue. What then?—Shall we say that the party has no remedy at all? No: this will not do. Every wrong is said to have its remedy, and every injury its appropriate redress. As before remarked, a bill quia timet is used to prevent wrongs, or anticipated mischiefs, by a party, who fears some future injury will probably be done to his rights or interests.

The greatest difficulty, which presents itself to my mind, is the right of the Court to interfere, by its process, with the private property of the defendants; and nothing but the absolute necessity of the case, which arises from the total absence of every other remedy, would, in my opinion, authorise the Court to do it. If the property in the possession of defendants was the specific property of the deceased, to which the ward of complainant is entitled; there would be no difficulty. But Judge Story, in his Commentaries, 2nd vol. page 130, when speaking with regard to estates of deceased persons, says, "If there is danger of waste of the estate, or collusion between the debtors of the estate and executors or administrators, whereby the assets may be subtracted; Courts of Equity will interfere and secure the fund; and in case of collusion with debtors, they will order the latter to pay the amount of their debts into Court." Now, although this is not an authority precisely in point, yet there is a strong analogy, between it and the facts charged in the bill. There is a charge of collusion, between the guardian and his securities, to 180 \*defraud the ward of complainant, and that, for this purpose, they have run the property of the guardian out of the State, and that the securities, whose property would ultimately be liable for the payment of this demand, have conveyed it fraudulently, for the purpose of evading said liability; and that there is apprehensions that it will be removed from the State also. Then, if it be conceded, that the Court has no right, under this state of facts, to restrain the defendants, by its process, from conveying their persons and property, beyond the limits of the State; there would certainly be a great defect of justice; and the defendants can, regardless of their obligations and liabilities to this infant child, in open day, remove themselves and every article of property, which they possess, to parts unknown, with perfect impunity. I think a proposition, so startling as this, would not be seriously contended for.

I am therefore of opinion, that the facts charged in this bill, make such a case as entitles the complainant to come into a Court of Equity, and invoke its powers, to restrain the defendants from removing their property beyond the jurisdiction of this Court, until his ward's interest can be protected, by a legal representation of the estate of his deceased sister. And I am also of opinion, that, so far from the fact, that the plaintiff has not a legal right to sue, being a ground of objection to this proceeding; this is the strongest reason, which can be urged in its favor. Otherwise the party would be left without remedy.

The second ground, upon which the motion is based, is because letters of administration have been granted to Joseph Ector and Richard Ector, two of the defendants, upon the estate of Mary Eliza, which letters, it is stated, were granted at the July term, 1841, of the Inferior Court of Heard county. This ground involves a matter of fact, which



seems to have arisen since the filing of the bill, and cannot therefore be any valid reason, why the bill should not have been sanctioned, originally. But, if the fact be true, it is proper subject matter for a plea, and not for a demurrer. A plea has also been filed in this case, embodying the matter contained in this ground of the motion. But, as it was alleged by complainant's counsel, that there had been no service of notice of the filing of the plea, the merits of the plea were not gone into upon the argument, and therefore it is not deemed proper to make

any decision in regard to the plea, 181 \*as the complainants may desire to take issue upon it, and shew that the facts therein contained are not true.

It is therefore ordered, that the motion to dismiss the bill be overruled, and that the motion to dissolve the writ or order, restraining the defendants from conveying the said negroes, and removing them beyond the jurisdiction of the Court, be also overruled; and that the motion, to dissolve the writ of ne exeat, so far as it restrains the personal liberty of the defendants, be sustained.

## DECISIONS IN THE CHATTAHOOCHEE CIRCUIT.

JOSEPH STURGIS, JUDGE.

### 185 \*MUSCOGEE SUPERIOR COURT.

Henry Kendall, and Elizabeth P. Kendall, Makers, and Daniel M. Jones, Endorser, v. The Justices of the 675th District of Said County.

1. *Justice's Court—Dividing Claim to Confer Jurisdiction*\*.—Proof Necessary to Oust Jurisdiction.†.—When several suits are brought, to one term of a Justice's Court, and it is sought to dismiss them, on the ground that they constituted, originally, one entire demand, which was divided, in order to give a Justice jurisdiction;—that fact must be proved.

2. *Same—Same—Same*.—The notes themselves are not evidence of the fact above required.

The above Certiorari is proceeding on the grounds, that three suits were instituted, in the Justice's Court of said district, predicated on three several due bills, two for \$30 each, and one for \$2.50, making, in the aggregate, the sum of \$62.50. Said due bills, made by Henry and Elizabeth Kendall, and endorsed by Daniel M. Jones, the plaintiff in Certiorari.

The grounds of error, assigned, are, that the three due bills constituted one entire contract, and were given for the same consideration; and that, therefore, the Court had no jurisdiction, the same exceeding the sum of \$30, besides interest. The return of the Court below admits the facts, as to the suits, and the due bills, the foundation of them, as charged; but denies that there was any evidence, that the consideration for them was one entire contract; but that the due bills were dated of the same date, and payable to the same payee. As the defendants in the court below, and plaintiffs in Certiorari,

failed to produce evidence, going to shew the entirety of the contract, for which the due bills were given, and did not move to consolidate the three actions, but merely objected thereto, on the ground of want of jurisdiction; I am of opinion, that the Court below committed no error, in overruling the plea. In coming to this conclusion, I

186 do not \*intend to be considered, as overruling the decision of my predecessor, in the case of the Planter's & Mechanic's Bank v. Leroy, Wiley, et al.—Georgia Decisions, Part I, 50. At the time that opinion was delivered, I fully concurred therein; and have seen no reason, since, to change my opinion. But the case at bar does not come up to the rule, as laid down in that case. For all the Court knows, each due bill may have been predicated on a separate and distinct contract; and so the Court below was bound to consider, until the defendants, under their plea in abatement, should make it appear otherwise, by proof. Let the Certiorari be dismissed and the cases in the Court below proceed in the terms of the Law.

Note.—The same point is decided, by the same Judge, in the following cases, in Muscogee Superior Court.

Hooper & Jones v. Justices of 675th District.

Jones & Harris v. same.

H. & E. P. Kendall v. same.

W. P. Jones & al. v. same.

Daniel M. Jones v. same.

See. also, Gresham v. Landens & al. Ante, 149; Brisco v. Brewer & al. Ante, 105; Pinckard v. Ware, Ante, 172.—Note in Original Edition.

187 \*Leroy M. Wiley v. The Planter's & Mechanic's Bank of Columbus, Defendants, and James M. Chambers, Garnishee. Daniel Hightower v. The Same.

Pleading—Answer of Garnishee—Traverse—Sufficiency.—When a garnishee's answer denies all indebted-

\*Justice's Court—Dividing Claim to Confer Jurisdiction.—See generally, Pinckard v. Ware, Ga. Dec. pt. 2, p. 172, and foot-note.

†Same—Same—Ouster of Jurisdiction—Proof Necessary.—See Pinckard v. Ware, Ga. Dec. pt. 2, p. 172.

ness; the general averment, that he is indebted, and has in hand effects of the defendant, without specifying what is his indebtedness, or what assets he holds, is uncertain, indefinite, and constitutes no traverse of the answer.

Suits at Law were sued out by the plaintiff, against the defendants, and recoveries had thereon, and summons of garnishment served, upon James M. Chambers, returnable to the Superior Court of Muscogee County, and the answer of the garnishee filed, at the October term, 1842, of said Court, denying any indebtedness to the defendants, or having any effects in hand, &c. To which answer the plaintiffs tendered an issue, traversing the answer of the garnishee, on the following grounds:

1st. Because the garnishee, before or at the time of filing his answer, was indebted to the defendants, in a large sum of money, to wit, the sum of \$30,000.

2d. Because the garnishee had, before or at the time of filing his answer, notes, accounts, and other property and effects in his hands, belonging to the said defendants, amounting in value to the sum of \$30,000.

3rd. Because the said garnishee held in his hands, at the time of filing his answers, or before and at the time or after the service of summons, notes, accounts, and other effects, the property of the defendants, amounting to \$30,000, which was transferred to him, by the defendants, in contemplation of insolvency, for the benefit of him, the garnishee, and other favored creditors, but not for the benefit of all the creditors.

188 \*To each of the said grounds of traverse, the garnishee, James M. Chambers, demurred, on the grounds, that the plaintiffs, in each of the said several grounds of traverse of said answer, did not allege or charge any specific indebtedness, nor did they specify what assets, their nature, kind, or character—that the allegations in each are indefinite, and that the judgment, to be had thereon, could not be plead in bar to any subsequent suit, to be brought thereon, against the said garnishee.

In determining this demurrer, it becomes necessary to look to the rules of pleading, in Courts of Law and Chancery, as well as the reasons of the rule.

The object and purpose of pleading are, that the party, called on or charged, may be fully informed and advised of any and every matter, they may have to answer, and of the character of the evidence that will be adduced, that he may prepare to meet it, and that the adjudication thereof may be final and conclusive, and the judgment had thereon may be plead in bar, to any subsequent action for the same demand or cause. If these are rules of pleading, and the reasons for the rules; is the garnishee, James M. Chambers, in the issue thus tendered, traversing his answers, fully informed and advised in what his indebtedness consists, whether by note, bond, or otherwise? What amount, what for, when due, whether the same is in writing, or if so, the description of the instrument or instruments, whereby they may

be known, when tendered in proof? And could he be enabled therefrom to meet the plaintiff's proofs, without being thus advised? Suppose the indebtedness was upon promissory notes, that had been paid off and discharged; would he be prepared with testimony, to prove it? Or, if they were without consideration, or the consideration was illegal, or had failed, or any other ground that would discharge them; could it be met by proof?

The general charge of indebtedness, is not particularized, by defining in what and for what, constitutes in my opinion no charge, upon which an issue could be had. It does not follow, because the garnishee answers that he is not indebted, that the charge, that he is indebted, charges any indebtedness. The plea of the general issue, to an action of debt, only denies the charge of indebtedness. Nil Debet. But is there any Court,

that would entertain a replication to 189 \*such a plea, which only replied that the "defendant was indebted," without specifying wherein? The argument, that the facts of indebtedness are fully known to the garnishee, would apply with as much reason and force, to any and every common law action, and therefore the plaintiff should only allege the defendant was indebted. The garnishment law was intended, by searching the conscience of the garnishee, to ferret out all the assets of the plaintiff's debtor. But whilst the law intended to prevent frauds, the answers of garnishees were taken and presumed to be true, unless it could be made to appear otherwise, by competent proof. If the same is susceptible of proof, the facts proved could as easily be charged: Therefore the plaintiff can have no cause of complaint, as to the decision made in this case. For, if they are unable to specify in what the garnishee's indebtedness consists; they are equally unable to prove it: and no Jury could find in favor of the issue, in the absence of such proof. But, if so vague and indefinite a charge was found to be true, and the garnishee was indebted; would the recovery, had by the plaintiff, be any bar to a suit hereafter by the defendants, the garnishee's creditor, against him? Suppose the garnishee had assets, and owed debts, and each amounted, in value, to the sum of \$30,000: how is he to be protected, if sued for the assets had, and not the debts due? How could he plead? and, finally, how is the defendant, the creditor of the garnishee, to be protected, if his demand should be greater than the amount charged? Is he not liable to be defeated also? It is clear, therefore, to my mind, that the general charge, of being "indebted to the defendants, in a large sum of money, to wit, in the sum of \$30,000," is indefinite, too general, and constitutes no traverse, in law, of the answer of the garnishee.

The reasons applied to the first ground apply with equal force and propriety to the other grounds. Therefore let the issue of Traverse of the Answer of the garnishee be dismissed, and the garnishee discharged from further answering to the same.



190 \*Nicholas Howard and Edward Molyneux, Complainants, v. Seaborn Jones, The Insurance Bank of Columbus, James S. Calhoun, Charles L. Bass, and John C. Mangham, Sheriff, &c.

1. Executions—Property Sold Coming Again into Possession—Second Levy.—Property, once sold under execution against J. S. is liable to be levied on again, if the defendant again becomes its owner.
2. Same—Property under Levy—Liability to Second Levy.—Property, under levy and claim, is subject to a second levy, under other executions against the defendant.
3. Same—Money Raised and Misapplied—Subsequent Sale.—If money is raised to pay off a fi. fa. but not applied to it: a subsequent sale, under the same fi. fa. will convey good title to a bona fide purchaser. *Semb.*
4. Same—Mortgaged Property—Sale after Foreclosure—Conveys Equity of Redemption Only.—A sale of mortgaged property, after foreclosure, under a common law judgment in favor of other creditors, disposes only of the equity of redemption.
5. Same—Same—Same—Mortgagee's Right to Proceeds.—Hence, the mortgagee cannot claim the proceeds of such sale, though his mortgage be elder than the judgment.

The bill in the above case charged, that on the first Tuesday in July, 1842, John C. Mangham, as Sheriff, by virtue of two writs of Fieri Facias, one in favor of William Foster, v. Charles L. Bass, maker, James S. Calhoun, T. & M. Evans, John J. Boswell, Wm. P. McKeen, and Seaborn Jones, endorser, the same being transferred to Seaborn Jones by the plaintiff, which judgment was obtained at October term, 1839, of Muscogee Superior Court, for the sum of \$5,774.93 principal, \$176.50 interest, and \$16.87½ cost; and the other in favor of the Insurance Bank of Columbus v. James S. Calhoun and Charles L. Bass principals, and T. & M. Evans, securities on the stay of the execution which was issued on a judgment obtained at October term, 1838, of the said Superior Court, for the sum of \$9,000 principal, \$894 interest, up to 10th December,

191 \*1838, \$3, protest fee, and \$11.25 cost; sold a portion of lot of land, number 175, on the corner of Broad and Randolph streets, on which was a two story brick building erected, occupied by L. J. Davis and George A. Walker, for the sum of \$3,050; the brick store on the north side of Randolph street, occupied by O'Hanlon, \$510; a brick granite on the south side of Randolph street, at that time occupied by S. Armstrong Bailey, for the sum of \$505. Also, lots 35, 36, 37, and 38, occupied as a residence, by H. Greenwood, for the sum of \$2,500. Also, the Oglethorpe House, with the tenements and law offices in the rear, on Randolph street, for the sum of \$5,000, all sold as the property of the said James S. Calhoun. That Nicholas Howard, one of the complainants, was the purchaser of said lots. That Edward Molyneux, jr. advanced to Howard the purchase money, to-wit, the sum of \$11,565, and that Howard received a deed from the Sher-

iff, for the said lots and improvements; that at the time of the purchase, the complainants believed that the property was subject to the fi. fa.'s; that the levies were legal, the sales were valid, and the titles to the property sustainable by law; that since the sale, complainants have ascertained that the said property was not subject to the executions or either of them; that the levies were illegal; that the Sheriff had no power or authority to sell said property; that the sales were void, and therefore, they had acquired no title by the purchase; on the ground, that the whole of said property was, on the 1st Tuesday in September, 1839, sold at Sheriff's sale, by virtue of one of said fi. fa.'s, viz. the one in favor of the Insurance Bank of Columbus, as the property of said Calhoun & Bass, except lots, number 25, 36, 37, and 38; and that by that sale, on the property sold, except the lots excepted, the lien of that last mentioned fi. fa. so far as the interest of Calhoun & Bass extended, was discharged, and the property released from the same, and was not liable to be again seized by said fi. fa.; and also that the whole of said property was also levied on as the property of James S. Calhoun, November, 1841, and advertised by the then Sheriff, for January sales, 1842, to satisfy fi. fa.'s in favor of James S. Shorter v. Calhoun, and Burton Hepburn v. Calhoun, and the aforesaid fi. fa. of the Insurance Bank of Columbus, and that a claim to said property had been interposed by one Arthur B. Davis, and the sales suspended, and that the Sheriff did not return the claim to the Court, as in

duty bound he should have done, nor deliver them to his \*successor in office; and that the claim is still undisposed of, and therefore that said lots were in the custody of the Law, and not subject to seizure and sale, until the said claims were disposed of; and therefore, that sale was void; also, that the fi. fa. of the Insurance Bank, together with sundry other fi. fa.'s sold on the 1st Tuesday in May, 1840, and at other times, before the sale in July, 1842, as the property of said James S. Calhoun, the proceeds of which amount to, in the aggregate, the sum of \$14,092.92 cents, which was more than sufficient to have paid off and discharged the said Insurance Bank fi. fa. if the same had been so applied, and therefore, that the same was equivalent to a payment of said fi. fa. and consequently, the fi. fa. was illegal and void; and that the fi. fa. in favor of William Foster, transferred to Seaborn Jones, had no lien on the property of Calhoun, as Calhoun was an endorser; that the debt upon which the judgment was founded, was not payable at bank; that Jones was an endorser also, and that the transfer, by Foster to Jones, conferred no lien in favor of Jones against Calhoun, or continued Foster's lien on the property of Calhoun. The bill also charges the money raised by said sale in July, 1842, still in the hands of the Sheriff. The bill prays, that the sale in July, 1842, may be set aside, and the deeds cancelled; that the proceeds of the sale viz. that the sum of \$11,565, may be decreed to be returned to Molyneux, and such other relief in

the premises, as may be equitable and just.

To this bill the defendants filed a general demurrer, on the grounds of a want of equity.

The complainants, by their bill, seek to set aside the sale made by Mangham, Sheriff, on three grounds:

1st. That the property had been previously sold as the property of Calhoun & Bass, by virtue of the fi. fa. of the Insurance Bank of Columbus; that by the previous sale, the property was discharged from the lien of the fi. fa. and was not again subject to the same; that the fi. fa. of William Foster was discharged by the transfer to Jones, the last endorser, so far as the same could operate against Calhoun.

2nd. That the property had been

levied on in November, 1841, \*by S. R. Bonner, the then Sheriff, for January sales, 1842, by sundry fi. fas. v. James S. Calhoun, et al. in favor of James H. Shorter, et al. and claimed by Arthur B. Davis; that the claim was undisposed of, and that the property could not be again seized, being in the custody of the Law. And

3rd. That said fi. fa. of the Insurance Bank was discharged and paid off, to-wit, that a former Sheriff had raised money, which if applied thereto, would have satisfied the same.

As to the first ground, take the allegations contained in complainant's bill to be true, as we must, for the purpose of considering this demurrer, and the bill no where charges, that at the time of the sale, in July, 1842, there was no legal title then subsisting in James S. Calhoun, one of the defendants; and so long as there is title in Calhoun, that title is the subject of levy and sale, and to any and every fi. fa. against him, as much as if it had never been before seized and sold. It all may be true that the same was so sold, and as suggested by defendant's counsel, may have been purchased by Calhoun, or his friend or trustee for him, or he may have, subsequent to the sale, acquired title. If the complainants wished to avail themselves of the ground, that there was no title in Calhoun or the defendants in fi. fa. they should have so charged; for the charge, as to a previous sale, does not in any wise charge a want of title in Calhoun, et al. but the bill (I will not say cautiously,) avoids charging the same, or where the title is; and I again repeat, that it no where charges, that there was no title Calhoun, et al. at the time of the sale in July, 1842, and in whom, the legal title then was. It is not a fixed and settled rule of Law, that where a fi. fa. has once seized and sold property, that the same property cannot be again seized by the same fi. fa. provided there is title in the defendant at the time of seizure. The rule, I understand to be this, that a Sheriff could not justify for trespass, in seizing that which had been previously sold by the same fi. fa. provided the purchaser remained in possession, unless he could show title then in the defendants; and that is as far as the rule has ever gone. I am therefore, of the opinion, that the same property may be sold

at any time that there is title in the defendant, notwithstanding the same has been previously sold as the same defendant's property, and to satisfy the same fi. fa. 194 The question is not, has the \*same been formerly sold; but is, was there title in the defendant, or not, at the time of sale. The bill no where charges there was not title, and the Court will not presume there was not, in the absence of such a charge.

As to the next ground, that the property was in custodia legis, having been previously levied on and claims interposed, and therefore until the claims were disposed of and levies discharged, was not subject to seizure at the instance of other judgment creditors; I have never understood the doctrine of custodia legis to apply to real estate, as the property remains in the possession of the tenant until sold, and is in his keeping, until, by virtue of sale, the possession is then delivered to the purchaser. But the rule is different, in relation to personal property. There the Sheriff, by levy, becomes possessed, acquires a right to hold and keep possession until sold, and then to deliver the possession to the purchaser, and could maintain an action, during the time of possession, for any violation of his right of possession. Such a thing as an action for trespass on freehold, by the Sheriff, whilst the same was under levy, was never heard of; whilst actions have been frequent, and are common, for violation of the qualified right. And what has been the practice? Is it not the every day practice that the Sheriff levies, at different periods, on the same property, either personal or real, at the instance, and to satisfy the claim of different judgment creditors? Is it not the same in relation to attachments? and what lawyer ever attempted to relieve the property from subsequent levies, by the interposition of the doctrine of custodia legis? But the doctrine will apply in cases where judgment creditors are in different jurisdictions; as instanced in the case cited in 10 Peters S. C. Rep. 400, in the case of Hangan v. Lucas. There, the question was not between judgment creditors of the same Court, but of different jurisdictions—one a creditor in the District Court of the United States, and the other in the State Court of Alabama. And in that case the subject matter of levy was personal property; negroes, not real estate, as in the case now under consideration. The question was as to jurisdiction there. The custody of the property is in the officer making the first levy, and consequently the possession had to be disposed of by law. Therefore the law gave it where it belonged. But here the custody of the property is in the

defendant. He remains in possession, 195 and is entitled to hold until \*the title is disposed of, and he by that disposition is dispossessed. I would have no hesitancy in deciding, as to the custody of the property belonging to the officer first seizing, provided the seizure gave him the keeping; but has it ever been disputed that the same officer, officiating in the same jurisdiction, could levy as many executions as the prop-



erty was subject to, and hold the same until each levy was disposed of, or the property sold, even personal property? Such is the every day practice, and our Statute fully authorises the same. Therefore the levy by Bonner was the levy of the Sheriff of Muscogee; the levy and sale by Mangham, was the act of the Sheriff of Muscogee, all acting in the same jurisdiction. And the former levy of Bonner, and the claim of Davis, in the opinion of the Court, interposed no legal barrier to the subsequent levy and sale by Mangham, Bonner's successor, and that complainant's title is in no wise vitiated thereby.

The remaining ground to be disposed of, so far as complainant's title is affected, was the fi. fa. of the Insurance Bank of Columbus, at the time of levy and sale, discharged and paid off, and the fi. fa. in favor of Wm. Foster, by the transfer to Seaborn Jones, a subsequent endorser to Calhoun, deprived of its lien on Calhoun's property? The complainants, by their bill, charged, that there was and had been raised, by levy and sale of Calhoun's property, the sum of \$14,092.92, and that this sum was more than sufficient to have discharged and paid off this fi. fa. But the bill also discloses the fact, that there were other judgments against the defendant, Calhoun, and it omits to charge that the Sheriff had raised monies sufficient, if applied, to fully pay off this fi. fa. with others of like dignity. If that fact existed, the complainants should have so charged it. But their bill discloses the existence of other claims, and does not charge the payment of this fi. fa. It may be true, that if this sum had been applied to this fi. fa. it would have discharged it, but the bill omits to charge it. The Insurance Bank was entitled to claim and have it, and the subsequent sale raises a fair presumption, that the same was otherwise applied; therefore, I am left to determine that this fi. fa. could not have been fully paid off and discharged, from the sum of money charged to have been raised, which relieves me from determining whether, if that had been true, money enough had been raised by the sale of a defendant's property to discharge a fi. fa. but which had not been applied, and that where an innocent  
196 purchaser had purchased \*property sold to satisfy the same, that his title would be affected thereby. I am inclined to the opinion that the sale would be valid, the title good, and it was so ruled in the case of *Voorhees v. The Bank of the United States*—See 10 Peters, 465; also, in the case of *Jackson, Ex Dem. Saunders, v. Caldwell*, 1 Cowen, 622; also, 6 Porter, 240, and so is the current of authorities; and the defendant would have his remedy against the officer, as well to recover the excess, as for damages. Having thus settled the question, as to the validity of the fi. fa. of the Insurance Bank of Columbus, it is unnecessary to examine the grounds taken in relation to the other, in favor of William Foster.

That a Court of Chancery has jurisdiction, and would and should exercise it, whenever a case is presented for consideration, shew-

ing that a mistake had occurred, in the levy and sale of property, as in the case of *Wright v. Hooker*, 4 Cowen, 415: here the land was misdescribed, in the advertisement of the Sheriff, by mistake; therefore, on that ground, the sale was set aside. And in the case of *Bexley v. Mead*, 18 Wendell, 611, the sale was set aside where property worth \$1000 was struck off for a trifling sum, on the ground of accident, in this, that the plaintiff in the execution had been disappointed in the attendance of an agent, and that the defendant was insolvent. And in the case of *McPherson v. Foster*, 4 Wash. C. C. R. 45, here the sale was set aside, on the ground of mistake, the Marshall having given an erroneous description of the premises sold. And in the case of *Mobile Cotton Press and Building Company v. Moore and Magee*, 9 Porter, where the plaintiff had agreed with defendant to postpone the sale, and so notified the Sheriff; the Sheriff, contrary to their agreement, sold the property, worth \$100,000, for a trifling sum. But the facts were not brought home to the purchaser. In this case, there was an improper execution of a fi. fa. where the plaintiffs and defendants both were prejudiced by the unauthorized act of the Sheriff; that the sale was fraudulent, although the purchaser may have acted in good faith, but the Sheriff's conduct, the seller, was certainly fraudulent and highly reprehensible. This case reviews the authorities generally on the several grounds, when Courts have set aside Sheriff's sales, and refunded to purchasers the purchase money. But they have all went on the grounds of fraud, accident and mistake.

But does this bill disclose any fact,  
197 where this sale is vitiated, either \*by fraud, accident or mistake, or any irregularity? Here is a valid fi. fa. seizing property of defendants, and disposing of the same in pursuance of Law; the Law has therefore disposed of the same to the purchaser. The complainants have not been prejudiced thereby. They have, in the opinion of the Court, acquired a valid title, or one that cannot be impeached from any fact disclosed by their bill.

I am therefore of opinion that the complainants, by their bill, are not entitled to be further entertained. Therefore, let the bill be dismissed and the injunction be fully dissolved.

Having disposed of the bill, the next question, that has been presented in connection with the demurrer, is the application of the purchase money, now in the hands of the Sheriff. This is claimed by Edward Molyneux, by virtue of a mortgage fi. fa. against J. S. Calhoun, the defendant, issuing from a judgment on the foreclosure of a mortgage, made by J. S. Calhoun to Molyneux, whereby the property sold was conveyed, and which is of older date than the judgments at Law, upon which the money was raised. That the mortgage had been regularly foreclosed, and execution issued, before the levy and sale of the mortgaged premises; that the mortgage fi. fa. was placed in the hands of the Sheriff on the day of sale, and immediately after the

sale of the property, with a notice that the plaintiff, Molyneux, would claim the money, raised on the sale of the mortgaged premises, but failed to give notice before the sale, and pending the sale, that the lien on the mortgage premises would be abandoned, and the corpus sold, and that the purchaser would purchase the whole title, the money being alone raised from the sale of the mortgaged premises, the same being sold to satisfy judgments at Law, to-wit, The Insurance Bank of Columbus, et al. v. James S. Calhoun, et al. In deciding this question, it only becomes necessary to consider and determine, whether the lien of the mortgage was extinguished, and fully discharged, by the sale under the executions at common Law, and that the purchaser acquired a title to the corpus, as well as the equity of redemption. If he did so, and the lien of the mortgage was discharged; then the mortgage execution ought to be entitled to have and receive the proceeds of the sale. But if in the discretion, and at the option of the mortgagee, the corpus was still liable to be sold to satisfy the mortgage lien; then he ought to be permitted to claim the same.

198 \*It certainly ought not to lie in the power and at the option of a mortgage creditor, to stand by with his mortgage execution in his pocket, and permit the mortgaged property to be sold by executions at law, and if he purchase, to determine that the corpus was sold, but if he is not the purchaser, or the same sold for a trifling sum, that only the mortgagor's title, as is generally termed the equity of redemption, was sold, and that the corpus is still subject to be sold to satisfy his demand. The Law never was intended to operate so unjustly. It would be unequal, iniquitous, and oppressive. The rule should be general, therefore, that purchasers may be induced to attend the sales, and that property may bring the best and highest price in market. But if it is at the discretion and will of the mortgagee, bidders or purchasers would not know when to attend the market, the kind of title to be sold, or what they were about to purchase. The mortgagor, by his mortgage deed, gave to the mortgagee a preference over all his creditors, save and except the then judgment creditors, with the reservation, or right to relieve the property from this preference or lien, at any time before the sale of the property. And the time and manner of sale is prescribed by the Law. The enjoyment of the property, as well as the right to redeem from the lien thus given until sold, still remains in the mortgagor; and this right or title, called here the equity of redemption, is subject to the demand and lien of judgment creditors at Law, and is subject to be seized and sold as other property, and which can be alienated by the mortgagor himself, and the purchaser only acquires such a title as was in the mortgagor, at the time of sale.—Could James S. Calhoun, on the day of sale, have sold any other right and title, than here prescribed? And could his judgment creditors, at Law, have conveyed, by the officers of the

Law, more than he could have conveyed himself? The Law only sells such a title, as the defendant could have sold himself. The Sheriff, therefore, in this case only sold such a title, as remained in the defendant, Calhoun, which alone was subject to the demand of his general judgment creditors at Law, and that only. Upon this the mortgage creditor, Edward Molyneux, jr. had no lien, claim, or demand, no more than any other creditor, whose demand was not in judgment, at the time of sale. Molyneux, it is true, had by a judgment of the Court, a right to sell this property, but until this right was exercised, the title before described belonged

and was subject alone to general judgment creditors. The Statute of \*our

199 State materially changes the common Law, in relation to the rights and titles of mortgagors, as well as mortgagees. By the common Law, on the decree of foreclosure, the right of the mortgagor to redeem, was lost and extinguished. By our Statute, a judgment of foreclosure is only an authority to seize and sell, given to the mortgagee, but the right to redeem exists in the mortgagor, until the moment, that the property is sold by the Sheriff; and that right was only sold by the Sheriff in this case. The thing being still liable to be sold, to satisfy the mortgagee's demand. And as the mortgagee's *fi. fa.* could only sell the thing, the corpus, it could only claim money arising therefrom. I am aware, from the decisions reported in this State, as well as from the opinions of sound lawyers submitted, that this is a vexed and unsettled question. That even in the same circuit, it has been determined each way—as by Judge Law, in the case of Jewett, et al. v. McGowen, (see Charlton R.) that the equity of redemption alone was sold. And in the case of Maxwell v. the Sheriff, Judge Henry decided otherwise, on the ground that the mortgage was foreclosed before the levy. Judge Law, in his letter to counsel, which has been read as argument in this case, says that there is evident distinction, between personal and real estate, and that the decision in the case of Jewett, et al. would apply with more propriety to real estate. For myself, I can see no distinction. The right to redeem in the mortgagor, until the thing is sold, is the same in each. Judge Hillyer has decided that, after foreclosure, a sale by a general judgment, sells the corpus; and I am advised that such has been the decision of the Northern and Western Circuits. The decisions in the Flint Circuit have been various. Some having gone so far, as I am advised by counsel, that the mortgagee has been decreed the money, even before foreclosure. Judge Cone decided, in Wilkinson Superior Court, that nothing but the equity of redemption could be sold; and it does seem to me that is the only safe and correct conclusion.

Edward Molyneux, jr. the mortgagee, still has a right to proceed against the property sold, and that right could not be in any wise defeated or prevented, by any rule of Law to



the Court known. If he can so proceed, it is manifest he has no right to the money thus raised.

200 \*Therefore, let the money raised be applied to the payment of the general judgment creditors, according to their dignity.

Foster, Howard & Pierce, M. J. Wellborn, and Holt & Alexander, Solicitors for Complainants, and Attorneys for Edward Molyneux, jr.

Jones & Benning, Iverson, Forsyth & Meigs, Thomas & Downing, Solicitors for Defendants, and Attorneys for general judgment creditors.

## 201 \*TALBOT SUPERIOR COURT.

William J. Mahon v. The Justices of the 877th District, Talbot County.

Statute of Limitations—Removing Bar.—Recommenc-

ing an action, within six months after a non-suit, does not oust the statute of limitations.

The ground of error, complained of in the Court below, by the plaintiff in certiorari, was the overruling the plea of the statute of limitation, in two cases in said Court, wherein one Wm. L. Walker was plaintiff, and the said Mahon, defendant, on two promissory notes, for thirty dollars each, which were over due, six years, at the commencement of the suits. The Court below overruled the plea, on the ground, that suits had been previously commenced, on each, and non-suits awarded, and that the last suits were within six months. The answers of the Justices admit the ground of error charged.—Whereupon, I am of opinion, that the Justices erred, in the Court below, in overruling the plea of the statute of limitation. Therefore, let the Certiorari be sustained, and the judgment, in each case, in the Court below, set aside and non-suits awarded.

# DECISIONS IN THE SOUTHWESTERN CIRCUIT.

WILLIAM TAYLOR, JUDGE.

## 205 \*RANDOLPH SUPERIOR COURT.

William H. Maynor, and David Godwin, v. Zera Lewis.

February Term, 1842.

1. **Original Papers—Secondary Evidence of Contents.**—Secondary evidence of the contents of an original paper may be admitted, at the discretion of the Court.

2. **Same—Same—Laying Foundation.**—A party's own oath is competent, to account for the loss of a paper, so as to let in secondary proof.

3. **Lost Bond—Evidence of Execution—Acknowledgment of Obligor.**—When a bond is lost, the acknowledgment of the obligor, that he executed it, is sufficient proof, without producing the subscribing witness.

4. **Same—Same—Degree of Proof Where Same Functus Officio.**—When an instrument "has performed its office," and is no longer essential to the legal title; the same proof of its execution is not required, as when it is a part of the title itself.

5. **Agreement to Sell Land—Attacking for Fraud—Right of Subsequent Purchaser with Notice.**—An agreement to sell land will not be held fraudulent, on the suggestion of a subsequent purchaser, with notice of the agreement, unless the party, said to be defrauded, has taken steps to set it aside, in a Court of Chancery.

6. **Same—Bond for Title—Validity against Subsequent Purchaser with Notice.**—A bond for titles to land will be held good in Equity, against a subsequent purchaser of the same land, who had notice of the bond.

7. **New Trial—Errors in Instructions—Harmless Error.\***—Misdirection of the Court to the Jury, on a point not affecting the substantial merits of the cause, is no ground for a new trial.

8. **Parol Agreement to Sell Land—When Enforceable against Subsequent Purchaser with Notice.**—Equity will enforce a parol agreement, for the sale of land, against a subsequent purchaser with notice of it; where the first purchaser is in possession, and has made substantial improvements.

9. **Same—Vendor Not in Possession—Interest of Tenant—Possession as Notice.†**—The purchaser of lands, not in the possession of vendor, is deemed to have notice \*of the tenant's claim

\*See Wyllly v. King, Ga. Dec. pt. 2, p. 7, and footnote; Baker v. Ezzard, Ga. Dec. pt. 2, p. 112.

†Possession as Notice.—The possession of real property is *prima facie* evidence of title; it puts purchasers upon inquiry, and binds them to a knowledge of whatever interest or title the party in possession may have; or, as it is frequently expressed, "possession is notice to all the world." English v. Doe *ex dem.*, 7 Ga. 391; Ware v. Jackson, 19 Ga. 454; Wyatt v. Elam, 19 Ga. 337; Wyatt v. Elam, 23 Ga. 204; Jordan v. Rhodes, 24 Ga. 480; Helms v. O'Bannon, 26 Ga. 138; Dudley's Lessee v. Bradshaw, 29 Ga. 26; Cogan v. Christie, 48 Ga. 585; Franklin v. Newsom, 53 Ga. 580; Wingfield v. Davis, 53 Ga. 655; Sewell v. Holland, 61 Ga. 608; Atkins v. Paul, 67 Ga. 97; Finch v. Beal, 68 Ga. 594; Empire, etc., Building Ass'n v. City of Atlanta, 77 Ga. 496; Broome v. Davis, 87 Ga. 587, 13 S. E. Rep. 749; McLendon v. Horton, 95 Ga. 59, 22 S. E. Rep. 45; Beckham v. Maples, 95 Ga. 773, 22 S. E. Rep. 894; Neal v. Jones, 100 Ga. 765, 28 S. E. Rep. 427.

to them: the possession being sufficient, to put him on his guard.

This bill was filed, to enjoin Zera Lewis, the respondent, from proceeding at common law, in an action of ejectment, against the complainants, for the recovery of lot of land No. (64) in the 8th District of originally Lee, now Randolph, County. The bill charges, that on the day of 18, William H. Maynor, one of the complainants, contracted with one Jacob Dove, the drawer of the said lot of land, for the same, who then resided, at the time of the aforesaid contract, in the county of Wilkinson, but who, at the filing of the complainant's bill, resided in parts unknown, beyond the jurisdiction of this Court. That at the time of making the contract, for the purchase of the said lot of land, Dove made and delivered to Maynor his bond, conditioned to make titles, upon the payment of the promissory note, then and there given, for the purchase money. The bill also charges, that Maynor sold to Godwin, the other complainant, the said land, and gave his bond to Godwin, conditioned to make titles, so soon as he, Maynor, could receive titles from Dove. The bill further charges, that after Godwin had purchased from Maynor, and was in possession, Lewis made application to Godwin, to purchase the land from him; that Godwin informed him, Lewis, that he held only Maynor's bond for titles, from whom he had purchased, and that Maynor had purchased from Dove, and held Dove's bond for titles; that Lewis, upon learning these facts, and ascertaining that the legal title was still in Dove, and being unwilling (having refused) to give Godwin his price, went immediately into the county of Wilkinson, and for the sum of two hundred and fifty dollars, purchased the legal title from Dove, who had previously sold the same to Maynor, in the manner before related.

The bill seeks a discovery of these facts, and charges Lewis with being a subsequent fraudulent purchaser, with notice of the equitable title in Maynor from Dove, and prays that the deed, from Dove to Lewis, be decreed as fraudulent and void, and that the deed, from Dove to Maynor, made in pursuance of their contract as aforesaid, be established, and confirmed, by the decree of this Court, and the said Lewis perpetually enjoined, in his action of ejectment, pending at common law.

207 \*Upon the trial of this cause, at the February term, 1842, of this Court, under the charge and direction of the Court, upon the law, the Jury returned a verdict for the complainants; and a decree was had accordingly. The respondent's counsel, being dissatisfied with the charge of the Court, moved a rule nisi (which was granted) containing the several grounds of exception, called upon the opposite parties to shew cause, on or before the first day of the next term of this Court, why a new trial should not be granted.

In discussing this motion for a new trial, I will only notice the several grounds in-

sisted upon by counsel, as they are presented in their order, in the rule nisi.

The first of the five exceptions, taken to the charge of the Court, is "That the Court erred, on the trial of the cause, in admitting parol testimony, on the part of the complainants, to prove the contents of the bond, from Dove to Maynor, to make titles to the lot of land, without first sufficiently accounting for the original, by showing its loss or destruction, by competent proof."

Let us recur to the testimony, and see if the Court erred, in permitting parol testimony of the contents of the original bond to go in evidence to the Jury, without first having the original sufficiently accounted for, by showing its loss, or destruction, by competent proof. William H. Maynor swore, that the original bond, from Dove to Lewis, was not in his custody, power or control; that he had searched for it, and it could not be found; that he thinks, upon receiving a deed from Dove to the land, he gave the bond up to Dove, believing and thinking it to be of no further use to him—that, if he did not give it up to Dove, the same is lost or destroyed, and that Dove resides in parts unknown, beyond the limits of this State. Such was the testimony, offered to the Court, and upon which, secondary evidence of the contents of the original bond, from Dove to Maynor, was permitted to go to the Jury. That Maynor was competent, before the Court, himself, to account for the original bond, is a legal point so clear, and so repeatedly adjudicated, that it would unnecessarily consume time, and sport with common sense, seriously to discuss it, and learnedly to establish, by reference to authority.

208 Then, if \*Maynor can prove the loss, destruction, or in any other manner bring himself within the rule laid down, in which he would be entitled to make secondary proof; has he so done? has he given to the Court a good reason, why the original bond is not itself now in Court?

"The admissibility of evidence, of the loss of a deed or other instrument, is always addressed to the sound discretion of the Court. Where a bond was surrendered, and thereby became functus officio, it was held, that there being no motion to preserve it, its loss should be presumed." Cases cited in 4 Philip's Ev. 1222. *Beggs v. Taylor*, decided by the Supreme Court of the United States, in 5 Peter's Cond. Rep. 647. The plaintiff swore, that "the original agreement, between himself and the defendant, relative to certain bank stock in controversy, his impression was, that he tore it up, believing it to be of no further use to him; and if he did not tear it up, the same was lost or destroyed; that he had searched for it, and it could not be found." This was held sufficient, to permit secondary evidence of the contents of the original agreement, to go to the Jury. "Proof, that the paper in question was thrown aside, as useless, and that the party believes it lost or destroyed, will be suffi-



cient, to let in secondary evidence."—1 Philip's Ev. 454. Justice Thompson, in the case of the U. S. v. Reyburne, reported in 6 Peters R. 365, lays down the rule, that "secondary evidence, of the existence and contents of any original instrument, may, always at the discretion of the Court, be shown, where the non production of the original is sufficiently accounted for, without requiring proof of its loss or destruction." In this case, the original commission, for which the defendant was indicted in the Circuit Court of Maryland, under an act of Congress, as having issued to one John Chase, for a vessel, to the intent, that the vessel might be employed in the service of a foreign people, to cruise and commit hostilities against the Emperor of Brazil, with whom the United States were at peace, and upon showing that the original commission was in the hands of the said John Chase, against whom a bench warrant for the same offence had repeatedly been issued, and returned "non est inventus," was held that, as the prosecutor knew not where to make application to the said John Chase, tracing the original commission in question into his possession, who could not be found, was sufficient to permit secondary

evidence of its contents, to go to the  
209 Jury. How stand the \*facts of the case at bar? Are they not analogous to the cases cited? and do they not bring this case within the self same principles, laid down in these cases, and to be found in many others? Maynor swears, that his impression is, that believing the bond to be of no further use to him, upon receiving the deed from Dove, he gave up the bond to Dove; and that if he did not surrender it, from having diligently searched for, and not finding it, he believes the same to be lost or destroyed. That Dove, in whose possession the bond was lost, lives beyond this State, in parts unknown.

The ancient rigor of the common Law, in this respect, has been much abated. If dispensed with the production of the original, only in a few excepted cases, such as casualty by fire, by robbery, and rebellion. The case of Reed v. Brookman, 3 T. R. 157, is the first case to be found, in which the rigor of the ancient rule was relaxed, and a declaration was sustained, brought upon a deed, and profert dispensed with, upon the general allegation of loss, by time and accident. The same liberal doctrine now prevails, in all the Courts of England, and of this Country. In Betts v. Jackson, 6 Wendell, 173, 181, the authority is laid down, as admitting of no exceptions, to presume the destruction of notes and other instruments, functus officio, which have been paid, and cancelled, and which were apparently of no further use. I might refer counsel to other cases, containing the same authority; but deem it unnecessary to do so, as these have fully satisfied my mind, that there was no error, in the charge of the Court, as contended for in the first ground.

The second and third exception, which from their character are so near the same, I shall consider together. The second exception is, "that the Court erred, in permitting the contents of the bond to be given in evidence, before proof of its execution, in behalf of the complainants." And the third is, "that the Court erred, in admitting hearsay evidence, in behalf of the Complainants, viz. the sayings of Dove, subsequent to his deed to Lewis, the defendant, which saying went to admit the execution of the bond of Dove to Maynor."

The testimony, introduced, and which went to prove the existence of the original bond, was the evidence of Ransom Godwin, who swore, that he saw, in the hands of Maynor, an original bond, of which  
210 he \*took a substantial copy, which bond was made by Dove to Maynor, on the day of 18 the same as set out in the complainant's bill,—that he heard Dove acknowledge the same to have been made by himself,—that he had seen the bond, in the possession of Maynor, anterior to the date of Lewis's deed,—but that his acknowledgments were subsequent to the deed to Lewis.

In investigating this branch of the subject, the first enquiry, presenting itself, is, whether the acknowledgments of Dove, that the bond held by Maynor was his instrument, was sufficient proof of the due execution and existence of the original bond, without first calling upon the subscribing witnesses to the same, to prove the bond; and secondly, whether his acknowledgments, made subsequent to his deed to Lewis, can affect that deed.

To the first enquiry, I answer, that unless I have greatly mistaken the authorities, which I have carefully studied upon this point, Dove's acknowledgments, of the genuineness of the bond, did, under the peculiar circumstances of this case, dispense with the necessity of calling upon the subscribing witnesses. As a general rule, a technical rule, remarks Lord Mansfield, in the case of Abbott v. Plumb, 1 Douglass, 216, 219, the confession of the obligor does not dispense with the necessity of producing the subscribing witnesses, unless it be shown, that their attendance cannot be procured,—yet if the subscribing witnesses deny the deed, you may call upon other witnesses, to prove it. In this case, Lord Mansfield had previously decided, upon the reason, and common sense view of the question, that the acknowledgment of the obligor was sufficient; and upon a rule nisi, granted for new trial, he makes the remarks, imputed to him in this case, in which he clearly points out the absurdity of this technical rule, which cannot dispense with the subscribing witness, and yet permits you to contradict, and entirely render nugatory, the testimony of those very subscribing witnesses, when they deny the deed. Chief Justice Spencer, in Hall v. Phelps, 2 John. R. 451, permitted the acknowledgments of the maker of a promissory note, attested by subscribing

witnesses, to go in evidence, without calling upon the subscribing witnesses; and remarks upon the case of Abbott and Plumb, that it is a strange principle, which requires the production of the subscribing witnesses, to prove a deed, 211 and yet, if they deny it, \*you may prove it aliunde. The confession of a party, that he gave a note, or any instrument, precisely identified, is as high proof, as that derived from the subscribing witnesses. The same doctrine is recognized as good authority, in cases involving the same identical principle, in the following cases—*Mauri v. Heffernan*, 13 John. R. 75; *Shaver v. Ehle*, 16 John. R. 201.

But aside from the authority of the cases above referred to, upon the first and best principle in the law of evidence, this bond has been duly proven to have had existence, and to have been duly executed.

The first and best rule of evidence, as I said, is that the best testimony, the nature of the case admits of, shall always be adduced. Then, the best testimony in this case would have been the production of the subscribing witnesses. If they could not be procured; then the handwriting of the obligor. If that cannot be proven; then the acknowledgments of the party himself are always admitted to be evidence, as high as the testimony of any witness, present, but not subscribing the same.—1 *Philips Ev.* 475; *Jackson v. Neely*, 10 John. R. 394. Do the facts of this case show, that this rule has been adhered to? It was in evidence, before the Court, that the original bond was either lost or destroyed, or had been surrendered to Dove, after having performed its office. The original, not being in the custody, power, or control, of the complainants, as a matter of course, could not be testified to, by any witness. Godwin, who swore that he heard Dove acknowledge the bond to be his bond, swore, also, that he knew nothing of Dove's hand-writing. It then follows, as an irresistible conclusion, that the acknowledgments, in this case, by the obligor in the bond, are the best testimony, that it was in the power of the complainants to produce, from the nature of the case. This view is fully sustained, from the fact, that these acknowledgments were made, concerning the very bond, that Ransom Godwin had, for some time previous, seen in the possession of Maynor, and which, upon the trial, could only go to the Jury, by secondary means.

If, then, the acknowledgments of the obligor prove the execution of the bond, and the facts of the case dispense with the necessity of producing the subscribing witnesses; the Court has committed no 212 \*error, upon that point, in permitting them to go to the Jury. But to the second point:—Let us see how the acknowledgment of Dove, subsequent to his deed to Lewis, fixes error upon the Court, in not ruling out such evidence.

First: These acknowledgments were made, concerning a bond, that had its existence,

long, before the date of Dove's deed to Lewis, and which had been, and was then, in the possession of Maynor. And, secondly, Dove being a party to the contract in the bond, his sayings must be admitted; those sayings, in law, always importing verity, and as high evidence, as though Dove had been placed upon the stand, himself, to testify. The defendant's counsel admit, that if Dove was present, he could be sworn as a witness. This much conceded, the question, to my mind, is settled, at once; for the same rule, that would admit Dove as a witness (he being a party to the contract sought to be established in the bill) also admits his sayings, and tells the complainants, that they, not being able to compel the party to testify, shall always be entitled to the benefit of any testimony, manufactured from his admissions.

The counsel contended, that Dove should have been made a party to this bill, before his acknowledgments, or sayings, can be given in evidence. To this it is replied, that Dove has taken up his bond, and made a deed; and that he also resides in parts unknown, and beyond the jurisdiction of this Court. But were he within the jurisdiction of this Court, as this question only incidentally and remotely affects his interest, it is not necessary that he should be made a party.—*Story's Pl.* 79 to 100. But, to return to the acknowledgments of Dove—It is a rule, that is well established, and one that I believe is recognized, by all the Courts, that where a bond, or any paper, has performed its office, and is no longer essential to the legal title, the same proof, respecting its execution, cannot be demanded, which might be required, were it relied upon, as composing a part of the legal title itself. Such was held to be the rule, in the Supreme Court of the U. S. in *Baldwin & ux. v. Massie's heirs*, 5 *Peters' Con. Rep.* 252. In this case, titles upon the assignment of a military warrant had issued, and the party was called upon to prove the existence of the assignment, and the Court decided, that the assignment itself, having performed its office, being no longer essential to the legal

213 \*title, the same proof, respecting its execution, could not be commanded, as might be required, were it relied upon, as composing a part of the legal title. In the case at bar, the bond from Dove to Maynor, had performed its office. Dove had made a deed, to Maynor, but subsequent to his deed to Lewis. The bond, having performed its office, is no longer a paper essential to the legal title. The bond is only relied upon, as an incident, a collateral circumstance, from which the Court and Jury are informed of the equity in the complainant's bill, and their right, in Chancery, to have the deed, from Dove to Lewis, cancelled. Maynor certainly had the right, to call upon Dove, for performance of his contract. In doing so, if Dove has taken up and redeemed his bond, by executing a deed to Maynor, for the land in dispute, and, in doing so, has acknowledged his



bond, as stated in complainant's bill; then, I repeat again, that the same proof cannot be required, respecting the execution of the bond, as though the bond constituted a part of the legal title. The complainants charge, in their bill, that the copy, as therein set forth, is a substantial copy of the original bond, made by Dove to Maynor, on the day of 18. They have proven, by parol testimony, that the copy was, substantially, a copy of the original, and that the original bond itself was acknowledged to have been made, by Dove himself. With these facts before us, and the authority of the cases referred to, can there be a solitary doubt, as to the correctness of the charge of the Court, and the untenable character of the exceptions, relied upon by the defendant?

The fourth exception taken is, that the Court erred, in charging the Jury, that if the bond, from Dove to Maynor, was void, on the ground of fraud, on the part of Maynor, in reading the same to him, Dove, falsely, at the time of its execution; until the same was set aside, on a suit between Dove and Maynor, it was valid, and binding, and that a Court of Chancery, cognizant of the fraud, would enforce it, until it should be set aside. This exception does not recite the language of the Court, in its charge, upon this point. The language, used in the charge to the Jury, was, that it might be true, that Maynor did deceive Dove, in writing a bond, different from the one agreed upon, that should contain their contract; and it might be true, that his contract with Dove was not free from the imputation of fraud: Yet, if Dove took

no steps and used no means, either  
214 to \*annul or rescind a contract, into which he alleges himself to have been fraudulently drawn; that the Court and Jury, cognizant of such a fraud, were bound to enforce this written contract, until the same, between Dove and Maynor, had been legally annulled or rescinded.

But, let us examine this exception, which imputes error to the Court, in its charge to the Jury, and see how it can stand the scrutinizing test of the authorities. To argue that Dove could resell this land, already sold to Maynor, would be to contend, that one party alone to a contract, at his pleasure or caprice, upon the alleged grounds of fraud, without the privity or assent of the other party, might rescind the contract: and unless the contract be set aside, either by the joint act of the parties, or by an act and operation of the law, it still retains all the binding force and efficiency of a contract. In *Skinner v. Dayton*, Chancellor Kent remarks, that he is inclined to think, it is not in the power of one party alone to a contract, to rescind that contract. This, he says, seems to be the French law; but the language of the English Judges seems to be different. In *Smith v. Field*, 5 T. R. 402, the doctrine, with the English Courts, seems to be settled, beyond a cavil, that one party alone to a contract cannot rescind the contract—

it must be the act of both parties. If a party is allowed to abandon his contract, in fieri, upon any ground, he ought, at least, to act promptly and decidedly, on the discovery of the very first breach. If he negotiates with the party, afterwards; he certainly waives all right, to rescind, or abandon.—*Lawrence v. Dale*, 3 John. Ch. R. 23. If one contract be proposed between the parties, and another is fraudulently substituted, in lieu thereof; equity alone can relieve.—2 Story's Eq. 77. Otherwise, where the necessity and use for the statute of frauds, of 29 Charles 2, requiring all contracts (other than such as are specifically excepted) in relation to realty, to be reduced to writing? There has been no testimony adduced, that Dove ever made any effort, or indeed, any application, to Maynor, to rescind this contract, set up in the complainant's bill.

There is no testimony, that goes to prove that Dove, upon ascertaining that the bond to Maynor contained a different contract, from the one made, ever gave any notice to Maynor, of any design or  
215 \*purpose, to annul or rescind the contract, as contained in the bond. And, indeed, there has been no testimony introduced, which establishes that Dove ever became dissatisfied with his contract with Maynor, until his cupidity had been stimulated, and honesty seduced, by the higher price, offered and paid by Lewis. But upon the contrary, subsequently recognizes his contract, redeems his bond, and complies with its conditions, by executing a deed to Maynor, for this lot of land. Then, such being the law and the evidence, until the contract between Dove and Maynor has been rescinded, it follows as a corollary, that the bond itself, being the highest evidence of the contract, must stand, until it has been annulled and set aside, upon the ground of fraud, in a Court of Chancery. Lewis can derive no advantage, from having the oldest legal title, obtained and procured in the manner disclosed by the testimony in this case. Nor can he, to cover his own fraud, seek shelter and protection, under this imaginary fraud of Maynor, towards Dove. None other than Dove, or those holding bona fide under him, can set aside this contract, upon the ground of fraud. No third party can come in, with unclean hands, covet another's rights, and secure to himself legal advantages, most unjustly and iniquitously, and yet flatter himself, that he can escape the searching eye of a Court of Equity.—*Jackson v. Hunt*, 12 Johns. R. 82, 83. This case does not fall within the provisions of the Statutes of 13 and 27 Elizabeth, which authorizes Courts of Law and Equity to interfere, and set aside contracts and conveyances, upon the ground of fraud, for the benefit of creditors. Could these statutes, by any fair construction, be made applicable to the case at bar; the exception would then be more plausible, and tenable. But standing as it does, upon principles totally and entirely different, I must still adhere to my first impressions,

reiterate the charge of the Court to the Jury, and overrule the exception of the respondent's counsel.

Having disposed of the preceding objections, I come now to the fifth and last, to-wit, that the Court erred, in its charge to the Jury, in charging that it was not necessary, for the complainants to give the bond of Dove to Maynor, in evidence to the Jury. That the naked possession of Godwin, one of the complainants, of the land, was sufficient evidence of the contract, between Dove and Maynor, if Lewis, the defendant, had notice of that possession, so far as to put him, Lewis, upon the enquiry,

before his purchase of the land from 216 \*Dove, to enable them to decree in favor of the complainants. In the first part of the last exception, I am satisfied that the Court erred, as has been stated. It did so, evidently, inasmuch as the complainants, having set up the existence of an older equitable title, and proven the same to have been reduced to writing, were bound to produce that written contract, or to account, satisfactorily, for its absence. Yet, as the bond was in evidence to the Jury, and the defendant having sustained no injury upon that account; the remark of the Court to the Jury, was nothing more than a mere speculative opinion, an "obiter dictum" which, of itself, can afford no sufficient ground, under the circumstances, for a new trial. When a misdirection of the Judge arises, the first enquiry is, whether it was in a material point, and affected the merits of the case. The Court, in passing upon exceptions of this character, is bound always to make this enquiry; otherwise, there would be no end to new trials; and the remedy would be infinitely worse than the disease.—3 East, 455; 8 Ib. 352; *Flemming v. Gilbert*, 3 John. 532. Being satisfied, that though the Court did err, in that portion of its charge, as has been imputed to it, yet, as the bond was given in evidence to the Jury, and the remark of the Court nothing more than a speculative opinion, an—"obiter dictum," upon a point, that could not affect the merits of the case, to the prejudice of the defendant; it seems to me cannot, of itself, be sufficient ground, alone, for granting a new trial. Though, had there been no bond, and nothing more than a parol contract, and the complainant, under that contract, had gone into possession of the land, constructed buildings, opened clearings, made fences, and enhanced considerably the value of the same, and the parol contract could be established; there can be no doubt, but that equity would decree a specific performance, against the vendor and subsequent purchasers, with notice.—1 Maddox Ch. 379.

But to return to the concluding parts of the fifth exception, upon the subject of notice. Was the possession of Godwin notice to Lewis, of the contract, under which Godwin and Maynor sold? Let us examine this point, upon authority, and see how far the doctrine has been carried, in the many cases reported, precisely analogous to the

case at bar. "If a person purchases an estate, knowing it to be in the possession of tenants; he is bound to enquire into the estate, which these tenants have, and 217 therefore he is affected with \*notice of all the facts, as to their estate."—

1 Story's Eq. 389. This very dictum of Judge Story is borrowed from Lord Rosslyn, in the case of *Taylor v. Stibbert*, 2 Ves. jr. 440. In *Douglass v. Whiting*, 7 Vesey, 436, and *Daniels v. Downs*, 16 Vesey, 249, the same doctrine is held,—that if a person purchases an estate, when there is a tenant, and neglects to look into the nature of the estate, and the title of such tenants; he must take, subject to such rights, as the tenants may have.—almost the precise language of Lord Rosslyn, in the case in 2 Ves. There are many other cases in point, and which could be cited, all going to the same extent, to affect the purchaser with notice, where there are tenants in possession. I will refer, however, to one other authority, highly complimented by Chancellor Kent, and which is to be found in the notes of Mr. Coventry, in 2 Powell on Mortgages, 599, in which the author remarks, that "a purchaser cannot be advised to complete a contract for an estate, not in the vendor's own occupation, without a communication with the tenants, to ascertain what interest they have." The cases, cited in this authority, are numerous, and the doctrine most ably discussed, both in the notes and the cases referred to. From these authorities, it must be clear, to every legal mind, that the possession of Godwin was notice to Lewis, and he, Lewis, was bound to enquire into Godwin's estate, before he purchased from Dove. That Lewis knew Godwin to be in possession, he admits in his answer; and it was proven also, by the testimony of Foster, who swore, that in the fall of the year 1835, Lewis came by his house, and invited him to go with him, Lewis, over to Godwin's, for that he wished to purchase from Godwin his land. That he went with him, and then heard Godwin tell him how the title stood, and what had been Maynor's contract with Dove, and his contract with Maynor; that Godwin asked him, Lewis, eight hundred dollars for the land, and that Lewis was willing to give only six hundred. Ransom Godwin swore, that upon the road in Stewart county, he fell in company with Lewis, who told him to poor old Godwin's possession of the land—that he was not able to comply with his contract, in the purchase of the land, and he feared would lose it.

Does such testimony leave any doubt, upon the mind of any intelligent man, that Lewis knew of the tenancy of Godwin, before he purchased from Dove? If he did; then I have shewn, as I flatter 218 \*myself, that he was affected with notice. But let us go further: Can any one doubt, from the testimony, but that Lewis had received positive notice of the contract, between Maynor and Dove, and Maynor and Godwin; and that, notwithstanding all of this notice, he went



forward, and purchased the land, and then received the oldest legal title. That he must be regarded in no other light, than as a fraudulent purchaser, attempting to cheat and defraud the complainants out of the land, to which they have acquired the oldest equitable title, under a previous contract, and in pursuance of which, had taken possession, cleared fields, built fences, and erected buildings, seems, to my mind, to be so clearly established, that I cannot consent to pursue the subject any further.

For these reasons, I shall therefore refuse the motion for a new trial, and order the decree upon the trial confirmed.

Holt & McDougald, Counsel for Complainants.

Sturgis & J. S. Patterson, Counsel for Respondents.

## 219 \*MACON SUPERIOR COURT.

Eustace S. S. Chittenden v. Patrick Brady.

1. Execution—Alias *fi. fa.* from Another Court—Claiming Money on Motion—Proof Required.—An alias *fi. fa.* from another court, cannot claim money, on motion, without producing the order of court, under which it was issued.

2. Same—Attachment for Failure to Levy—Contempt Purged by Levy before Issuance.—When an attachment has been granted against a Sheriff, for neglecting to levy an execution; he purges his contempt, by proceeding to sell all the defendant's property, and bringing the money into court, before the attachment issues; even though the whole fund may be absorbed by other executions.

The respondent, Green Barrow, Sheriff of the said County of Macon, moves to set aside the attachment against him, upon the above stated case, upon the following grounds:

First: That since granting the rule absolute ordering an attachment, and the issuing of the attachment itself, he has proceeded with said *fi. fa.* and sold all of the property, both real and personal, within his knowledge, belonging to the defendant, Patrick Brady, and brought the money into Court, where it has been distributed, by an order of Court, in exclusion of the *fi. fa.* of the plaintiff, Chittenden, to other *fi. fas.* in favor of James A. Everett and others, against Brady.

Second: That the *fi. fa.* above stated, being an alias *fi. fa.* issued by the Clerk of the Inferior Court of Sumter County, was excluded from receiving the money, unless the plaintiff could show that the said *fi. fa.* had been issued, by the authority of the said Inferior Court of Sumter County. The plaintiff, failing to satisfy the Court that such an order did exist at the time, was excluded.

After a careful examination of the authorities, and the law, in relation to attachment for contempt; I am satisfied, upon a clear conviction, \*that the respondent, Barrow, under the

showing which he has made to the Court, and which has not been controverted, is entitled to a dissolution of the attachment, and to be discharged from the further operation of the same against him.

The process of attachment, it is said, may be divided into three classes: 1. Civil; 2. Criminal; 3. A compound of the Civil and Criminal.—1 Comyn's D. "Attachment." Under the last division, we are to consider the question, which is before the Court. In cases of neglect of duty of a Sheriff, such as failing to collect or pay over money, when collected on execution, it is partly a criminal and partly a civil process. It is criminal in its form and effect, so far as it is intended to punish the Sheriff for the neglect. It is a civil process, as far as its effect is to compel the Sheriff to place the injured party in as good a situation, as he would have been in, had the Sheriff done his duty.

This proceeding by attachment, in England, is rarely granted by the Court, immediately against the Sheriff. For malpractice in the view of the Court, he might be forthwith attached; but for a neglect of duty, the proceeding is always to shew cause: and upon his failing to shew cause, if he do not obey the process of the Court, he will be amerced, and the amercements will be increased, till he does obey.—2 Hawk. P. C. Ch. 22, Sec. 4.

In Georgia, as in the other States, the proceeding by attachment is a substitute for amercement, in which the offender was punished by fine to the King, and in which the remedy of the party injured was upon petition to the King, to be indemnified, out of the fine imposed. The inconvenience of this mode of proceeding was the reason why the Courts have substituted attachments, to compel the Sheriff to do justice to the injured party.—Daniel v. Capens, 4 McCord's R. 237. Attachments, the object of which are purely to compel the payment of money, is said to be clearly, an execution upon the civil side of the Court, and does not differ from the nature of other civil demands.—1 Cowen, 136; T. R. 265; 4 T. R. 316, 809; 7 T. R. 156.

Where an attachment has issued, for neglect in failing to raise the money, upon *fi. fa.* if the party has sustained neither 221 delay nor loss, \*then the Sheriff, by doing what he should have done, in the first instance, may be discharged. So, if he is prevented, by misfortune or otherwise; then, upon doing all that he can do, he is also entitled to discharge. So, intervening a rule absolute for an attachment, and the issuing of the attachment itself, if the Sheriff proceeds and sells all the property, belonging to the defendant, and applies the proceeds to older *fi. fas.*; upon shewing these facts, he is entitled to have the attachment dissolved, and set aside.—McLean v. Du Bose, 1 Bailey's R. 646. Where a party is entitled to an attachment, but delays moving for the same, and the Sheriff, in the meantime, has proceeded and done all that he could do; he is entitled

to a dissolution of the attachment.—7 T. R. 451, 453; *Mongin v. Cheney*, 1 Hill's R. 145.

Having introduced the authorities here quoted and cited, let us apply the same doctrine, contained in them, to the case now before the Court. What are the facts in this case. They are, that a fi. fa. issued from the Inferior Court of Sumter county, at the instance of the plaintiff, Chittenden, against Brady, and was placed in the hands of the Sheriff, with instructions to raise the money upon it. The Sheriff neglecting to do so, at the September term, 1842, of Macon Court, the plaintiff's counsel moved a rule absolute against the Sheriff, directing him to pay over to plaintiff's counsel the amount due, with interest and costs, upon the said fi. fa. and that upon a failure to do so, an attachment do issue, upon application, against the said Sheriff, directing his imprisonment, until he shall purge himself of the contempt, by payment of the amount due upon plaintiff's fi. fa. The plaintiff, having obtained the rule absolute, remains inactive, and indulges the Sheriff, until the present term of the Court. In the meantime, however, the Sheriff has proceeded and sold all of the property, both real and personal, belonging to Brady, and brought the money into Court. The plaintiff's counsel comes into Court, contends for the money, and upon examination, for the first time, discovers that he has an alias fi. fa. issued by the Clerk of the Inferior Court of Sumter County. Having produced no order from said Court, authorising the Clerk of said Court to issue any such alias fi. fa. the fi. fa. of Chittenden was set aside, as a nullity, and the money applied to the payment of other fi. fa's, then in Court, contending for it.

222 \*Could a case be made out, in all respects, more completely analogous, than the case at bar, to the case already cited in 1 Bailey's R. 646? In the case cited, as in the case at bar, the Sheriff proceeded and sold all the property, belonging to the defendant, and it was applied to older fi. fa's, and this too, intervening the order for an attachment, and the issuing of the attachment itself. Having done so, the Court decided that he was entitled to have the attachment dissolved. The plaintiff has indulged the respondent. In doing so, he has enabled him to purge himself of the contempt imputed to him. He has done so, by selling all the property belonging to Brady, and has brought the proceeds into Court. The Court having excluded the fi. fa. he claims to be discharged from the operation of the attachment. The Sheriff has done all that he could do. He has brought all the money into Court; and that too, before the attachment issued. The indulgence is, and must be, to the benefit of the Sheriff.—7 T. R. 451, 453.

The position, assumed by counsel, in the argument, that the liability of the Sheriff is fixed, by the rule absolute for the payment of the debt, interest, and costs, and

that he can be discharged upon no other grounds, is true, with some qualifications. If the party has suffered neither delay, nor loss, by the negligence of the Sheriff, he should be discharged. What delay has he suffered, in this case, that the plaintiff himself has not acquiesced in? Having obtained an order for an attachment, at the September term of this Court, 1842, why has he failed to make application for it to be issued, until, by an order of this Court, his fi. fa. has been excluded, from receiving any portion of the money, raised from the sale of the defendant's property? What loss has he sustained, by the act of the Sheriff? To whom is it attributable, that his fi. fa. should be so irregular and defective, when brought into Court, as to be unable to claim money, to which it was justly entitled, had the proper evidence of its genuineness accompanied in? Certainly not the Sheriff. It is his loss, who would attempt to collect money, upon an alias fi. fa. from another county, without first accounting for the original fi. fa. or producing some evidence, that the Clerk was authorised to issue such an alias.

Then, if the Sheriff is not held responsible, for the validity of the plaintiff's fi. fa.

and by the indulgence given to him, 223 since obtaining \*the rule, and before the issuing of the attachment, he has gone forward and done all that he could do, by bringing the money into Court, upon the sale of all of the defendant's property; and this money having been taken from this fi. fa. and applied to others of younger dates, without resistance being made by the plaintiff; upon the clearest principles of justice, sustained and supported by the authorities introduced, hereinbefore cited, I cannot hesitate to dissolve the attachment. The argument of counsel, that the debt was fixed upon the Sheriff, by the rule absolute, and that it was his duty to procure the necessary evidence of the validity of the fi. fa. for his own indemnity, cannot control this case. The Sheriff stood in contempt, and he could purge himself, in one of two ways; either by paying the money himself, and taking control of this fi. fa. or by going forward, and selling all of the property, belonging to the defendant, that could be found, and placing the plaintiff in as good situation, as he would have been in, had he done his duty, in the first instance. This he has done. He has placed him in this situation; and has therefore purged himself of the contempt, for which he stood committed.

For these reasons, it is very clear, that the attachment should be dissolved. It is therefore ordered by the Court, that the attachment, in this case, be dissolved, and the Sheriff discharged, from the further operation of the same.

W. J. Patterson & B. Hill, for plaintiff in fi. fa.

A. M. D. King, Geo. W. Towns, for the respondent.



## 224 \*EARLY SUPERIOR COURT.

## Charles F. Bemis v. Elias Simpson.

April Term, 1843.

**Set-Off Not Due at Beginning of Action—Insolvency of Plaintiff—Equity Jurisdiction.**—A Court of Equity will not interfere to set off a claim, not subsisting at the commencement of an action at law, against the judgment when rendered, even upon the suggestion that the plaintiff at common law is insolvent.

This bill was filed by the complainant, to enjoin Simpson, the plaintiff at common law, from proceeding upon an execution, obtained against Bemis, at the August adjourned term, 1842, of Early Superior Court, for the sum of one thousand and fifteen dollars and sixty-eight cents. The bill charges, that since the commencement of the suit against Bemis, by Simpson, but before judgment, upon which the execution has been obtained, Bemis, the complainant in this bill, in a fair and legal course of trade, for a valuable consideration, had become the owner, bearer, and endorsee, of three several promissory notes, made by the said Simpson, and payable to one Park G. Street, all of said promissory notes having become due, in January and June, of 1838 and 1839, amounting to the sum of six thousand dollars, besides interest. The bill charges that Simpson, having no visible property, would, in the belief of the complainant, either avoid through design, or would be really incapable of responding to the complainant, in an action at common law, for the recovery of the three promissory notes aforesaid; and for these reasons, seeks to enjoin Simpson, upon his *fi. fa.* and to compel him to set off, upon the promissory

notes belonging to Bemis, the full amount of the principal, interest and costs, upon the *fi. fa.* of Simpson.

The respondent demurred to the bill, for the want of equity, and moved to dismiss the same, with the injunction.

In the consideration of this bill, the only equitable feature presenting itself is, that Bemis, being the endorsee of the promissory notes before described, apprehends the loss of any recovery, that may be

225 \*had against Simpson, upon the allegation of Simpson's insolvency. In reviewing the authorities, however, it is very clear, that the demurrer must be sustained, and the bill dismissed. It is true, that the case of Reynolds v. Burling, in a note to Sullivan v. Montague, 1 Douglass, 106, 112, would seem to go to establish that a subsequent matter of set off may be allowed, at any time before plea pleaded. But these decisions, in England, have been overruled, by the cases of Evans v. Prosser, 3 T. R. 186, and Dickson v. Evans, 6 T. R. 59. The authorities, as they now exist upon this subject, particularly in this country, I believe, are by no means at all conflicting. They all agree, so far as I have examined them, that debts, to be set off, must be mutual, subsisting, debts, at the time the action is commenced.—Shepherd v. Turner, 3 McCord's R. 249; Carpenter v. Butterfield, 3 Johns. Cas. 145.

The same doctrine prevails, in cases of bankruptcy. To entitle a person to a set off, his demand must be an existing one, at the time the bankruptcy happens.—Dickson v. Evans, 6 T. R. 59. The same rule has been adopted, with regard to executors and administrators. Debts, mutually subsisting at the death of the testator or intestate, only, are allowed to be set off.—May, adm'r

\*Equitable Set-Off—Debt Not Due.—Where a bank having money on deposit with another, failed in business and became insolvent, being at the time indebted to the depositary upon promissory notes, the sum total of which exceeded the amount of the deposit, it was the right of the depositary, by way of equitable set-off, to appropriate the money on deposit, as far as it would go, to the satisfaction of such notes, although they had not yet become due. Georgia Seed Co. v. Talmadge, 96 Ga. 254, 22 S. E. Rep. 1001.

See also, Ga. Code, § 3755 (2908): "If a plaintiff resides without this state, or is insolvent, the defendants may set off against him a debt not due, under such equitable terms as may be prescribed by the court."

**Same—Generally.**—In cases of set-off, equity generally follows the law. Mills v. Lumpkin, 1 Ga. 511; Ruckersville Bank v. Hemphill, 7 Ga. 396; Jordan v. Jordan, 12 Ga. 77, 89; Harwood v. Andrews, 71 Ga. 784. But it will take jurisdiction where there are peculiar equities between the parties, particularly in cases of insolvency. Mills v. Lumpkin, 1 Ga. 511; Ruckersville Bank v. Hemphill, 7 Ga. 396; Jordan v. Jordan, 12 Ga. 77; Harwood v. Andrews, 71 Ga. 784; See in this connection, Ga. Code, § 3996 (3141).

Thus, where the defendant at law had an equitable interest in, but not the legal title to, a judgment against the plaintiff at the commencement of the

action, and his indebtedness having been created with reference to his demand against the plaintiff, and with the understanding that they should be included in a future settlement, the plaintiff at law being insolvent, it was held, that equity would enjoin the action at law and take cognizance of the matters in controversy. Lee v. Lee, 31 Ga. 26. See also, Ruckersville Bank v. Hemphill, 7 Ga. 396.

And so where the plaintiff in a judgment at law is insolvent, and a *scire facias* is pending to revive a previous judgment against him and in favor of the defendant in the judgment which is not dormant, equity will enjoin the collection of the judgment which is not dormant until the dormant judgment shall be revived. Camp v. Pace, 42 Ga. 161. *A fortiori* where the plaintiff in the judgment which is not dormant has taken the benefit of the homestead and exemption laws, and thereby placed all of his property beyond the reach of his creditors. Tommey v. Ellis, 41 Ga. 260.

But a debtor to a bank for borrowed money can not set off against his note, or a judgment rendered thereon, the dividend that will be coming to him as a stockholder when the affairs of the bank are wound up, unless there was an agreement to that effect, or he can show some equitable ground for being protected against the demand of the bank. Ruckersville Bank v. Hemphill, 7 Ga. 396.

of *White v. Flak*, 2 Nott & McCord, 398. The doctrine of set off is an equitable one; and Courts are disposed to favor it. But, in doing so, there is one maxim, that must not be overlooked—that, in set off, “*equitas sequitur legem*,” equity must follow the law, and wherever the law favors a set off, Courts of law and of equity are, and should be, inclined to its favor.

The complainant in this bill has shewn, that he came into possession of the notes against Simpson, since the commencement of Simpson's action against him, and before verdict. He cannot now be entitled to his injunction, not having been in possession of the notes, at a time when he could, under proper circumstances, call upon a Court of Equity, to aid him in a demand of set off. The allegation of insolvency does not alter the question, as the facts present themselves in this bill. If this allegation made it at all equitable, that the complainant should be allowed his set off, having come into the possession of the notes upon Simpson, since the commencement of Simpson's action, but before 226 verdict; he has lost, by \*negligence, his rights, if indeed they could have ever existed. Courts of Equity will rarely enjoin a verdict at law unless some unconscionable advantage, through the artifice and trickery of the opposite party, has been obtained; such, for instance, as an agreement by Simpson, to allow Bemis his set off, provided Bemis would let his, Simpson's, demand go into judgment. Bemis knew Simpson's condition, at least the law so presumes it, at the time he received the notes upon Simpson; and if Simpson is really insolvent, it cannot now be made a reason, to allow Bemis his set off. Having purchased the notes upon Simpson, since the commencement of his action, he must institute his action at Law, upon the notes, if he wishes to recover upon them.

The demurrer is therefore sustained, and the bill ordered to be dismissed.

J. S. Patterson, Counsel for Complainant.  
John H. Jones, Counsel for Respondent.

## 227 \*DECATUR SUPERIOR COURT.

**John Donaldson v. Henry Kendall, Survivor, and Andrew J. Miller, Adm'r, and Green Mitchell, and Daniel B. Douglass, Sheriff.**

1. **Limitation of Judgments—Sheriff's Return Making Perpetual.**—A Sheriff's return on an execution, within seven years of the date of the judgment, renders it perpetual.

2. **Partnerships—Power of Partner to Bind by Deed.**—One partner cannot bind the firm by deed.

\***Partnership—Power of Partner to Bind by Deed.**—A partner cannot by virtue of the authority he derives from the relation of co-partnership, bind his co-partner by deed. *Drumright v. Philpot*, 16 Ga.

3. **Claim Law—A Cumulative Remedy—Election of Remedies.**—The Claim law of Georgia gives only a cumulative remedy. That, by action of Trespass, remains: but a party, electing one of these remedies, is bound by his election, and cannot resort to the other.

4. **Equity Jurisdiction—Relief against Judgment.**—After a verdict at law, a party cannot, by original bill, avail himself of a relief, which he might have had, pending the action.

This bill was filed by the complainant, to enjoin Daniel B. Douglass, Sheriff of Decatur county, from putting Green Mitchell into possession of lot of land, No. 248, in the 20th district of said county. This lot of land was regularly exposed to sale, on the first Tuesday in February, 1843, and purchased by Green Mitchell, at Sheriff's sale. The complainant seeks to enjoin the Sheriff from putting the purchaser into possession, upon the following allegations, contained in his bill—First: That this lot of land was drawn by one David Harrell, of Joice's district, Hancock county, and by him sold and conveyed to Henry and Thomas H. Kendall, on the 28th day of January, 1822,—that Henry and Thomas H. Kendall, on the 14th day of December, 1822, sold and conveyed the said lot of land, to one Henry Kendall, sen'r, who, on the 13th day of December, 1836, sold and conveyed the same, to the complainant in this bill, who, thereupon went immediately into possession of said lot of land, and has greatly enhanced its value, by building houses, clearing and improving lands, &c.—that, at the April term, 1823, of Hancock Superior Court, one John L. Anderson obtained a judgment, against the firm of H. & T. H. Kendall, for the sum of five hundred dollars, besides interest and 228 \*costs,—that the fi. fa. upon said judgment was levied upon the said lot of land, and a claim interposed, by the complainant in this bill, returnable to the Superior Court of said county of Decatur,

424; *Sutlive v. Jones*, 61 Ga. 676; *Printup Bros. v. Turner*, 65 Ga. 71. But if a deed be executed by one partner in the presence of and with the assent of all the partners, it shall be deemed the deed of all. *Cunningham v. Lamar*, 51 Ga. 576.

In *Straffin v. Newell*, T. U. P. Charl. 163, 4 Am. Dec. 705, it was held that this doctrine did not apply in the case of a charter party, on the ground that a charter party being exclusively a mercantile transaction, and always in the course of trade, one partner can therefore bind the other by signature and seal in this species of mercantile contracts.

**Same—Same—Ratification.**—But a prior authority, or a subsequent ratification, not under seal, either express or implied, verbal or written, is sufficient to establish the deed as the deed of the firm, and binding upon it as such. *Drumright v. Philpot*, 16 Ga. 424. See also, *Sutlive v. Jones*, 61 Ga. 676; *Printup v. Turner*, 65 Ga. 71.

As to ratification in cases of agency, other than partnership, see *Pollard v. Gibbs*, 55 Ga. 45; *Colquitt v. Smith*, 76 Ga. 709; *McCalla v. American Freehold, etc., Co.*, 90 Ga. 113, 15 S. E. Rep. 687; Ga. Code, § 3002.



at the November term, 1840, when, for the want of parties, the claim was continued,—that at the August term, 1841, Andrew J. Miller, as the administrator of the said Anderson, was made a party plaintiff, and at the February term, 1842, the plaintiff in *fi. fa.* confessed a judgment to the claimant, reserving the right of appeal,—that upon the trial of the appeal, the Court having decided that the deed from H. & T. H. Kendall, to Henry Kendall, sen'r, being executed by one partner, in the name of the firm, could not be read in evidence, and the execution against H. & T. H. Kendall having an entry made by the Sheriff of Hancock county, within seven years from the date of the judgment, being permitted to go in evidence to the Jury, that the complainant was surprised, by the decision of the Court, upon these two questions of evidence; and that, inasmuch as H. & T. H. Kendall had conveyed an equitable title to Henry Kendall, sen'r, and that being the only link defective in the chain of title of the complainant, to the aforesaid lot of land, and that as the equitable title had vested in Henry Kendall, sen'r, under whom this complainant holds, on the 14th day of December, 1822, anterior to the date of the judgment, obtained at Hancock Superior Court, April term, 1823, in favor of the said Anderson, against the said H. & T. H. Kendall,—that to permit Mitchell, the purchaser at Sheriff's sale, with a knowledge of these facts, to dispossess the complainant, before he can be permitted to resort to a Court of Equity, for the purpose of attempting to perfect and complete his chain of title, would be to give him an unconscientious advantage, which a Court of Equity should restrain.

These are the material allegations in this bill, and which I shall consider in the nature of "a bill for a new trial." To this bill, the respondents demur, generally.

The first and second points, to be considered and settled by the Court, in this bill, are, whether the Court erred, in permitting the *fi. fa.* of Anderson, having but one entry of "no property to be found in the county," made by the Sheriff of Hancock county, within seven years from the date of the judgment, to be read in evidence to the \*Jury, upon the trial.

That an execution, having an entry made, and returned by the proper officer, within seven years from the date of judgment, may be perpetuated, is the construction that has ever been given to the Act of 1823 (Prince D. 458) by all of my predecessors in this Circuit, and is the construction, which, I have been credibly informed, has been given to it by Judge Cole, and was given to it by him, too, upon a former trial of this very case. Such a construction, to say the least of it, is entirely consistent with a literal construction of its provisions. Upon a careful review of this point, therefore, I am still satisfied with the decision of the Court, as conforming to the decisions made almost universally by our Judges.

In the second place, let us see if the Court can sustain itself, in the decision rejecting the deed of H. & T. H. Kendall, then made in the firm name, by one of the co-partners, upon the trial of the claim in the Court below. In the case of *Harrison v. Jackson* and others, in 7 T. R. 207, Lord Kenyon remarked, that it was the first time that he had ever heard it seriously contended, except in case cited *ad nisi prius*, that one partner might make a deed, binding the firm. Such a doctrine, he remarks, would be most alarming to the mercantile world. "One partner cannot charge the firm, by deed, with a debt, even in commercial dealings. It would be inconsistent with technical rules, and contrary to the general policy of the law: for the execution of a deed requires a special authority."—3 Kent's Com. 23. See also 3 John. Cases, 180, *Clement v. Brush*, where the very point, now before the Court, was decided.

So much, then, by way of authority, as would seem to sustain, most clearly and conclusively, the decision of the Court, upon the two points, in regard to which, it is urged, by the complainants, that they were taken by surprise. I have thus adverted to these authorities, to satisfy counsel, that so far as they might be justly entitled to call upon the Court, either by bill or motion, to reverse its decisions, and to correct them when erroneous, the bill, from this consideration, is not entitled to be further considered.

But let us now consider the allegation, in the third place, which urges upon the consideration of the Court an equitable title in Henry Kendall, sen'r, vesting anterior to the date of the execution of Anderson, \*and which they seek to perfect into a legal title, by calling upon Henry Kendall, survivor of H. & T. H. Kendall, to respond to the charges of the complainant, of a design and an attempt to convey a legal title to Henry Kendall, sen'r, who had paid a full and bona fide consideration for the said lot of land, to the firm of H. & T. H. Kendall. Before we can determine whether the complainant can now come into Equity, and enjoin Mitchell, the purchaser at Sheriff's sale, under the aforesaid *fi. fa.* of Anderson, until his title can be perfected, after a trial at common law upon the claim; we shall have to determine, first, as to the character of our claim law, under our Statute. After consultation and mature deliberation, I am satisfied that our claim laws are cumulative, in their character, of the common law. By the common law, an action of trespass was the almost universal remedy, to try the right of property, levied on, and claimed by a third party. Our Statute does not, in terms, nor by implication, repeal the common law. An action of trespass may be brought now, or a claim may be interposed, to try the right of property. The claimant is not compelled, under our law, to interpose his claim, but may have his election. But, after having made his election, he will be bound by it. He can-

not interpose his claim, go to trial upon the right of property, and then, if it is found against him, resort to his action of trespass. When he has elected to try the right of property, under our claim law, the same legal consequences will follow, as though he had sued in trespass, or in trover, or in ejectment; and the judgment will be equally binding and conclusive. Claims, for the trial of the right of property, like trespass, are antagonistic suits. The parties have their day in Court; and either party may file his bill for discovery, or for aid in prosecuting his claim successfully. And the claimant should have filed his bill, and have availed himself of the powers of a Court of Equity, in order to have made his claim available, if indeed it was a good one. But if he has neglected to do any thing, which he should have done, and judgment has gone against him; Equity cannot, and will not, relieve him. After a verdict at law, a party comes too late with a bill for relief, when he might have had it, pending the suit at law.—1 Vern. 176. If a party has omitted to file a bill, for the discovery of facts, known to him before the trial, and material to his defence; and has suffered a verdict to go against him, by going to trial without adequate

231 \*proof of those facts; he cannot afterwards claim an injunction, or a new trial, from a Court of Equity; for it was his own folly, not to have prepared himself with such proof, or to have filed his bill for a discovery, and to have procured a stay of trial, until the discovery.—2 Story's Eq. 180; Sewell v. Freeston, 1 Ch. Cases, 65. The complainant, in his bill, shews that it was known to him, before the trial, that his deed from H. & T. H. Kendall, to Henry Kendall, sen'r, was defective; and if he has gone to trial, without an effort to perfect his title in Equity, by filing his bill in aid of his claim at common law; it is his own folly. The cases of Thompson v. Berry & Van Buren, 3 John. Ch. R. 395, Le Guen v. Gouverneur, 1 John. Cases, 436, are in point. If the claimant had been ignorant of the fact that his titles were defective, pending the claim; or if he had been unable to have filed his bill, in support of his title; or if the plaintiff in fi. fa. had obtained his verdict by fraud, or possessed himself of something improperly, by means of which he has obtained an unconscientious advantage; equity will relieve.—2 Story's Eq. 182, Eden on Injunctions, chap. 3, p. 10, 11. But where the party first submits to try at law, with a knowledge of the facts, upon which he rests in support of his title, and a

verdict is rendered against him; he cannot then come into equity, and file his bill for discovery and relief, and enjoin the operation of the verdict, until he can have another trial in Equity, in attempting to perfect his title.—1 John. Cas. 436; 1 John. Ch. R. 51; 3 Ib. 395; 12 Mass. R. 268; 1 Vesey, 527.

In the trial of the claim, at common law, the same rules apply, in admitting or rejecting evidence, as in an action of trespass. The verdict of the Jury is against the claimant, and his rights are concluded by the judgment of the Court. And to all intents and purposes, the trial of the claim case as fully settles the rights of the purchaser at Sheriff's sale, after the trial that has been had upon the claim, as the verdict of a Jury, and the judgment of a Court, can settle it. The allegation of the complainant, therefore, that he holds under Henry Kendall, sen'r, in whom titles vested in December, 1822, previous to the date of Anderson's judgment, and that he does not hold under the defendants in fi. fa. is not true in fact: for, if the deed from H. & T. H. Kendall was properly rejected, which I have already attempted to prove, and as, I flatter myself, I have successfully done;

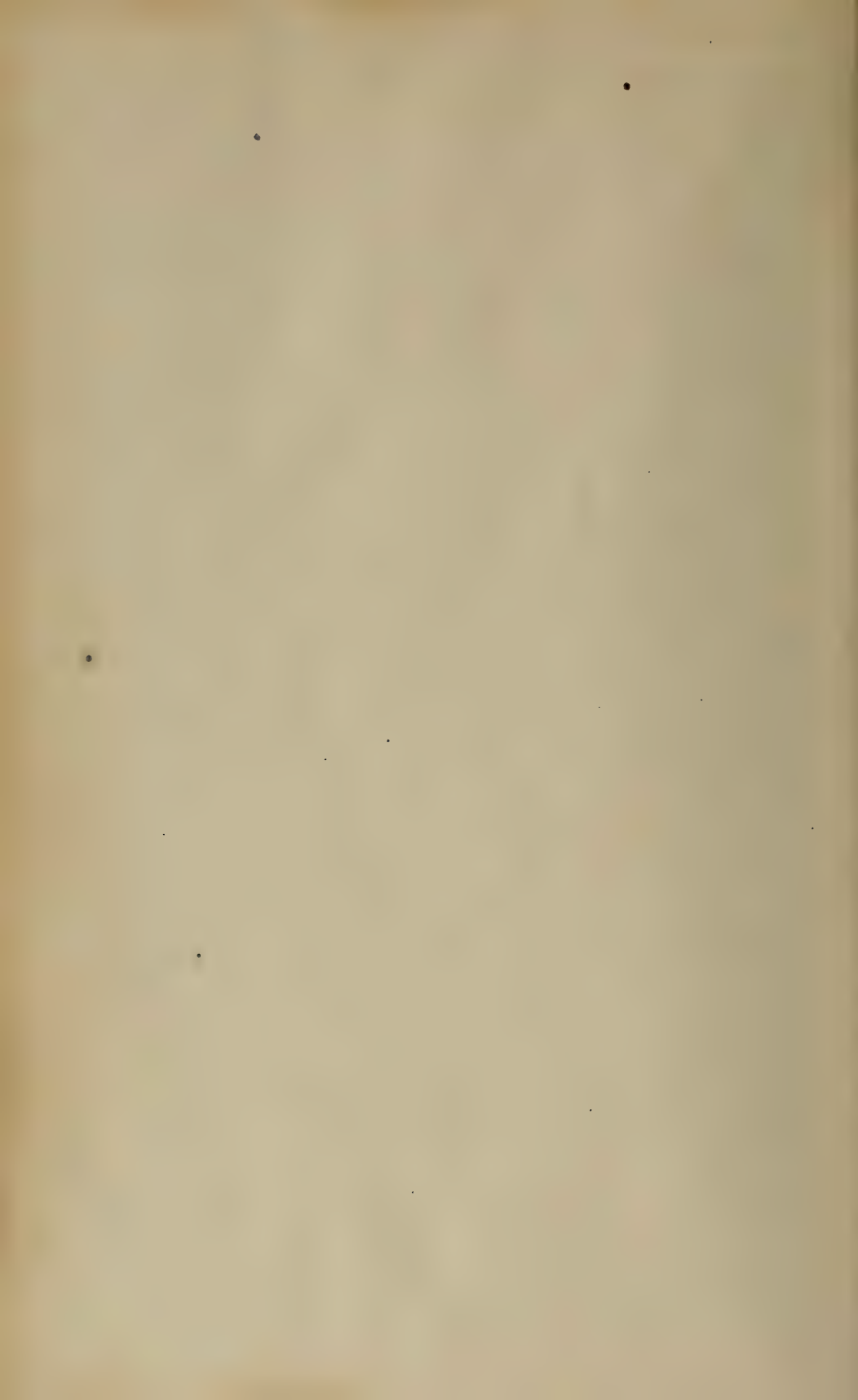
232 \*there was no evidence before the Jury, that titles ever had gone out of Henry Kendall and Thomas H. Kendall: but that they still held said lot of land, subject to the fi. fa. aforesaid. The respondent, Mitchell, therefore, having become the purchaser at Sheriff's sale, for a valuable consideration, in a fair and open transaction, and the defendants in fi. fa. H. & T. H. Kendall, still having vested in them the legal title to the said lot of land, up to February, 1843, when the Sheriff of Decatur county, at public sale, sold and conveyed the same to the said Green Mitchell, who was then and there the highest bidder; it is, therefore, the duty of the Sheriff, under the act of 1823 Prince's D. 458, to put him into possession of the aforesaid lot of land.

For these reasons, it is therefore ordered by the Court, that the demurrer to this bill be sustained, and the bill dismissed. It is also further ordered, that the Sheriff of said county, Daniel B. Douglass, proceed, instantler, to place Green Mitchell into the possession of lot of land No. 248, in the 20th district of originally Early, now Decatur, county.

Warren & Scarboro, T. C. Sullivan, for complainant.

C. B. Strong, S. T. Bailey, for respondent, Mitchell.





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10. Secondary evidence of the contents of

original papers may be admitted, at the discretion of the court. 205

11. A party's own oath may account for the loss of a paper, so as to let in secondary evidence. Ibid.

12. When a bond is lost, the acknowledgment of the obligor, that he executed it, is sufficient, without producing the subscribing witness. Ibid.

13. When an instrument is no longer essential to the legal title; the same proof of its execution is not required, as when it is part of the title itself. Ibid.

See Practice, 4, 5.

### EXECUTORS AND ADMINISTRATORS.

1. An executor *de son tort* can give to a third person no legal control of decedent's property. 7

2. On a cause of action, accruing after decedent's death, his representative may sue, either individually, or as representative. Ibid.

3. In paying a decedent's debts, mortgages have a general lien on the estate, on a footing with judgments, in the order of their dates. 84

4. An administrator *ad colligendum* can bring no action. 174

5. The next of kin of a decedent cannot sue for his property, without administration. Ibid.

### EXECUTORY DEVISE.

See Contingent Remainder.

### FRAUD.

See Deceit in Sales.

### FRAUDULENT CONVEYANCE.

1. Recording a deed, required by law to be recorded, is constructive notice of the sale, to all subsequent purchasers. 20

So, of a will. Semb. Ibid.

2. A bona fide purchaser acquires no higher estate, by purchase, than that of his vendor. Ibid.

3. A mortgage is not within the Act of 1818, against partial assignments. 76

4. An agreement to sell lands will not be held fraudulent, against a subsequent purchaser with notice, unless the party, said to be defrauded, has taken steps to avoid it, in Equity. 205

5. A bond for titles will be held good, in Equity, against a \*subsequent purchaser, with notice of the bond. 205

6. Equity will enforce a parol agreement for the sale of land, against a subsequent purchaser with notice, when the first purchaser is in possession, and has made substantial improvements. Ibid.

7. A purchaser of lands, not in the possession of vendor, is deemed to have notice of tenant's claim. Ibid.

See Husband and Wife.

## GARNISHMENT.

See Choses in Action, 2.  
Practice, 9.

## GUARANTY.

1. A promise, by a third person, to the drawer of a bill of exchange, that the drawee shall accept it, will enure to the benefit of an endorser for the drawer's accommodation, if communicated to him by promissor's authority; and will sustain an action, by such endorser, for breach of guaranty, if the bill is not accepted. 89

2. In such action, the endorser, having paid the bill, may recover interest. Ibid.

## HABEAS CORPUS.

See Constitutional Law.  
Mittimus.

## HUSBAND AND WIFE.

1. When a parent allows personal property to go into possession of a daughter, on her marriage, or soon after, and to remain there; it is considered a gift, and vests in the husband. 166

2. If any condition is attached to such gift, it must be expressed at the time. Ibid.

## ILLEGALITY.

1. In a Justice's court, the magistrate may decide on the facts, upon an affidavit of illegality. 129

2. But if he leaves it to a jury, there is no error. Ibid.

3. An affidavit of illegality reaches nothing prior to the judgment. 130

See New Trial, 7.

## INJUNCTION.

An injunction may be continued, in the discretion of the court, after all the equity of the bill is denied in the answer. 15

See Chancery, 1.

## INTEREST.

See Guaranty, 2.

## 240 \*JOINDER OF ACTIONS.

See Pleading, 1, 2.

## JUDGMENT.

Judgments cannot be set aside, for want of jurisdiction, at the instance of other creditors. 105

## JURISDICTION.

1. The question of jurisdiction must be tried in the court where it arises. 36

2. It may be raised, at any stage of the proceedings, if the defendant is not laches. Ibid.

3. To oust the jurisdiction of Equity, a party's remedy at law must be adequate, complete and suitable. 46

4. A plea to the jurisdiction is a personal

right, and available only by the defendant. 105

5. When several suits are brought, in a Justice's court, defendant can take advantage of their amounting to more than thirty dollars, only by a plea to the jurisdiction. 149

6. And the fact, that they originally constituted but one demand, must be proved. 172, 185

7. The original notes are not evidence of this fact. 185

## JURORS.

1. Jurors are not allowed to converse with a witness, who testified before them, after being charged with a cause. 107

2. Jurors must be unanimous, to find a verdict. 132

3. It is no ground of error, that the foreman of a jury omits to sign his name in full to the verdict, where the parties are present, and no objection made. 159

## JUSTICES' COURTS.

Before a Justice's execution can be levied on land, a return must be made that personal property cannot be found to satisfy it: and this, even if defendant points out the land for levy. 170

See Jurisdiction, 4, 5, 6, 7.

## LIEN.

A factor's lien, for a balance accrued in the life time of his principal, does not attach to property, coming into the factor's possession, after principal's death, by order of his representative. 7

See Claim, 3.

Mortgage, 1.

## LIMITATION.

1. Recommencing an action, within six months after a nonsuit, will not oust the Statute. 201

241 2. A sheriff's return on an execution, within seven years of \*the date of the judgment, makes it perpetual. 227

## MITTIMUS.

A mittimus, not specifying the time and place of the offence, is void, and the prisoner will be discharged, on habeas corpus. 40

## MORTGAGE.

1. The lien of a junior mortgage is destroyed, by sale of the premises, under foreclosure of an elder one. 46

2. But the junior mortgage has an equitable claim to the proceeds of the sale, after paying the elder. Ibid.

3. A mortgage, before foreclosure, cannot claim money, by rule, in a court of law. Ibid.

4. A mortgage, under our law is a mere incumbrance to pay a debt; and is not within the act of 1818. 76



5. A sale of mortgaged property, after foreclosure, under a common law judgment in favor of other creditors, carries only the equity of redemption. 190

6. Hence, mortgagee cannot claim the proceeds of such sale, though his mortgage is older than the judgment. Ibid.

See Executors, &c., 3.

#### NE EXEAT.

See Chancery, 6.

#### NEW TRIALS.

1. A new trial will not be granted, for mere error in the charge, where justice has been done. 7

2. The verdict of a special jury must be clearly wrong, to authorise a new trial. 20

3. In case of doubt, especially after two concurrent verdicts, no new trial. 88

4. Admitting an incompetent witness is no ground for a new trial, where all the facts, proved by him, are proved by others. Ibid., 119

5. Where there is conflicting testimony, a new trial will not be granted, merely because the verdict may be against the weight of evidence. 42, 82, 136, 161, 164

6. When jurors converse with a witness, who testified before them, after being charged with a case; a new trial will be granted. 107

7. When there is conflicting evidence, on an oath of illegality, in an inferior court; that court is competent to decide on the weight of the evidence. 111

8. A new trial will be granted, for misdirection of the court, in matter of law, material to the issue. 112

Secus, on a point, immaterial. 205

9. A new trial will be granted, where a verdict is manifestly \*against evidence. 157

#### PARTNERSHIP.

1. Payment of a partnership note, by a third person, for one of the firm, is such a payment as to prevent the third person from recovering it, against the firm. 157

2. One partner cannot bind the firm, by deed. 227

#### PLEADING.

1. A count in tort cannot be joined with one in assumpsit. 89

2. Where assumpsit is the proper remedy, a scienter is not necessary, to enable a party to recover for fraudulent representations. Hence, alleging fraud and scienter, in such case, is mere surplusage, and will not make the count sound in tort, so as to constitute a misjoinder with a previous money count. Ibid.

3. A declaration in attachment need not recite the previous proceedings, which are already part of the record. 144

4. In assumpsit, all the facts being stated,

from which the law implies a promise; a formal allegation of a promise is not necessary. Ibid.

See Assumpsit.

Debt.

Practice, 2-3.

#### POSSESSORY WARRANT.

1. The Act of 1821, giving this remedy, is to be construed strictly. 63

2. Property, voluntarily delivered to another cannot be recovered back, by this process. Ibid.

#### PRACTICE.

1. A court of law cannot distribute money by rule, unless the rights of the parties are so clear, as not to need equitable interposition. 46

2. If one of several joint plaintiffs die, pendente lite; the suit will proceed in the name of the survivors, whether partners or not. 123

3. After opening a default, defendant may take advantage of a radical defect in the declaration. 125

4. A note cannot be objected to, as evidence, after it has been read, and proof offered to defeat it. 131

5. Proving an account in a Justice's court, previous to a nonsuit, does not dispense with proof of the same account, in a subsequent action, in the same court. 133

6. On an appeal from the court of ordinary, on a motion to set aside a will once proved; the party attacking the will holds the affirmative. 136

7. The propounder of such will cannot dismiss the proceedings. Ibid.

8. In an appeal, on a caveat to the probate of a will, the propounder holds the affirmative. Semb. Ibid.

243 \*9. When a garnishee's answer denies all indebtedness; the general averment, that he is indebted, and has effects, without specifying how he is indebted, or what are the effects, is no traverse of the answer. 187

10. An alias fi. fa. from another court, cannot claim money, by rule, without producing the order of court, under which it issued. 219

See Jurors, 3.

#### PRINCIPAL AND AGENT.

See Appeal, 2.

#### QUIA TIMET.

See Chancery, 8.

#### SET-OFF.

A court of Equity will not set off a claim, not subsisting at the commencement of an action at law, against the judgment when rendered, even if the plaintiff at law is insolvent. 224

## SHERIFFS.

1. A sheriff's return of service cannot be impugned, by a bill filed to set aside the judgment. 36

2. When an attachment has been granted against a sheriff, for neglecting to levy an execution; he may purge his contempt, by selling all the defendant's property, and bringing the money into court, before the attachment issues; even if other executions claim it all, 219

## SURETY.

A surety is discharged by the plaintiff's delaying, for a consideration, to levy his f. fa. against the principal, who becomes, in consequence of the delay, less able to pay. 119

See Appeal, 1, 2, 3.

## TRUSTS.

1. A Trustee may change the investment of a trust estate, where it is clearly for the interest of the cestuy que trust. 15

2. But, without an order of court, he does so, at his own risk. Ibid.

3. A Trustee will not be allowed to encroach on the capital, for the maintenance of the cestuy que trust, but under very peculiar circumstances. Ibid.

## VARIANCE.

See Evidence, 1.

## WITNESS.

See Evidence, 3, 7, 12.













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